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YEARS FROM THE UNGPs

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Editorial
Introduction to the Special Issue

Cláudia Alvarenga Marconi

Rachel Chambers

João Paulo Cândia Veiga

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VOLUME 22 • N. 1 • 2025
INTERDISCIPLINARY APPROACHES TO BUSINESS &
HUMAN RIGHTS: AN ASSESSMENT OF THE FIELD 10+
YEARS FROM THE UNGPs

Introduction to the Special Issue

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In March 2024, the Brazilian Journal of International Law launched a special issue Call entitled “*Interdisciplinary Approaches to Business & Human Rights (BHR): An Assessment of the Field 10+ Years from the UNGPs.*” The Editors received submissions of various manuscripts on interdisciplinary challenges, conceptual developments, and methodological efforts involved in addressing and approaching the BHR agenda from different standpoints. The geographical distribution of responses indicates that the Call had circulated throughout Brazil and worldwide. The responses demonstrate a genuine spirit of combining and (re)articulating diverse fields of study – Political Science, International Relations, Business Ethics, International Law, Environmental Policy, and others. Their overall aim is to provide a comprehensive understanding of the complex interplay between Business and Human Rights and offer a critical appraisal of the knowledge gathered, of the meaningful academic research, and of the practical progress achieved throughout this agenda after the first ten years of the U.N. Guiding Principles on Business and Human Rights (UNGPs). The UNGPs, adopted in 2011, constitute a key normative framework developed under the norm entrepreneurship of John Gerard Ruggie. They aim to prevent and address human rights abuses in business activities while fostering regulatory developments, the transformation of global value chains, meaningful stakeholder engagement, and rightsholder-driven access to remedy.

Such a response is situated within a broader landscape of academic research and helps to circumscribe a political economy portrait of publications under the umbrella of BHR. In an international mapping exercise, 2025 marks the first time in history that the Business field has more publications than the Law field, according to the Web of Science prompt “Business AND Human Rights”. Adding the Business area to Management, the difference is even greater, with 1,601 articles compared to 849 in the Law field. It should be noted that the combined fields of International Relations and Political Science result in a total of 496 articles: the fourth largest field of study for business and human rights, as the image below demonstrates:

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IMAGE 1 – DISTRIBUTED AREAS ON BUSINESS AND HUMAN RIGHTS



Source: Web of Science, accessed on July 14th, 2025.

In percentage terms, Business and Management together account for more than 36% of total publications, compared to 19.1% for Law. International Relations and Political Science account for just over 11% of the total articles indexed by Web of Science.

TABLE 1 – NUMBER OF ARTICLES OF EACH AREA (%)

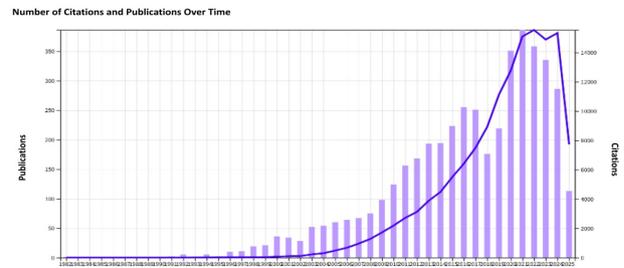
Field: Web of Science Categories	Record Count	% of 4,434
Business	1,028	23.184%
Law	849	19.147%
Management	573	12.923%
Environmental Sciences	325	7.330%
Economics	317	7.149%
International Relations	269	6.067%
Environmental Studies	262	5.909%
Ethics	256	5.774%
Green Sustainable Science Technology	232	5.232%
Political Science	227	5.120%

Source: Web of Science, accessed on July 14th, 2025.

In terms of BHR publications' life cycle, it is interesting to note that the field emerged in the mid-1990s, at the time of major United Nations Conferences that characterized the first part of the decade and the call for companies to assume greater social and environmental responsibility through various non-binding documents from international agencies and organizations, such as the Agenda 21, International Labor Organization standards, and OECD Guidelines for Multinational Enterprises. The citations' peak corresponds to a moment of maturity – a turning point - when the topic has been cascading within the academic and scientific community, which occurs in the first half of the second deca-

de of the 21st century, more specifically from 2020 to 2025.

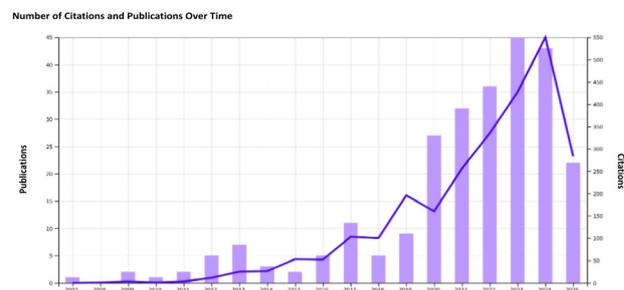
GRAPHIC 1 – NUMBER OF CITATIONS OF THE 4.434 ARTICLES



Source: Web of Science, accessed on July 14th, 2025.

Using the prompt “Business” AND “Human Rights” AND “Due Diligence,” the number of articles drops to 258, with Law predominating over other fields. Human Rights Due Diligence (HRDD) is a subject related to Law, although it has its roots in the soft law standards of the UNGPs. There are 82 articles in the fields of Business and Management, and the field of Political Science and International Relations remains in third place, with 64 articles. Even in terms of an uneven ontology and varying formats (recognized as both means and an end in itself) in the UNGPs, HRDD is a relatively recent topic addressed in publications, with articles first appearing in 2007 and experiencing notable exponential growth from 2020 onwards:

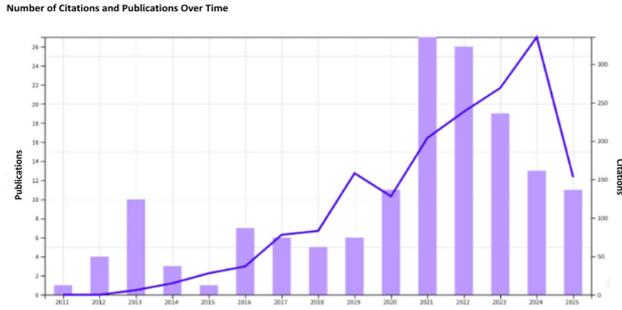
GRAPHIC 2 – CITATIONS: BHRs AND DUE DILIGENCE



Source: Web of Science, accessed on July 14th, 2025.

Considering the prompt “Business” AND “Human Rights” AND “UNGP,” the number of articles drops to 150. Reference to UNGPs began to appear in BHR literature starting in 2011, when the United Nations Human Rights Council unanimously approved the guidelines. At its 10-year follow-up ceremony, we reached the peak of publications, which have been decreasing since then.

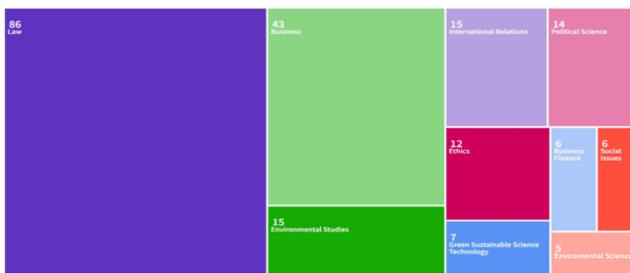
GRAPHIC 2 – CITATIONS: BHRs AND UNGPs



Source: Web of Science, accessed on July 14th, 2025.

Interestingly, in the context of UNGPs, Law also corresponds with the area with the highest number of articles, 86 in total, followed by Business with 43 articles. Political Science and International Relations entail 29 articles, which places the area in third place in terms of the number of articles.

IMAGE 1 – DISTRIBUTED AREAS ON BHRs AND UNGPs



Source: Web of Science, accessed on July 14th, 2025.

When the focus is on the UNGPs, the field of Management does not stand out. On the other hand, numerous articles relate human rights to the environment, sustainability, and to the field of environmental studies. Adding them all together, there are 27 articles which would place these areas in third place.

TABLE 2 – NUMBER OF ARTICLES OF EACH AREA (%)

Field: Web of Science Categories	Record Count	% of 150
Law	86	57.333%
Business	43	28.667%
Environmental Studies	15	10.000%
International Relations	15	10.000%
Political Science	14	9.333%
Ethics	12	8.000%
Green Sustainable Science Technology	7	4.667%
Business Finance	6	4.000%
Social Issues	6	4.000%
Environmental Sciences	5	3.333%

Source: Web of Science, accessed on July 14th, 2025.

Focusing on the seven articles included in this Special Issue, they reflect a wide range of geographical and institutional perspectives, while also highlighting the contributions of scholars engaged both in advancing business and human rights within their own contexts and through broader collaborative networks.

It is possible to identify some cross-cutting issues in all of them, such as the robustness of corporate responsibility in respecting human rights and its evolving patterns and interpretations, and its interplay with states’ duty to protect against human rights abuses by third parties, including businesses; as well as the HRDD as a cornerstone of BHR governance. Besides, all of them demonstrate either the importance of strategically expanding the debate on BHR, conceptually, thematically, or by repositioning its moral and political foundations, or highlighting the necessity of filling the gap in the current state of the debate.

Olena Uvarova and Iurii Barabash co-author an article entitled “**Resolution of dilemmas of human rights sanctions against corporations through the application of the business and human rights concept,**” in which they discuss how sanctions targeting companies have become common but face contested legality due to potential conflicts with state human rights obligations, the rule of law, and international norms.

Despite advancements in the BHR framework, sanctions receive limited attention, often being seen merely as amplifying corporate risk or justifying withdrawal. These sanctions raise critical questions, such as whether a corporation’s responsibility to respect human rights

includes using leverage to mitigate risks even when the company is not directly involved. The article uses Ukraine as a case study, and the many sanctions applied to companies following Russia's full-scale invasion. The article advocates for a reevaluation of sanctions through the key framework of the UNGPs, with a focus on the "involvement framework," which distinguishes between "causation," "contribution," and "direct linkage." The authors also introduce the notion of "public power linkage," expanding the understanding of corporate responsibility to situations where a company holds significant influence over the human rights environment even without direct involvement. They call for the integration of the BHR approach into sanctions regimes to ensure that these tools align with the rule of law and genuinely contribute to the protection of human rights in complex political contexts.

In their written collaboration entitled **"Rethinking corporate human rights responsibility: a functional model"**, **Chiara Macchi, David Birchall and Nadia Bernaz** propose a functional model for the corporate responsibility to respect. Their starting point is that in the current economic system, businesses control crucial resources and services that are necessary for realizing human rights. They argue that the normative foundations of the UNGPs, particularly their grounding of corporate responsibility in societal expectations, are inconsistent with this reality. To the authors, human rights norms for companies entail merely a negative responsibility of not causing harm, and they question what positive human rights responsibilities companies should have. The article interestingly tests the concreteness of the functional model it advances by examining business supplier capacity towards key resources, such as water and food. Building on the academic debate on states' human rights jurisdiction, the article proposes a "functional model of corporate responsibility." This model centers on the functions companies perform and the resulting power relations as the basis for assigning human rights responsibility. The article suggests this model could clarify the "responsibility to respect" under the UNGPs and provide a unifying theory grounded in international human rights law. **Michelle Lucas Cardoso Balbino, Gilda Nogueira Paes Cambraia and Nayara Lima Rocha da Cruz**, in their article **"The social participation and the social license to operate (LSO): cross-analysis of legal concepts"** discuss the rise of transnational law in the context of global-

ization, where duties and powers are shared among states, transnational corporations, formal international organizations, and non-governmental organizations, including foundations and universities. In this context, the authors draw on the theoretical approach of 'stakeholders,' a concept in business administration, to define the rights of communities in the transnational context, which is one of the most vulnerable and fragile stakeholder groups due to human rights violations committed by large multinational companies. The authors innovate by specifying the conditions under which the social participation of the communities involved occurs and how the social license to operate is granted, that is, how and under what conditions communities authorize the operation of companies. **Daniel Iglesias Márquez**, in his article **"Shaping corporate responsibility in Latin America to address the challenges of climate change and the energy transition"** sheds light on the climate emergency and emphasizes Latin American challenges within the BHR agenda in this respect. Márquez argues that the climate emergency necessitates urgent action from states and companies in the Americas to address the negative human rights consequences of climate change. The article focuses on the corporate responsibility to respect human rights and the environment within the context of the climate emergency and energy transition in Latin America. It provides a critical analysis of the implementation of standards within the Inter-American Human Rights System (IAHRS). These standards aim to ensure, through state action, an environment where companies consider their climate impacts, preventing and remedying adverse consequences on human rights and the environment from their energy transition commitments. Scientific evidence suggests that "Carbon Majors" companies are responsible for a substantial portion of the world's cumulative emissions. Several prominent Carbon Majors operate in Latin America. The responsibility of business to respect human rights will significantly signal a definitive inclusion of a climate dimension through a governance model rooted in human rights and climate justice, guiding corporate conduct in the context of the energy transition. He argues that business responses to climate change must not only aim at decarbonization but also ensure fair, inclusive, and environmentally respectful outcomes. **Axel Marx and Elene Dzneldze**, in their co-authored article, **"Human rights due diligence and access to remedy: a comparative analysis of twenty-six due diligence laws and proposals"**, pro-

vide a comparative analysis of human rights due diligence laws and proposals, focusing on access to remedy for victims of corporate human rights violations. The rise of global value chains and outsourcing has underscored the need to address human rights violations and provide victims with access to remedy. Human rights due diligence legislation represents an approach to confronting corporate human rights violations. While studies have focused on the emergence and scope of these laws, less research has analyzed what they provide for access to remedy. The paper examines how due diligence norms are transforming into legally binding mechanisms and their links to access to remedy. It analyzes remedial provisions in 26 legislative documents, categorizing remedies as “restitution,” “compensation,” or “satisfaction,” based on international law concepts. Restitution aims to re-establish the situation before the wrongful act. Compensation covers financially assessable damage. Satisfaction includes actions like verifying facts, apologies, or promises not to repeat the act. The analysis shows significant variation in access to remedy provisions across due diligence laws. The legal guarantee of effective remedy for victims is still developing, evidenced by the spectrum of remedial and sanctioning measures. Restitution is seen as the primary mechanism to “make good” on violations. However, restitution is not envisioned as a singular remedy in any of the analyzed legislative documents. Most laws combine different remedy categories or mandate only compensation or satisfaction. Only six legislative initiatives include duties or obligations that could fall under the restitution category. Marx’s and Dzneladze’s article fills a gap in the literature by comparing and evaluating (considering institutional design effectiveness) remedy provisions in due diligence legislation from around the world. Their comparative findings invite further inquiry, such as subgroup analyses of legislation in the Global South or Latin America regarding access to remedies, or more detailed case studies examining how specific laws operate in practice.

Juan Camilo García Vargas and Dilia Paola Gómez Patiño’s article “**The normative dimension of human rights due diligence,**” takes as its starting point the assumption that due diligence is an evolving concept. It poses as its guiding question how human rights due diligence has been developing in terms of its normativity and which sorts of challenges can be identified in its implementation trajectory. A section entirely focused on the Latin American context emphasizes that,

even if HRDD legislation is not yet fully completed, it is worthwhile to examine aspects of National Action Plans or other legislative efforts from a country-based perspective. The text selects the Colombian context as one that deserves more attention in developing and advancing an HRDD approach from a Latin American perspective. **Sandro Gorski Silva and Danielle Anne Pamplona** co-author an article entitled “**Human rights due diligence: between external efforts and interna corporis measures to combat human rights violations caused by companies**”, and assume that due diligence can play different roles in the legal sphere. There are rules of due diligence in international law, which are applied and recognized by sovereign states through international treaties. Under national law, due diligence in human rights must verify company violations through the domestic justice system. There are also soft law instruments, i.e., voluntary corporate accountability initiatives such as the United Nations Guiding Principles (UNGPs). The authors add value to the discussion by breaking the dichotomy between binding and voluntary instruments, demonstrating that it is possible to advance corporate accountability through soft law, as was the case with the UNGPs. On this basis, some European countries have created human rights due diligence legislation under national law (France, the Netherlands, and Germany), and the European Commission has approved corporate due diligence in sustainability, integrating the human rights and social and environmental sustainability agendas. In summary, the articles collectively highlight the evolving landscape of BHR through various disciplines and backgrounds, centering on the complexities of defining and implementing corporate responsibility to respect, the increasing focus on mandatory human rights due diligence, the persistent challenge of ensuring effective access to remedy for victims, and the indispensable role of states in regulating corporate conduct to protect human rights in different regional scenarios. Having a Special Issue published on the topic in a well-known Brazilian-based journal can also contribute to democratizing the agenda and make its interdisciplinary mark a broader invitation to collaboration between scholars, networks, and centers of research.

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CRÔNICA

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

**Chronicles of Private
International Law:** highlights of
HCCH's work over the past three
years

Nadia de Araujo

Arnaldo Silveira

Gustavo Ribeiro

Inez Lopes

Lalisa Froeder Dittrich

Fabício Polido

Marcelo De Nardi

Nereida de Lima Del Águila

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Chronicles of Private International Law: highlights of HCCH's work over the past three years

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1 Introduction

These chronicles are dedicated to reviewing the past three years of intensive work carried out by the Hague Conference on Private International Law (“HCCH”) and serve as an update to the 2022 Chronicles¹. The HCCH has been modernizing itself, increasingly focusing on new topics, and enhancing the use of digital tools in its communications and the daily application of its conventions. Undoubtedly, the area of international legal cooperation is among the most active.

The paper covers both the HCCH's post-conventional projects, which yield more immediate results - such as those led by Nadia de Araujo (OCJ), Arnaldo Silveira (maintenance obligations), Gustavo Ribeiro (Apostille), and Inez Lopes (domestic violence in the 1980 Convention) - as well as legislative projects, as developed by Lalisa Froeder Dittrich (Parentage), Fabricio Polido (Codifi), and Marcelo De Nardi and Nereida de Lima Del Águila (Jurisdiction Project). All chronicles incorporate the Conclusions and Decisions (“C&D”) of the 2025 Council's meeting just held in March 2025².

Nadia de Araujo describes one of the most famous and utilized post-conventional work of the HCCH in the procedural field, addressing the topic “The Innovations of the Service Convention (1965) and the Evidence Convention (1970): Outcomes of the 2024 Special Commission.”

Throughout the Chronicle, Nadia analyzes the Service Convention, along with a report on the 2024 Special Commission Meeting. Emphasis is placed on the topics and outcomes of the 2024 Special Commission that are of interest to Brazil, particularly regarding the electronic transmission

¹ ARAUJO, Nadia; DE NARDI, Marcelo; RIBEIRO, Gustavo; POLIDO, Fabricio LOPES, Inez; OLIVEIRA, Matheus. Crônicas de Direito Internacional Privado: destaques do trabalho da HCCH nos últimos dois anos. *Revista de Direito Internacional*, Brasília, v. 19, n. 2, p. 27, 2022. Available in: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/8688/pdf>. Last access: Feb. 28, 2025

² For the text of 2025 CGAP's Conclusions and Decisions (C&D). Available in: <https://assets.hcch.net/docs/1828feba-831f-4f6f-a95e-6286e0495057.pdf>, Last access: March 9, 2025.

of requests, which involves an increased use of information technology. The Chronicle also describes the innovations introduced by the 2024 Special Commission and the Working Groups established to review the Handbooks of the Service and Evidence Conventions, as well as the new Country Profiles, whose work, carried out after the meeting, was endorsed by CGAP 2025.

Arnaldo Silveira reports the necessity of a system like iSupport to facilitate cooperation in child support and maintenance obligations in general. iSupport offers tools for the multilingual electronic exchange of maintenance requests between countries, as well as for case management within and between different central authorities. A brief description of the system is made, and the progress of its implementation is reported, focusing on recent developments. The article also emphasizes Brazil's central role in iSupport development and the prospects for its local implementation. Looking forward, the article mentions the next steps in iSupport's evolution, towards maximizing its impact on families and individuals reliant on international maintenance payments.

Gustavo Ribeiro's chronicle reports on the Apostille Convention, which has been in force since 1965 and simplifies the authentication of public documents for international use by eliminating the need for diplomatic or consular legalization. Brazil adopted the Convention in 2016, becoming its 110th Contracting Party, with global participation now at 127 countries. As Gustavo points out, Brazil recorded a peak of 2.8 million Apostille procedures in 2024, mainly for transnational legal matters. His article depicts two relevant aspects of the Convention. First, he shows that Article 1(3)(b) of the Convention excludes commercial and customs documents from its scope. Despite the exclusion, some Contracting Parties still apply Apostilles to trade-related documents such as certificates of origin and health certificates. Second, Gustavo calls attention to the practical use of the Convention. The Apostille Convention has been evolving with the introduction of the Electronic Apostille Programme (e-APP) to digitize and modernize the process. By 2024, 56 Contracting Parties had adopted at least one component of the e-APP, while 36 had fully implemented it. Furthermore, the e-APP saw accelerated adoption during the COVID-19 pandemic, emphasizing the need for digital authentication.

Inez Lopes's chronicle examines the challenges of applying the Hague Convention in domestic violence cases. The Forum on Domestic Violence and the Hague Convention, held in 2024, highlighted the legal complexities of balancing the Convention's return principle with the need to protect victims. Courts struggle with interpreting Article 13(1)(b) and its "grave risk" exception, particularly when mothers flee abusive situations. The lack of judicial consensus and ineffective protective measures often lead to the re-victimization of women and children. The article calls for stronger protective mechanisms, judicial training, and a more integrated approach that aligns international legal frameworks with human rights, gender issues, and the best interests of the child.

Lalisa Froeder Dittrich's text discusses the efforts of the HCCH to create a new international instrument to facilitate the recognition across borders of legal parentage, including concerning international surrogacy arrangements. It highlights the complexities associated with varying legal frameworks, which can lead to adverse situations for children, such as "limping parentage," where their rights—of knowing their origins, for instance—are jeopardized. The HCCH "Filiation/Surrogacy Project" arose from the need for harmonized laws to protect children's rights in the context of new family arrangements and the use of artificial reproductive methods, often with intending parents living in a different country than those of the child and/or the surrogate mother. The chronicle follows the project's development, highlighting the main points that the Working Group must address in the future instrument. Furthermore, it notes Brazil's active participation in the Experts and Working Group on Filiation/Surrogacy, underlining the initiative's relevance and impact on families navigating the challenges of cross-border parentage.

Fabricio Polido analyses the current intersection between the HCCH work and emerging digital technologies, particularly in response to developments in distributed ledger technologies (DLTs), blockchain, crypto-assets, and tokenization. These efforts were formalized under the HCCH mandate for PIL issues in Digital Economy and subsequently deepened thanks to the achievements of the HCCH Conference on Commercial, Digital and Financial Law Across Borders (Codifi), a broader initiative aimed at exploring the legal implications of the digital economy on existing HCCH instruments and new PIL-digital related issues. Among

the key developments are the Expert Group on Central Bank Digital Currencies (CBDCs) and the Exploratory Project on Digital Tokens, both established under mandates from the Council on General Affairs and Policy (CGAP) in March 2024. These initiatives aim to assess jurisdictional and applicable law challenges, considering the emergence of CBDCs on a domestic scale, decentralized nature of digital assets, and their impact on cross-border financial transactions. This article explores the evolution, scope, and legal challenges of these projects, highlighting Brazil's active role in shaping regulatory discussions through its Virtual Assets Law of 2023 and the Brazilian digital currency – Drex Project.

Finally, **Marcelo De Nardi and Nereida de Lima Del Águila** report on the 8th meeting of the Working Group on Jurisdiction, the latest of the Jurisdiction Project, ongoing for more than three decades work of The Hague Conference on Private International Law (HCCH) regarding the issue of jurisdiction in situations connected to legal systems of more than two States. After the 2005 Convention on Choice of Court Agreements and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments, already in force, but not for Brazil, the work was directed to the theme of jurisdiction itself, and the scope of current work is to address problems arising from concurrent judicial proceedings, being them *parallel proceedings* or *related actions*. With this report, the public is offered the opportunity to understand the evolution of HCCH's legislative work on the subject, with a technical-political analysis based on the personal experience of the authors, who are members of the Brazilian Delegation negotiating for the initiative. The active involvement of the Brazilian Delegation in this project is a testament to Brazil's commitment to international legal cooperation. Since the draft convention is already fully structured, and ready to start the political discussion phase, it is convenient to inform the public of the proposed content to foster debate on the decisions to be taken during the negotiation of the future international treaty. The draft treaty's content touches on the interests of private individuals and companies involved in situations connected to the legal systems of more than one State, in "international" or "transnational" situations, notably those of a commercial nature.

2 Chronicles: The 2024 Special Commission (SC) on the practical operation of the 1965 Service Convention, the 1970 Evidence Convention, and the 1980 Access to Justice Convention: Brazilian perspective on its results. (Nadia de Araujo)

2.1 Introduction

One area in which the Hague Conference on Private International Law (HCCH) has achieved great success over the years is the standardization of practices that facilitate international legal cooperation through procedural conventions³.

To ensure that the practice and application of these conventions remain continuously updated, the HCCH has expanded its activities to include so-called post-convention activities⁴. Given the difficulty in obtaining acceptance for approving changes to the texts of already adopted conventions, and considering the need to modernize previously developed work, convening periodic Special Commissions was adopted to complement and update the functioning of conventions in force. This is done through the development of best practice guides or the revision of existing manuals, thus avoiding the lengthy and costly negotiation of new treaties⁵. Ultimately, these meetings allow States to exchange experien-

³ About these Convention: ARAUJO, Nadia; DE NARDI, Marcelo; VARGAS, Daniela Revisitando as convenções processuais da Conferência da Haia para o Direito Internacional Privado: um olhar a partir do Brasil. In: A Conferência da Haia de Direito Internacional Privado e seus impactos na sociedade: 125 anos (1893-2018). ARAUJO, Nadia; RAMOS, André de Carvalho (org.). Belo Horizonte: Editora Arraes, 2018, pp. 115-135.

⁴ On post conventions work: ARAUJO, Nadia. Governança Global no Direito Internacional Privado: a atividade pós-convenção da Conferência da Haia de Direito Internacional Privado. In: Boletim da Sociedade Brasileira de Direito Internacional, v. 108, pp. 249-264, 2020.

⁵ The Special Commissions are preceded by preparatory work carried out by the Permanent Bureau of the HCCH in collaboration with Working Groups composed of experts and representatives of the Member States. Upon completion, the conclusions reached must be approved by the HCCH Council on General Affairs and Policy ("CGAP").

ces, promote uniformity in the interpretation of conventions, and consequently, increase the reliability and use of these instruments.

In July of 2024 a Special Commission was held in The Hague. It discussed, among other topics, the operation of the Service Convention,⁶ the Evidence Convention,⁷ and the Access to Justice Convention. At the end of the meetings, the Special Commission adopted Conclusions and Recommendations,⁸ which were endorsed by 2025 CGAP in its Conclusions and Decisions (C&D)⁹.

The 2024 CGAP determined the creation of Working Groups tasked with completing the revision of the 5th edition of the Practical Handbook on the Service Convention and Evidence Convention^{10,11}. After the work at the Special Commission, the Service Handbook was approved through a written procedures while the Practical Handbook on the Evidence Convention was approved at 2025 CGAP¹².

Additionally, the 2024 CGAP mandated the establishment of a Working Group to develop Coun-

try Profiles pertaining to the two conventions. The Country Profile, which details each country's practices regarding both treaties, were also approved at the 2025 CGAP. This is an innovation introduced by 2024 CGAP to the procedural conventions and discussed during the 2024 Special Commission. After, it was finalized¹³ by the Working Group responsible for this task. At 2025 CGAP its work was approved, and it urged the States to complete them and updated them in a timely fashion¹⁴.

This chronicle provides a brief description of the Service Convention and highlights the most important results of the 2024 Special Commission (SC 2024), including the Evidence and Access to Justice Convention in topics important for Brazil. This initial description is deemed necessary because, although the Service Convention has been a subject of debate at the HCCH for nearly 50 years, Brazilian doctrinal production on the topic is scarce, as the country only adopted the convention in 2019. However, it is urgent to raise awareness among legal professionals about this Convention, which is essential for international legal cooperation so that its use by civil society can increase, being their primary beneficiary¹⁵.

2.2 General Characteristics of the Service Convention

The Service Convention¹⁶, adopted at the 10th Diplomatic Session of the HCCH on November 15, 1965, is part of a set of HCCH treaties that facilitate the resolution of cross-border issues in civil and commercial matters, simplifying and expediting inter-state communication, which is increasingly necessary in the context of growing international trade and mobility. Despite the time elapsing since its inception, this Convention remains an important instrument of international legal cooperation, particularly for the transmission of documents, due to the high number of States that have ac-

⁶ For more information on the 2024 Special Commission see: HCCH. Special Commission on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions. Disponível em: <https://www.hcch.net/pt/publications-and-studies/details4/?pid=8513&dtid=57>

⁷ Both Conventions are enforced in Brasil through Decrees nºs 9.039/2017 e 8.343/2014, respectively.

⁸ HCCH. 2024 Conclusions & Recommendations Disponível em: <https://assets.hcch.net/docs/6aef5b3a-a02c-408f-8277-8c995d56f255.pdf> (“C&R 2024”).

⁹ HCCH, Conclusions and Decisions (C&D) available in: <https://assets.hcch.net/docs/1828feba-831f-4f6f-a95e-6286e0495057.pdf>, last access: March, 9, 2025. Related to the 2024 SC, see para. 44 to 60.

¹⁰ HCCH. Practical Handbook on the Operation of the Service Convention. Haia: HCCH, 2016 (“Manual”).

¹¹ The Manual begins with a glossary of the terms used and a section providing concise answers to frequently asked questions, followed by a detailed analysis of the Convention, with comprehensive commentary on its articles. It is divided into four parts. The first part examines the nature and scope of the Convention, covering its history, objectives, and application. The second part addresses the channels of transmission, while the third focuses on the mechanisms for protecting the defendant. The fourth and final part discusses the relationship between the Convention and other treaties, such as the Inter-American Convention on Letters Rogatory of 1975 (promulgated in Brazil by Decree No. 1,899/1996), which is used for service of process, notification, and summons, as well as for requests for the taking of evidence contained in a letter rogatory.

¹² See in CGAP 2025 C&D para. 52: “CGAP welcomed the adoption of the Practical Handbook on the Operation of the Service Convention. CGAP highlighted the importance and usefulness of the Handbook and encouraged Contracting Parties to the 1965 Service Convention to promote the use of the Handbook.”

¹³ See CGAP 2024 C&D, in <https://assets.hcch.net/docs/917cb804-9e7c-4f58-ba6d-f505303f9376.pdf>.

¹⁴ See in CGAP 2025 C&D para .59 and 60.

¹⁵ See David McClean remarks: “th[e service] protects the defendant by ensuring the most basic principle of procedural justice: the right to be heard, in response to a document that contains the essential elements of the claim to which the defendant is to respond” (Service of Process. BEAUMONT, Paul; HOLLIDAY, Jayne. A Guide to Global Private International Law. Oxford: Hart Publishing, 2022, p. 162).

¹⁶ For more information, see: <https://assets.hcch.net/docs/b64c9362-e068-4d3e-9591-d39fa9141f54.pdf>

ceded to it across the Americas, Europe, Asia, Africa, and Oceania. Today, 84 States are Contracting Parties¹⁷, including Brazil, which internalized the Convention in 2019. The Convention has also proven capable of adapting to the new era of digital communication, with some countries implementing electronic transmission for the sending and receiving of requests—finalizing and making the Country Profiles publicly available will be highly beneficial for the practical application of the Convention.

The Service Convention establishes the transmission channels to be used when a judicial or extrajudicial document must be transmitted from one Contracting State to another for service, notification, or summons of a natural or legal person¹⁸. In particular, it represented a significant advancement over the excessively bureaucratic document transmission methods that, under the Civil Procedure Conventions of 1905 and 1954, depended on consular legalization. By stipulating the obligation for States to designate a Central Authority¹⁹, a key entity responsible for facilitating communication between States, the Convention allowed for direct communication between States through these authorities, establishing the model mechanism that was later adopted by other procedural conventions.

While primarily addressing the transmission of documents for service and notification, the Service Convention does not include substantive rules regarding these procedures. This deliberate omission ensures that the Convention does not modify the domestic laws of member countries, thereby accommodating different legal traditions²⁰. This flexibility is a testament to the Convention's adaptability and ability to foster international legal cooperation²¹.

One of its great advantages is the elimination of legalization or equivalent formalities in transmissions, creating a system of trust between States that ensures the authenticity of documents exchanged between forwarding authorities, which may vary depending on local rules, to the central authorities of the receiving countries. This simplifies the process and reduces the time and costs involved in document transmission. A positive aspect of the Convention is the elimination of legalization requirements for documents sent through the official channel, enabling forwarding authorities to send directly to the central authorities of the receiving states, and the possibility of exemption from fees, which reduces costs for those involved and facilitates the international transmission of judicial acts. The completion of service is certified through a standardized form issued in English, French, or the language of the requested country.

2.3 The 2024 Special Commission Meeting

From July 2 to 5, 2024, within the framework of the Hague Conference on Private International Law (HCCH), the Special Commission (SC) met to discuss the operation and application of the Service²², Evidence²³, and Access to Justice²⁴ Conventions (collectively, the “Conventions”), concluding with the approval of Conclusions and Decisions (C&D) with Brazil's support. The negotiations and discussions took place at the Academy of International Law, located in the Peace Palace in The Hague, Netherlands. Two hundred sixty delegates attended the meeting in-person and online,

Thus, the State interest in having control over its territorial sovereignty plays a role in the service of process upon a defendant, who is resident there. According to this view, the service of process is only possible, as a rule, by “tolerance” (such as to direct service by consular and diplomatic channels), consent or collaboration in the framework of international judicial assistance. From a common law point of view, sovereignty concerns relating to the service of process might appear strange and unfamiliar. For instance, under the U.S. Federal Rules of Civil Procedure service is often effected by the plaintiff's attorneys or by private firms specializing in the service of process, not by government officials.”

¹⁷ For the list of contracting states, see in HCCH: <<https://www.hcch.net/pt/instruments/conventions/status-table/?cid=17>>.

¹⁸ Service Convention, Article 1: “The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. This Convention shall not apply where the address of the person to be served with the document is not known”.

¹⁹ Service Convention Article 2: “Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6. Each State shall organize the Central Authority in conformity with its own law.”

²⁰ CAPONI, Remo. Transnational litigation and elements of fair trial. *Revista Eletrônica De Direito Processual*, v. 16, jul-dec/2015, p. 506-549

²¹ See (*Ibid*, pp. 517-518): “According to widespread opinion in the civil law systems, service of process is an act of sovereignty.

²² Convention on Service, signed at the Hague on 15.11.1965. In Brazil, Decree n° 9.734, 2019. (http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/D9734.htm) .

²³ Convention on Evidence, signed at the Hague on 18.03.1970. In Brazil, Decree n° 9.039, 2017. (http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/D9039.htm).

²⁴ Convention on Access to Justice, signed at the Hague on 25.10.1980. In Brazil Decree n° 8.343, 2014. (https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/decreto/d8343.htm).

representing 55 HCCH Member States and there were also observers from intergovernmental and private institutions. This was the first HCCH meeting in which Spanish was recognized as the third official language²⁵. The representative from Finland presided over the Special Commission.

The discussions were based on preliminary documents provided by the Permanent Bureau (PB), including revised versions of the Practical Handbooks on the Service and Evidence Conventions and preliminary versions of the Country Profiles, which detailed the practices of States regarding the Conventions. Notably, the preparatory work conducted by the PB, along with the Working Groups (WGs), focused on refining these Practical Handbooks and Country Profiles. These materials can be obtained at the HCCH website and will be updated to reflect the SC's Conclusions and Recommendations. Also, it is important to note that at the 2025 CGAP meeting the 2024 SC C&D was endorsed²⁶.

2.4 Key Highlights of the SC 2024 Negotiations and Brazil's Participation

Brazil's primary objective was to achieve progress regarding the electronic transmission of documents and the acceptance of electronic signatures routinely employed in the country's judicial system. This matter is particularly relevant for the effective implementation of the Service Convention but also pertains to the transmission and execution of the Evidence Convention. Specifically concerning the Service Convention, Brazil emphasized its practice of making extensive efforts to locate recipients of notifications, even when the provided address is incomplete. This practice was recorded in the C&D (paras. 76-77).

Two other significant issues concerned (i) ensuring the broadest possible scope for the Service and Evidence Conventions, adopting a more extensive interpretation of the term "civil and commercial," and (ii) enhancing the recording of information regarding the practices of Contracting States concerning service of process in Countries Profiles. Both points were address-

ed in the C&R (paras. 122-126 and 112-114, respectively).

Regarding the Practical Handbooks and the Country Profiles, areas in which Brazil had a particular interest, progress was made during SC 2024. There was consensus that several new items should be added to the presented drafts, and it was recommended that they be approved after the conclusion of the Working Groups' activities, first through written notice. At 2025 CGAP the Practical Handbook on Service and on the Evidence Convention, as well as the Country Profile of the Service and of the Evidence Convention were approved.

The use of information technology (IT) for each of the Conventions was one of the most debated topics throughout the SC 2024 meeting. Several States expressed a desire to intensify their use, both for transmitting requests and for communication between the Contracting States and other interested parties. Plenary discussions revealed a significant divergence in the matter, with a substantial group of States accepting only paper-based and postal transmissions. In contrast, others have adopted email or even exclusive platforms for transmissions.

The group in favor of electronic transmission highlighted that the text of both Conventions permits the broadest possible use of IT, given its general nature and the absence of any prohibitions or specific rules. Brazil strongly supported this stance, urging other States to fully accept its electronic signature, a standard practice in its judiciary system. The opposing group expressed concerns about fraud and privacy violations, which, in Brazil's view, could be addressed through simple and integrated measures.

In any case, in paras. 10-14 of the C&R, SC 2024 reiterated the need for increased use of IT to ensure efficiency and speed in transmission and communication between the parties. As a final note, the issue was referred to the Country Profile Working Group, as States are encouraged to indicate their practices in their profiles. Another specific solution was the task assigned to PB to create and maintain an internal email list of the Central Authorities' addresses to be circulated among member States. To expand the use of electronic means in the Service Convention, the Guide for Completing the Model Form was well received, and the acceptance

²⁵ The members of the Brazilian Delegation were: Ambassador Fernando Simas Magalhães, Arnaldo Silveira (MJ/DRCI, online), Nadia de Araujo (PUC-Rio), Frederico Bauer (Diplomat, Itamaraty), Thiago Lindolpho Chaves (AGU), Sâmia Albuquerque (MJ/DRCI, online) and Ana Beatriz Schwanck Fernandes (Assistant, Itamaraty).

²⁶ See in CGAP 2025 C&D para. 44.

of its virtual transmission and electronically signed forms was encouraged (C&R, paras. 79, 84-85).

Before the meeting, the PB provided updated information on the timeframe for executing service requests, with some Contracting States recording completion in less than three months (C&R, para. 94). Based on the data received, most countries that received requests electronically and responded similarly completed proceedings in a shorter timeframe than others that did not embrace this system and relied on mail. It became evident that fulfilling requests as quickly as possible and taking measures to reduce processing time is essential for full compliance with the Service Convention (C&R, para. 95) and that using electronic means effectively achieves better results. In summary, the plenary agreed on the importance of electronic transmission.

The discussions on IT resonated at 2025 CGAP, which welcomed the active role of the PB in providing a separate mailing list for the use of the Central Authorities of the three conventions and noted the importance of keeping the contact information for each mailing list up to date. Also, Contracting Parties were encouraged to enter the mailing list by giving the PB with the relevant contact information for their Central Authorities²⁷.

Regarding the Service Convention, two topics stood out in plenary discussions. The first concerns the possibility of contractually waiving the application of the Convention (contractual waiver), with the Rockefeller case, that was decided in the US, being presented as an exception, where a contractual arrangement was deemed to waive formal service procedures. SC 2024 highlighted the potential negative impact of such contractual agreements on defendants' rights and the recognition and enforcement of judgments in Contracting States, emphasizing the importance of applying the Convention in the spirit of cooperation between States. It also questioned the effect of private agreements considering the declarations and reservations made by each State (C&R, para. 111).

The second topic addressed the service of process on foreign States, a controversial issue given the differences in practices among Contracting States. SC 2024 encouraged States to disclose their rules and practices in their Country Profiles and recorded that (i) receipt by

the Central Authority of the requested State does not constitute effective service on that State and (ii) service on diplomatic missions is not permitted (C&R, paras. 112-114).

Regarding the Evidence Convention specifically, intense debate occurred on the use of electronic means not only for transmitting requests through electronic versions of the Model Form but also for obtaining evidence (C&R, paras. 28-29 and 32-34). It was suggested that States indicate in their Country Profile whether they accept or will accept digital or electronic signatures on requests (C&R, para. 33).

Within the framework of this Convention, the use of video-link for evidence gathering was also discussed. SC 2024 noted that the Evidence Convention does not contain any obstacles to its use (C&R, para. 48). Contracting States were encouraged to indicate their position on using video for evidence gathering in their Country Profile (C&R, paras. 49, 51).

The final notable topic concerning the Evidence Convention is related to the interpretation of Article 23, which addresses pre-trial discovery and is a recurring source of misunderstanding among contracting parties. SC 2024 emphasized that this provision should only apply to requests transmitted via Letters Rogatory under Chapter I of the Convention (C&R, para. 56). In this regard, it encouraged States to review their general reservations to this provision, referencing the specific reservations made by the United Kingdom²⁸ and the terms of Article 16 of the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad²⁹. It was also stressed that a mere reservation to Article 23 should not lead to an automatic rejection of the request without an analysis of its scope (C&R, para. 54).

Finally, discussions on the Convention on Access to Justice were limited, likely due to the fewer Contracting States. Notably, para. 63 of the C&R reflects the joint proposal by Switzerland and Brazil, resulting from informal discussions during the SC 2024 meeting regarding the conditions for assessing the need for legal aid. States are recommended to provide documentation on

²⁷ See in CGAP 2025 C&D para. 46.

²⁸ For the UK reservation, see in: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=564&disp=resdn>.

²⁹ For the Inter-American Convention, see in: <https://www.oas.org/juridico/english/treaties/b-51.html>.

the applicant's financial situation to allow for a more accurate assessment by the requested State.

2.5 Final Remarks

With the conclusion of the SC 2024 and considering the approved C&R, the efforts to raise awareness among Contracting States regarding best practices in applying the Conventions have received a positive impetus. The work carried out by these periodic Special Commissions enhances the proper implementation of the Conventions, and there was a consensus that the next session should be convened in five to six years, an interval deemed appropriate by the plenary. At 2025 CGAP, a WG was established to finalize the Good Practices documents relevant to these conventions, meeting online only.

A practical measure endorsed by SC 2024 was the encouragement for States to hold online meetings in the interim between this and the next General Commission, particularly to continue discussions on the use of IT in the transmission of cooperation requests. The PB volunteered to assist in initiating these discussions, targeting central authorities and other users of the Conventions. In 2025, CGAP mandated the PB to convene online meetings. The mandate includes online meetings for Central Authorities to discuss and exchange experiences to develop a deeper understanding of the use of information technology and develop additional guidance on the e-transmission of requests and associated matters.

It is also noteworthy that the requests for the inclusion of information in the Country Profiles were approved, the revisions to the Practical Handbooks were agreed upon, and confidence was expressed in the work carried out by the Working Groups. Undoubtedly, the expansion and democratization of information promotes transparency, facilitates Central Authorities' work, and enhances their users' understanding of these Conventions.

For Brazil, additional efforts should be made to raise awareness among legal practitioners regarding the Conventions discussed, which are essential for international legal cooperation, to increase their use by civil society, which, ultimately, is their greatest beneficiary.

3 Chronicle: The advantages of the iSupport system in the Maintenance Convention (Arnaldo Silveira)

3.1 Introduction

The recovery of maintenance obligations across international borders presents significant legal challenges. This article argues the necessity of a system like iSupport³⁰ to facilitate cooperation in this area. It offers a brief description of the system and reports on the progress of its implementation. It also focuses on recent developments. The article also emphasizes Brazil's role in iSupport development and its local implementation. Looking forward, the article mentions the next steps in iSupport's evolution toward maximizing its impact on families and individuals reliant on international maintenance payments.

3.2 International Legal Cooperation in child support and maintenance cases

It is important to note that when individuals involved in maintenance or child support matters require assistance, domestic judicial or administrative orders are often insufficient to address the necessary issues, especially when enforcement must take place across different countries. This is because the issuing authorities lack jurisdiction in foreign countries. These authorities, as a rule, must resort to a form of international legal cooperation, and thus request the relevant authority in the foreign country to comply with its decision.

The need to rely on the foreign authority for execution may seem obvious, but it is quite common to see local authorities issuing orders or decisions to be made or to have effects on other countries, without considering their lack of jurisdiction abroad.

To achieve the execution of these orders and decisions the interested party may obtain voluntary collaboration of those abroad affected by them or may start litigation directly in the foreign jurisdiction. Another option is to resort to international legal cooperation.

³⁰ iSupport was mentioned by Professor Inez Lopes in the 2019 issue of these Chronicles, in pg. 27 "Chronicle 2 Cross-border Maintenance: an assessment after the Hague Convention entered into force in Brazil (item 2.7 iSupport)".

It is rife to see national authorities assuming that they can issue orders for execution to be carried out abroad with no treaty to base them, just as if they were issuing orders to be executed within their jurisdiction. It is also quite common to see orders directed at foreign Embassies and Consulates in the same jurisdiction of the national authorities, instead of an international legal cooperation request. In these cases, it must be reminded that foreign Embassies and Consulates are not subject to these orders, as prescribed by the 1961 Vienna Convention on Diplomatic Relations³¹ and the 1963 Vienna Convention on Consular Relations³².

Thus, in a case of child maintenance in which it is necessary to serve a person abroad, to obtain evidence or to request enforcement in a foreign country, there are three paths available, as previously mentioned: (i) voluntary collaboration of those abroad affected by it; (ii) litigation of the interested parties directly in the foreign jurisdiction; or (iii) international legal cooperation.

3.3 The role of the Central Authorities in child support and maintenance cases

When an international legal cooperation request is made on maintenance and child support recovery in transnational cases, it generally occurs with the assistance of Central Authorities designated by each State which is a party to a certain treaty. The Central Authorities' role includes, among other activities: (i) receiving incoming and outgoing international legal cooperation requests for child support or other types of maintenance, like spousal support; (ii) detecting the existence of one or more treaties that could help to move the case forward; (iii) facilitating their correct formatting and documenting, depending on the result of the previous step; (iv.a) executing the incoming requests or facilitating their execution; or (iv.b) sending outgoing requests to the foreign Central Authority; and (v) following up on the effectivity of the case, including, among several other responsibilities, facilitating the payment by the debtor to the creditor.

In Brazil, the Central Authority for international legal cooperation in civil matters is the Ministry of Justice and Public Security - MJSP. This includes requests based on treaties and, in the absence of an applicable treaty, requests based on reciprocity. Most of the requests for cooperation in civil matters are maintenance and child support cases. Within the MJSP, the role of Central Authority is delegated to the Department of Assets Recovery and International Legal Cooperation - DRCI of the National Secretariat of Justice. The full list of treaties in force in Brazil that can be used for child support and maintenance cases can be found on the DRCI's website³³, including the only international instrument in this field which is under the responsibility of the General Prosecutor's Office - PGR, the United Nations Convention on the Recovery Abroad of Maintenance³⁴. Also known as the 1956 New York Convention, this treaty is largely superseded by the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (Hague 2007 Child Support Convention)³⁵, for which the DRCI is also the Central Authority.

It should be pointed out that, currently, the vast majority of the maintenance and child support legal cooperation requests received or sent by the Brazilian Central Authority are not yet based on the Hague 2007 Child Support Convention, but on other treaties, like: (i) The Hague Service Convention, or "*Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*"³⁶; (ii) The Inter-American Convention on Letters Rogatory³⁷; (iii) other treaties used with Mercosur State Parties and

³¹ 1961 Vienna Convention on Diplomatic Relations, articles 22, 24, 31 and 37. In Brazil, Decree n° 56.435, 1965. (https://www.planalto.gov.br/ccivil_03/decreto/antigos/d56435.htm).

³² 1963 Vienna Convention on Consular Relations, articles 31, 33 and 44. In Brazil, Decree n° 61.078, 1967. (https://www.planalto.gov.br/ccivil_03/decreto/d61078.htm).

³³ (<https://www.gov.br/mj/pt-br/assuntos/sua-protacao-cooperacao-internacional/cooperacao-juridica-internacional-em-materia-civil/acordos-internacionais/prestacao-internacional-de-alimentos>).

³⁴ United Nations Convention on the Recovery Abroad of Maintenance. In Brazil, Decree n° 56.826, 1965 (<https://www2.camara.leg.br/legin/fed/decret/1960-1969/decreto-56826-2-setembro-1965-397343-publicacaooriginal-1-pe.html>).

³⁵ Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. In Brazil, Decree n° 9.176, 2017. (https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9176.htm).

³⁶ Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In Brazil, Decree n° 9.734, 2019. (https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/d9734.htm).

³⁷ Inter-American Convention on Letters Rogatory. In Brazil, Decree n° 1.899, 1996. (https://www.planalto.gov.br/ccivil_03/decreto/1996/d1899.htm).

Associated Countries, like the Las Leñas Protocol³⁸; (iv) The Hague Evidence Convention, or “*Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*”⁴⁰; and (v) bilateral treaties.

3.4 The Hague 2007 Child Support Convention

The Hague 2007 Child Support Convention allows for several types of child support or maintenance requests⁴¹, like applications for the establishment of maintenance decisions, the recognition and enforcement of maintenance decisions, enforcement of maintenance decisions and modification of decisions. It is also possible, under certain conditions, to request the determination of paternity, the location of debtors and creditors of maintenance, the service of process upon them, and the identification of their income and assets.

As the Central Authority for the Hague 2007 Child Support, DRCI directly executes incoming requests for the location of debtors or creditors of maintenance or child support and, when necessary, requests location assistance from other Brazilian governmental agencies. Most importantly, DRCI facilitates the execution of all the other types of requests. For many of those cases, the requests are sent by DRCI to the Office of the Public Defender of the Union - DPU, so that judicial procedures can be established. A joint bylaw was signed between the DPU and the National Secretariat of Justice⁴², to which DRCI is linked. Also, the Ministry of Foreign Affairs, at the request of DRCI, designated the DPU as a Public Body under article 6(3) of the Hague 2007 Child Support Convention. DPU, thus, plays a particularly significant role in executing incoming requests in Brazil, acting in close partnership with the Central Authority (DRCI).

³⁸ “Protocolo de Cooperação e Assistência Jurisdicional em Matéria Civil, Comercial, Trabalhista e Administrativa” (Protocolo de Las Leñas) – Mercosur. In Brazil, Decree n° 2.067, 1996.

³⁹ “Acordo de Cooperação e Assistência Jurisdicional em Matéria Civil, Comercial, Trabalhista e Administrativa entre os Estados Partes do Mercosul, a República da Bolívia e a República do Chile” – Mercosur. In Brazil, Decree n° 6.891, 2009.

⁴⁰ Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. In Brazil, Decree n° 9.039, 2017. (https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9039.htm).

⁴¹ Article 10 of the Hague Child Support Convention.

⁴² Portaria Conjunta n° 1, de 29 de outubro de 2019. (<https://pesquisa.in.gov.br/imprensa/servlet/INPDFViewer?journal=515&pagina=209&data=06/11/2019&captchafield=firstAccess>).

3.5 The need for international initiatives for the electronic transmission of international legal cooperation requests

When it comes to the transmission of the outgoing requests and to the receipt of the incoming requests, surprisingly enough, the international standard is still not the electronic transmission. Many foreign Central Authorities still demand paper requests sent by physical mail.

The Brazilian legal community is accustomed to a fully electronic national judicial system and tends to assume that this is the prevailing global standard. This leads many to believe that the requests for international legal cooperation sent abroad through DRCI in its’ Central Authority role will be sent electronically. Unfortunately, this is not the case, because many countries still demand paper requests sent by physical mail.

DRCI, the Brazilian Central Authority, as well as many other foreign central authorities, considers the institutional e-mail accounts of the central authorities to be secure enough for sending and receiving international legal cooperation requests. This is currently the main electronic tool for the exchange of requests.

Other means of electronic transmission of requests include the use of encrypted e-mails and other secure transmission systems, such as the secure website provided by the “*Rede Iberoamericana de Cooperação Jurídica Internacional - IberRede*”⁴³. There are also country-specific solutions, like those made available by China, Peru, and the United States of America - the latter exclusively for requests under the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (HCCH 1965 Service Convention) and the Inter-American Convention on Letters Rogatory⁴⁴.

European Union countries are probably switching to the electronic transmission of requests among its members, since the enactment of the European Parliament and Council adopted Regulation (EU)

⁴³ The “Medellín Treaty”, or “*Tratado Relativo à Transmissão Eletrônica de Pedidos de Cooperação Jurídica e Judiciária Internacional entre Autoridades Centrais*”. (https://comjib.org/wp-content/uploads/2019/08/Tratado_Medellin_PT.pdf).

⁴⁴ In the United States of America, incoming requests for international legal cooperation based on these two treaties are dealt with by a company named ABC Legal, contracted to this end by the United States’ Central Authority, the Department of Justice.

2023/2844 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial, and criminal matters. Countries outside the EU should not be immediately affected by the implementation of the Regulation. Regardless, when this practice becomes widespread within the EU, it would be expected that EU countries may choose to require the same standard from countries outside the EU.

Over the past decades, DRCI has actively and persistently advocated for the electronic transmission of international legal cooperation requests, which represents worldwide leadership in initiatives for the electronic transmission of requests.

Among these initiatives, DRCI has suggested and achieved the negotiation of the *Tratado Relativo a la Transmisión Electrónica de Solicitudes de Cooperación Jurídica Internacional Entre Autoridades Centrales (Tratado de Medellín)*, aimed at the electronic transmission of those requests between the Central Authorities of the Ibero-American countries via the Iber@ website, one of the features of IberRede. Several other initiatives have been put in place by DRCI, including bilateral practices and advances with most of the Mercosur partners and with some countries of the Community of Portuguese Speaking Countries – CPLP. In the specific field of maintenance and child support, DRCI has also included Brazil in the first Pilot Project of iSupport and has since had a significant role in its development.

3.6 iSupport

iSupport is the secure electronic transmission and case management system designed to be used by the Central Authorities for international child support and maintenance requests, developed under the coordination of the Permanent Bureau of the Hague Conference on Private International Law – HCCH with the collaboration of many of the members of that organization, including Brazil.

The system user interface is based on commonly used internet browsers and is available in English, French, German, Portuguese, Spanish, and Swedish. Additionally, after a case is registered in iSupport, the forms necessary to formalize the request can be automatically generated in the language of the requested authority. The data entered by the Central Authority is not automatically translated, but it is transposed to a form who-

se fields and standard text are in the language of the requested country. Thus, some additional translation by the user may be necessary, depending on the relevant form and related to the information filled by the user in the form.

iSupport is tailor-made to be used both for requests made between parties to the Hague 2007 Child Support Convention, and for requests made between parties to the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition, and enforcement of decisions and cooperation in matters relating to maintenance obligations (the European Regulation⁴⁵). Even so, it is also designed to accommodate requests made under other multilateral or regional maintenance and child support treaties, such as the 1956 New York Convention, and the 1989 Inter-American Convention on Support Obligations (the Inter-American Convention), as well as bilateral agreements.

The case management feature of iSupport also allows case management and the exchange of messages between the relevant Central Authorities. It also allows the automatic collection of the statistics that the Permanent Bureau of the HCCH requests periodically from the Parties to the Convention. Other features are currently being developed and tested, like the monitoring of the international transfer of maintenance funds.

The security of request transmissions via iSupport relies on e-Codex, a European technology whose development and coordination first relied on a partnership between certain European countries, organizations, and experts, but has recently been chosen as a standard by the European Union – EU. It is currently under the auspices of the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice - EU-Lisa⁴⁶.

The coding and design of iSupport were commissioned to the Indian company Protech, following the appropriate open selection processes that apply to the HCCH and supervised by the iSupport Governing Body. As it was partly funded by the EU, the rules of that international organization also applied.

⁴⁵ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0004&qid=1741648505159>).

⁴⁶ (<https://www.eulisa.europa.eu/activities/large-scale-it-systems/e-codex>).

The iSupport Governing Body is comprised of members of the HCCH that have contributed to the development of iSupport over the years, as some countries contributed by direct funding or by human resources fully or partially dedicated to the project.

iSupport saw a recent breakthrough, after ten years of planning, developing, testing, and some false starts. Germany and Sweden were the first countries to finally start to use iSupport for the secure exchange of child support requests.

3.7 The involvement of Brazil in iSupport Development and Implementation

Brazil was one of the first countries to adhere to the Pilot Project of iSupport, in 2014. In the first years, two to three long virtual meetings were held each week between the participants of the project, many times including representatives of the contracted company, Protech. Decisions were made about what the system would include, how the information would flow within the system and between authorities, the levels of security and how to technically implement each solution. Even the size and format of each field of the database were discussed at length.

At the same time, several virtual meetings were also held to discuss administrative matters like the funding of the project, tender and contracting rules, and projects for requesting funding from the participant countries and the EU. The text of a possible agreement between countries interested in using iSupport and the HCCH was also discussed.

The translation of iSupport to Portuguese was done by the Brazilian representatives from the DRCI and by the representatives of the Portuguese Ministry of Justice. Each word or phrase to be displayed in an iSupport screen was translated, taking into account the use of terms that would be acceptable in the Portuguese language spoken in Brazil, and in the Portuguese language spoken in Portugal and in most of the other Portuguese-speaking countries.

Over the years, Brazil has continued to participate consistently in frequent iSupport virtual meetings, including technical ones and the Governing Body ones.

The Information Technology personnel of the MJSP and the DRCI have worked together over the

years to always have the latest testing release of iSupport installed. Testing with the HCCH and the other countries involved was and is frequent.

At the same time, DRCI looked for budgetary solutions to enable iSupport's full implementation, as payments to an international organization follow specific and bureaucratic legal and administrative procedures in Brazil. For that matter, DRCI is also studying the terms of proposed agreements to deal with that matter, either by an agreement between the MJSP and Protech, or between the HCCH and the MJSP. There is also discussion about whether a formal treaty would be needed to allow for regular iSupport payments to the HCCH.

As the number of countries using iSupport now is still small, DRCI is under pressure to justify the need for this additional expenditure. In the meantime, DRCI was able to fully or partially establish procedures for sending requests based on the Hague 2007 Child Support Convention through the Central Authorities' institutional e-mail addresses to Austria, the Czech Republic, England, Estonia, Finland, Greece, Ireland, Italy, New Zealand, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and several State authorities from the United States of America.

3.8 Current stage of iSupport

According to the Statute of the HCCH, the Council on General Affairs and Policy - CGAP is composed of all Members and is in charge of the operation of the Conference, of giving directions to the work of the Permanent Bureau, to approve regulations, and examine and determine the action to be taken regarding all proposals intended to be placed on the Agenda of the Conference.

The matter of iSupport was under consideration of the last meetings of CGAP. In 2023, paragraph 36 of the CGAP Conclusions and Decisions document stated that “CGAP noted recent encouraging developments in relation to iSupport and renewed its invitation to Members and Contracting Parties to consider implementing the software with a view to facilitating the recovery of child support payments and generating savings in their child support operations”. In 2024 paragraph 38 of the CGAP Conclusions and Decisions document, stated that “CGAP noted the **first official exchange of data using iSupport between Germany and Sweden**, and their continued use of iSupport. CGAP also noted

the continued efforts towards improving the ease of installation and user-friendliness of iSupport. CGAP encouraged Members to draw from the experience of Germany and Sweden with a view to assessing the possibility of implementing iSupport in their own operations.” (emphasis added).

Currently, iSupport is implementing functional developments about payments and technical improvements, with EU funding. Some countries have expressed that their decisions on the implementation of iSupport depend on further developments of the system’s Application Programming Interface – API. An API could be described as a set of definitions and protocols that allows one application to access the features or data of another application.

iSupport is now entering a phase of development based on a new EU-funded project, called R2G, which stands for Ready to Go. It involves simplified installation and setup, improved interface, and training, as well as enhanced support and guidance.

Many countries have recently expressed interest in implementing iSupport soon, including Estonia, Finland, France, Hungary, Portugal, and Spain. It is worth noting that at 2025 CGAP the increase in States using iSupport (an electronic case management and secure communication system for the cross-border recovery of maintenance obligations) was noted, as well as the advances of the software concerning the transfer of maintenance funds. As a result, in its C&D, 2025 CGAP encouraged Members to use the support offered by the PB and contribute to the improvement of iSupport by sharing their requirements for the software. (para. 32)

3.9 Final Remarks

The electronic transmission of international legal cooperation requests is not yet the norm in international legal cooperation in civil matters, including maintenance or child support cases, but it is past due. Brazil is deeply involved in finding solutions for attracting other countries to implement electronic procedures. When it comes to international legal cooperation in maintenance or child support cases, iSupport is an especially important initiative to achieve the electronic transmission of these requests.

Brazil is closely following the latest developments and the start of iSupport operation, while domestic

measures are being taken to make it possible to implement it internally.

The relevance of iSupport shall rise considerably when its implementation is spread to other countries other than the ones that already use it.

4 Chronicle: Two Topics about the Apostille Convention: the counterintuitive exclusion of customs and commerce documents from its scope and the rise of e-Apostille. (Gustavo Ferreira Ribeiro)

4.1 Introduction

Conceptualized in the 1950s and in force since 1965⁴⁷, the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the “Apostille Convention”) is one of the leading international legal instruments developed by the Hague Conference on Private International Law (HCCH), in terms of contracting parties and practical use⁴⁸.

Brazil internalized the Apostille Convention in 2016⁴⁹ and became the 110th Contracting Party to the Convention. Worldwide, the number of signatories reached 127. The recent accessions include Bangladesh (March 30, 2025), Canada (January 11, 2024), China (November 7, 2023), Pakistan (March 9, 2023), Rwanda (June 5, 2024), and Senegal (March 23, 2023)⁵⁰.

⁴⁷ GRAVESON, R. H. The ninth Hague Conference of Private International Law. *International and Comparative Law Quarterly*, v. 10, p. 19, Jan. 1961.

⁴⁸ HCCH. Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Hague, Oct. 5, 1961. Available in: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=41>. Last access: Feb. 28, 2025.

⁴⁹ BRASIL. Decree n° 8.660, of Jan. 29, 2016. Promulgates the Convention on the Elimination of the Requirement of Legalization for Foreign Public Documents, signed by the Federative Republic of Brazil, in The Hague, on October 5, 1961. DOU: Section 1, Brasília, DF, p. 3, 1 Feb. 2016. Available in: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/d8660.htm. Last access: Feb. 28, 2025.

⁵⁰ The two main HCCH Conventions, in terms of Contracting Parties, are the Apostille Convention (127 parties) and the Convention on the Civil Aspects of International Child Abduction (103 parties). For a comparison of the Conventions, see: HCCH. *Status Chart*. Available in: <https://www.hcch.net/pt/instruments/status->

But what exactly is an Apostille procedure? In the context of world document circulation between different countries, the procedure serves as a specific form of legalization that authenticates the signature of public documents without requiring diplomatic or consular intervention. According to the Apostille Handbook, “a document for which an Apostille has been issued under the Apostille Convention is referred to as having been ‘apostilled’⁵¹. The procedure does not certify anything about the substantive content of the document.

As we have already discussed in a previous chronicle, the Apostille Convention reduces bureaucracy, simplifies processes, and seeks to reduce the costs inherent to legalization by establishing procedures to eliminate the requirement for diplomatic or consular legalization of public documents⁵².

In Brazil, a significant business newspaper recently reported a record number of Apostille procedures in the country in 2024. An estimated 2.8 million procedures were recorded in that year, many of which related to citizenship processes or the inclusion of evidence abroad in cases of transnational litigation. The newspaper article also mentioned the routine use of apostilles for corporate documents, such as when companies participate in foreign bidding processes, and the foreign authority demands a “negative certificate”⁵³ from a Brazilian public authority⁵⁴.

Indeed, the Apostille Handbook highlights numerous situations in which the Apostille is applicable, including:

international marriages; international relocations; applications for studies, residency or citizenship in a

charts. Last access: Feb. 28, 2025.

⁵¹ HCCH. *Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention*. Hague, Secretariat, 2023, paragraph. 7. Available in: <https://assets.hcch.net/docs/a19ae90b-27bf-4596-b5ee-0140858abeaa.pdf>. Last access: Feb. 28, 2025.

⁵² ARAUJO, Nadia; DE NARDI, Marcelo; RIBEIRO, Gustavo; POLIDO, Fabrício LOPES, Inez; OLIVEIRA, Matheus. *Crônicas de Direito Internacional Privado: destaques do trabalho da HCCH nos últimos dois anos. Revista de Direito Internacional, Brasília, v. 19, n. 2, p. 14, 2022*. Available in: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/8688/pdf>. Last access: Feb. 28, 2025.

⁵³ A negative certificate, in Brazil, is equivalent to a “Debt Clearance Certificate” or a “Certificate of Good Standing”. They are provided electronically by the competent tax authorities.

⁵⁴ LAURA, I. *Cartórios bateram recorde de apostilamentos no ano de 2024. Valor Econômico*, São Paulo, Feb. 22, 2025. Available in: <https://valor.globo.com/legislacao/noticia/2025/02/22/cartorios-bateram-recorde-de-apostilamentos-no-ano-de-2024.ghtml>. Last access: Feb. 28, 2025.

foreign place; intercountry adoption procedures; international business transactions and foreign investment procedures; enforcement of intellectual property rights abroad; and foreign legal proceedings⁵⁵.

Another author adds documents such as purchase and sale agreements, joint operation agreements, drilling contracts, payment orders, and confidentiality agreements to the list⁵⁶.

In this context, this chronicle aims to explore two specific aspects of the Apostille Convention. The first is the counterintuitive exclusion of the Apostille Convention for foreign trade, as Article 1(3)(b) of the Convention explicitly states that it does not apply to commercial and customs documents⁵⁷. Would it not be precisely those documents (such as import and export licenses, certificates of origin, health certificates, and invoices) that would benefit most from the Convention? The second aspect is practical. It concerns the ongoing modernization of the Convention by implementing the Electronic Apostille Programme (e-APP).

This research adopts bibliographical review methodology, including an analysis of doctrinal texts, preparatory works of the Convention, and the latest technical materials prepared by the Apostille Section of the HCCH Secretariat, such as the C&D. It is important to note that the C&D, among other things, encouraged States to join the Apostille Convention and to implement the e-APP⁵⁸.

⁵⁵ HCCH. *Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention*. Hague, Secretariat, 2023, paragraph. 7. Available in: <https://assets.hcch.net/docs/a19ae90b-27bf-4596-b5ee-0140858abeaa.pdf>. Last access: Feb. 28, 2025.

⁵⁶ ADAMS JR, James W. *The Apostille in the 21st Century: international document certification and verification. Houston Journal of International Law*, v. 3, n. 3, p. 520, 2012.

⁵⁷ Apostille Convention, article 1(3)b: “(...) However, the present Convention shall not apply: (...) b) to administrative documents dealing directly with commercial or customs operations.”

⁵⁸ See 2025 CGAP, C&D para. 63 to 67: “63.CGAP encouraged Members and Contracting Parties interested in translating the Apostille Handbook to contact the PB. 64 CGAP welcomed the C&R of the 13th International Forum on the e-APP and thanked the Republic of Kazakhstan and the Maqsut Narikbayev University for their generous support in hosting the event. 65 CGAP noted that the methodology underlying the World Bank Group’s Business Ready Report identifies the Apostille Convention and the e-APP as factors that improve an economy’s business environment. CGAP encouraged States to join the Apostille Convention and to implement the e-APP. 66 CGAP mandated the PB to convene an online brainstorming session to discuss the acceptance of electronic Apostilles in circumstances where Contracting Parties, under their domestic law, cannot accept electronic public documents. 67 CGAP will consider the specific timing for the next meeting of the SC on the practical

4.2 The Counterintuitive Exclusion of Commercial and Customs Documents from the Scope of the Apostille Convention

The Apostille Convention defines four categories of public documents within its scope:

- a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server (“huissier de justice”);
- b) administrative documents.
- c) notarial acts.
- d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that.⁵⁹

The term “public document” in the Convention originates from the French term “actes publiques”, which was deemed adequately represented in English as “public documents”⁶⁰. However, the Convention does not apply to “administrative documents dealing directly with commercial or customs operations”⁶¹.

At first glance, the Convention’s language leaves no doubt regarding its non-applicability to commercial or customs transactions. However, this exclusion is peculiar and should be interpreted restrictively.

This is because the provision is rooted in the composition of European countries that primarily negotiated the Convention. At that time, these countries did not require legalizing documents related to commercial and customs operations, aligning their spirit with Article VIII:1(c) of the 1947 General Agreement on Tariffs and Trade (GATT)⁶².

In contrast, Zablud highlights a different reality outside Europe, where most countries used to require consular legalization of documents related to imported goods, a process known as *consular invoice* or *consular visa*.

According to Zablud, this form of legalization took place at the destination country’s consulate, located in the exporting country. Despite being gradually phased out, this practice persisted over time, as consulates generated substantial revenue from these services, often causing procedural delays⁶³.

Thus, two contrasting views emerged: European countries, which had already abandoned the requirement for legalizing trade-related documents, and countries that maintained “consularization” for such documents⁶⁴.

During the preparatory work for the Apostille Convention, as noted in the explanatory report by Professor Loussouarn, the exclusion in Article 1(3)(b) was introduced after extensive debate. A proposal was even considered to create an exception to the exclusion (“*une exception à cette exclusion*”), allowing documents such as certificates of origin and import/export licenses to be apostilled. However, a general exclusion prevailed for two reasons. First, such documents were typically already exempt from legalization. Second, where formalities were required, they did not serve to authenticate documents but to verify their content and apply substantive control by the competent authority⁶⁵.

Professor Loussouarn points out that the Commission sought to avoid too generic exclusion. The term administrative, which describes documents, would allow commercial documents, such as contracts and powers of attorney related to trade, to be subject to Apostille. Furthermore, the adverb “directly” would restrict the exclusion to documents whose content expresses a commercial or customs purpose, except those that may occasionally be used for commercial transactions. Professor Loussouarn illustrates these types of docu-

operation of the Apostille Convention at CGAP 2027, noting that it is expected to take place before the end of 2029”.

⁵⁹ Apostille Convention, article 1.

⁶⁰ GRAVESON, R. H. The ninth Hague Conference of Private International Law. *International and Comparative Law Quarterly*, v. 10, p. 20, Jan. 1961.

⁶¹ Apostille Convention, article 1(3)b.

⁶² This GATT provision provides that Contracting Parties should minimize the complexity and incidence of import formalities. This includes simplifying documentation requirements for imports and exports.

⁶³ ZABLUD, P. *Aspects of the Apostille Convention: a position Paper*. 5 nov. 2012. Available in: https://assets.hcch.net/upload/wop/2012apostille_info05.pdf. Last access: Feb. 28, 2025.

⁶⁴ In fact, the composition of the Special Committee formed to discuss the Apostille Convention was predominantly European. Professor Loussouarn, from the Faculty of Rennes, in France, was the Commission’s rapporteur. The ten other members came from Germany, Japan, Yugoslavia, Belgium (2), the Netherlands, Luxembourg, Türkiye, Italy and Spain. See HCCH. *Actes et Document de La Neuvième Session*: Tome II. Hague: Secretariat, Oct. 5th, 1960, p. 15. Available in: <https://assets.hcch.net/docs/3ecef86a-5af4-481f-9a68-63d6b8d6c6ef.pdf>. Last access: Feb. 28, 2025.

⁶⁵ HCCH. *Actes et Document de La Neuvième Session*: Tome II. Hague: Secretariat, Oct. 5. 1960, p. 175. Available in: <https://assets.hcch.net/docs/3ecef86a-5af4-481f-9a68-63d6b8d6c6ef.pdf>. Last access: Feb. 28, 2025.

ments with the certificates issued by Patent Offices at this point⁶⁶.

Zablud, based on the distinctions made in Loussouarn's report, emphasizes that two types of administrative documents directly related to commercial, or customs operations can be distinguished for exclusion from the Convention's coverage. Those issued by governments or government institutions and those issued privately, of an administrative nature, and related to commercial or customs operations. The first group would include import and export licenses, health certificates, and product registration certificates. The second group would consist of documents typically issued by non-governmental sources in some countries, such as certificates of origin, certificates of conformity, end-user certificates, and commercial invoices. According to Zablud, this second group would be covered by the Convention's Apostille and could be subject to Apostille⁶⁷.

However, the different legal concepts regarding administrative and directly related terms and the possible institutional arrangements (governmental or private) for issuing countries' foreign trade documents can raise complexities.

Consequently, the interpretation of the scope of the exclusion in Article 1(3)b of the Convention has been attracting the attention of the Special Commission of the HCCH since 2003. In 2016, the Special Commission even suggested that the exclusion be interpreted "extremely narrowly"⁶⁸.

According to the Special Commission, among the parties to the Convention, there are three approaches to commercial documents of private origin: (i) some

parties maintain the exclusion and do not require legalization procedures; (ii) others require the Apostille procedure, often because they require, before the Convention comes into force, some form of legalization or authentication; and (iii) finally, a small number apply the Convention not issuing or accepting Apostilles, thus requiring the traditional legalization procedure⁶⁹.

Seeking more guidance on the interpretation of exclusion, the HCCH Secretariat sent a questionnaire to several countries in 2021. In total, 84 responses were obtained: 79 from Contracting Parties, including Brazil, and five from non-parties⁷⁰.

As we already had the opportunity to quote in a previous chronicle,

roughly 88% of responses indicated that this exclusion does not present any difficulties in the operation of the Convention. When asked if the Article 1(3)(a) exclusion is justified in the modern context of the operation of the Convention, 66% agreed and 19% disagreed. A slightly lower proportion of responses (74%) indicated that the exclusion in Article 1(3)(b) on administrative documents dealing directly with commercial or customs operations does not present any difficulties in the operation of the Convention. Approximately 58% of respondents consider that the exclusion is justified in the modern context of the Convention, while 25% do not. Thus, while the majority of respondents in both instances did not report difficulties related to the Article 1(3) exclusions, a minority do not consider the exclusions justified in the modern operation of the Convention⁷¹.

The questionnaire results reflected mixed levels of interpretation of the Contracting Parties, with distinct rates of issuance and acceptance of specific categories of documents subject to Apostille. Health and safety certificates, product registration certificates, and certificates of origin were the most apostilled documents (in terms of issuance)⁷². Thus, we concluded in the pre-

⁶⁶ HCCH. *Actes et Document de La Neuvième Session*: Tome II. Hague: Secretariat, Oct. 5. 1960, p. 175-176. Available in: <https://assets.hcch.net/docs/3ecef86a-5af4-481f-9a68-63d6b8d6c6ef.pdf>. Last access: Feb. 28, 2025.

⁶⁷ ZABLUD, P. *Aspects of the Apostille Convention*: a position Paper. 5 nov. 2012, op. 3-4. Available in: https://assets.hcch.net/upload/wop/2012apostille_info05.pdf. Last access: Feb. 28, 2025. In a recent note from the HCCH Secretariat, on the scope of exclusion, this second group of commercial documents subject to apostille is illustrated with the following elements: contracts, powers of attorney and certificates issued by patent offices. HCCH. Info. Doc. N. 3. *Note on Article 1(3) Exclusions*. Hague: Secretariat, Oct. 2021, p. 2. Available in: <https://assets.hcch.net/docs/e84b8f1c-3756-4784-9167-a377d481a5b1.pdf>. Last access: Feb. 28, 2025.

⁶⁸ HCCH. Info. Doc. N. 3. *Note on Article 1(3) Exclusions*. Hague: Secretariat, Oct. 2021, p. 19. Available in: <https://assets.hcch.net/docs/e84b8f1c-3756-4784-9167-a377d481a5b1.pdf>. Last access: Feb. 28, 2025.

⁶⁹ HCCH. Info. Doc. N. 3. *Note on Article 1(3) Exclusions*. Hague: Secretariat, Oct. 2021, p. 3. Available in: <https://assets.hcch.net/docs/e84b8f1c-3756-4784-9167-a377d481a5b1.pdf>. Last access: Feb. 28, 2025.

⁷⁰ HCCH. Prel. Doc. n. 2. REV. *Summary of Responses to the Apostille Questionnaire*. Hague: Secretariat, Oct. 2021, para. 19. Available in: <https://assets.hcch.net/docs/562ae0df-8797-47e6-85e6-6055e7689639.pdf>. Last access: Feb. 28, 2025.

⁷¹ HCCH. Prel. Doc. n. 2. REV. *Summary of Responses to the Apostille Questionnaire*. Hague: Secretariat, Oct. 2021, para. 13-15. Available in: <https://assets.hcch.net/docs/562ae0df-8797-47e6-85e6-6055e7689639.pdf>. Last access: Feb. 28, 2025.

⁷² HCCH. Prel. Doc. n. 2. REV. *Summary of Responses to the Apostille Questionnaire*. Hague: Secretariat, Oct. 2021, para. 18. Avail-

vious chronicle that the big picture reveals that the purpose of the Convention and the restricted exclusion are not fully agreed upon among the respondents⁷³.

Additionally, the latest version of the Apostille handbook posits that.

[I]n practice, a number of Contracting Parties apply the Convention to administrative documents that are essential to the operation of cross-border trade and commerce, such as import/export licences, certificates of origin and health and safety certificates. This is on the basis that these documents are considered to be of a public nature under their national law or policy, and that these documents previously required legalisation. The application of the Convention to these documents is considered valid because it is the Convention's purpose of abolishing legalisation and facilitating the use of public documents abroad. This interpretation has been endorsed by the Special Commission, which has recognised the importance of facilitating the circulation of these in international trade and commerce. Where a free trade agreement applies, documents relating to customs operations are often not subject to legalisation or other equivalent formality due to the simplification and harmonisation of customs procedures. In most cases, customs administrations verify these documents by contacting the relevant authorities in the exporting country⁷⁴.

In conclusion, despite the non-homogeneous application of the Convention by Contracting Parties, the PB suggests a pragmatic view of the exception. Some countries still apply the Apostille to commercial or customs documents. However, this would be preferable rather than legalization itself and would be in line with facilitating international trade.

4.3 The Rise of the Apostille Programme (e-APP)

While the previous section debated a substantive issue (an exclusion of scope) of the Apostille Convention, the current one refers to a practical aspect of the

Convention: its anachronistic form. After six decades of operation, a completely different world emerged regarding available technology. However, not all countries have implemented an electronic apostille procedure and continue to operate with analog procedures.

Hasanova states that a model for implementing the electronic procedure dates to the early 2000s when the HCCH, in cooperation with some member states, developed the e-APP program. The author also reminds us that the electronic apostille has seen a surge considering the COVID-19 pandemic when the Secretary General of the HCCH emphasized a greater need for electronic authentication and recognition of public documents during the health crisis⁷⁵.

A preliminary report for the 2025 CGAP meeting indicates that in 2024, multiple Contracting Parties, including the Philippines, Russia, Panama, Ecuador, and Morocco, successfully implemented both components of the e-APP: issuing e-Apostilles and establishing e-Registers. The report also notes that certain U.S. states, such as Kentucky, Minnesota, and Washington, have fully adopted the system⁷⁶.

In total, the report points out that 56 Contracting Parties (44% of all Contracting Parties) have implemented at least one component, and 36 (28.3%) have deployed both, making the digital shift to rise and gain momentum⁷⁷.

The report also brings some insights from the 13th International Forum on the e-APP, held in Astana, Kazakhstan, marking the first forum in Central Asia. Attended by over 300 participants from 70 Contracting and three non-Contracting Parties, the Forum provided a platform for knowledge-sharing on the e-APP's implementation. Panel discussions explored the best

able in: <https://assets.hcch.net/docs/562ae0df-8797-47e6-85e6-6055e7689639.pdf>. Last access: Feb. 28, 2025.

⁷³ ARAUJO, Nadia; DE NARDI, Marcelo; RIBEIRO, Gustavo; POLIDO, Fabrício LOPES, Inez; OLIVEIRA, Matheus. Crônicas de Direito Internacional Privado: destaques do trabalho da HCCH nos últimos dois anos. *Revista de Direito Internacional*, Brasília, v. 19, n. 2, p. 27, 2022. Available in: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/8688/pdf>. Last access: Feb. 28, 2025.

⁷⁴ HCCH. *Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention*. Hague, Secretariat, 2023, paragraph. 136-138. Available in: <https://assets.hcch.net/docs/a19ae90b-27bf-4596-b5ee-0140858abeaa.pdf>. Last access: Feb. 28, 2025.

⁷⁵ Nazrin Hasanova. The electronic Apostille in worldwide circulation of public documents. *Baku State University Law Review*, v. 4, n. 1. Feb. 2023, p. 24-29. One should note that Brazil, under the auspices of the National Council of Justice (CNJ), presented in October 2019, at the 11th International Forum of the Electronic Apostille Program, its national platform. See: CONSELHO NACIONAL DE JUSTIÇA. Agência CNJ de Justiça. Brasil disponibiliza nova plataforma de apostilamento. 2019. Available in: <https://www.cnj.jus.br/brasil-disponibiliza-nova-plataforma-de-apostilamento-para-comunidade-internacional/> Last access: Feb. 28, 2025.

⁷⁶ HCCH. Prel. Doc. n. 12 of December 2024. 1961 Apostille Convention: Update. Hague: Permanent Bureau, Dec. 2024, para. 7. Available in: <https://assets.hcch.net/docs/fe013755-6580-4701-a97c-99abf376bf78.pdf>. Last access: Feb. 28, 2025.

⁷⁷ *Ibidem*, para. 7.

practices, technological advancements, and integration strategies for new digital authentication tools. The conclusions and recommendations from the Forum underscored the need for continuous innovation and cooperation in adopting the e-APP⁷⁸.

The report calls attention to the active engagement of the Permanent Bureau (PB) in promoting the Apostille Convention through targeted assistance and promotional initiatives. Bilateral engagements with officials from Bangladesh, Pakistan, Spain, and Thailand, among others, facilitated discussions on best practices for implementation. Additionally, per the report, the PB contributed to various regional and international events, including the Asian African Legal Consultative Organization session in Bangkok and the Montana Notary Conference in the U.S., further amplifying awareness of the Convention and the e-APP⁷⁹.

Notably, the report stresses a notable development in 2024, with the inclusion of the Apostille Convention and the e-APP in the World Bank's Business Ready Report⁸⁰. Recognized as key factors in the dispute resolution scoring methodology, these elements highlight the Convention's role in enhancing global business environments.

Finally, the report notes that the Apostille was not included in the CGAP 2024 agenda. However, future digital innovations and integration with emerging authentication technologies will shape the next phase of the Convention's development. For the CGAP 2025 agenda, the Apostille Convention was scheduled as a section topic concerning "Transnational Litigation & Apostille," and was part of the C&D, para. 63 to 67⁸¹.

4.4 Final Remarks

This chronicle addressed two aspects of the Apostille Convention. The first dealt with the so-called article 1(3)(b) exception, and the second related to the use of e-APPs.

⁷⁸ Ibidem, para. 9-10.

⁷⁹ Ibidem, para. 17.

⁸⁰ Ibidem, para. 18. For the full report, see: WORLD BANK. Business Ready, 2024. Available in: <https://www.worldbank.org/en/businessready> Last access: Feb. 28, 2025.

⁸¹ HCCH. Prel. Doc. n. 12 of December 2024. 1961 Apostille Convention: Update. Hague: Permanent Bureau, Dec. 2024, para. 19-20. Available in: <https://assets.hcch.net/docs/fe013755-6580-4701-a97c-99abf376bf78.pdf>. Last access: Feb. 28, 2025.

One can identify the Article 1(3)(b) exception's historical roots and verify that the practice among Contracting Parties remains diverse. However, the PB adopts a pragmatic view when the exclusion seems not to be working, i.e., Contracting Parties do issue or require Apostille procedure in commercial or customs documents. In this case, the Apostille procedure would be better and less bureaucratic than the legalization itself, fulfilling the objective of facilitating trade.

The second point is that the digital transformation of the Apostille process, driven by the e-APP, represents a critical step forward in modernizing document legalization. Despite significant progress, the uneven implementation of e-apostilles among Contracting Parties indicates the need for further harmonization and cooperation.

Ultimately, the Apostille Convention remains a cornerstone of international legal cooperation, reducing bureaucratic burdens and enhancing efficiency in document verification. The record number of Apostille procedures in Brazil in 2024 contributes to the argument, though a more comprehensive comparative study of its use could be carried out.

5 Chronicle: Return or Protection? Article 13(1)(b) of the 1980 Hague Convention and Domestic Violence in Parental Abduction Cases. (Inez Lopes)

5.1 Introduction

Before the 8th Meeting of the Special Commission in 2023, several non-governmental organizations (NGOs) contacted the Permanent Bureau of the Hague Conference on Private International Law (HCCH) and expressed concerns, particularly regarding the application of Article 13(1)(b) of the 1980 Convention on the Civil Aspects of International Child Abduction⁸² in the context of domestic violence. The Secretary-General emphasized that, according to HCCH norms and regulations, only international NGOs can act as observers in

⁸² Promulgated by Decree No. 3,413 of 14 April 2000, approved by the National Congress through Legislative Decree No. 79 of 15 September 1999.

the meetings of this international organization. For this reason, the NGOs were unable to participate in the 2023 meeting. In this context, the Secretary-General of the HCCH suggested the organization of a Forum, which would represent an excellent opportunity for the exchange of information and perspectives on the jurisprudence relating to the application of Article 13(1)(b), aiming to discuss good practices and effective strategies⁸³.

The Council on General Affairs and Policy (CGAP) approved the organization of a Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Convention. The Forum took place in Sandton, South Africa, from 18 to 21 June 2024, co-organized with the Government of South Africa and the Centre for Child Law at the University of Pretoria⁸⁴. Also on 2025 CGAP the report on the 2024 Forum was noted, and the holding of a Second Forum was welcomed. The Second Forum will be held in Brazil, in October 2025⁸⁵. Like the first, the 2025 CGAP observed that the Second Forum will not result in any HCCH Conclusions and Recommendations.

This article aims to analyze the main discussions on domestic violence within the scope of private international law (PIL), with emphasis on the debates at the Forum on Domestic Violence and the application of Article 13(1)(b) of the 1980 Hague Convention on International Abduction in transnational family relations.

Using a qualitative method through bibliographical review and analysis of HCCH documents, this work seeks to contribute to new discussions on domestic violence in transnational family relations, considering that it remains an open topic. From a human rights perspective, this study presents the dialogue between international sources, the principle of the best interests of the child, and gender issues in cross-border private relations.

5.2 The Main Discussions of the Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Convention

In the opening session, Mandisa Muriel Lindelwa Maya, Deputy President of the Supreme Court of South Africa, stated that while the Convention prioritizes the safe return of children, the instrument contains exceptions to the general rule, including the “grave risk” provision in Article 13(1)(b), which establishes that a child should not be returned if such return would expose them to physical or psychological harm or otherwise place them in an intolerable situation⁸⁶. The Chief Justice also emphasized that the Guide to Good Practice acknowledges that harm to the mother can be equivalent to harm to the child and that for the exception in Article 13(1)(b) to apply, the child does not need to be the direct victim of harm. However, she added that despite the clarity of the guidance provided by the Guide to Good Practice, there is still no judicial consensus on the application of Article 13(1)(b)⁸⁷.

One of the central discussions addressed the role of key actors in the application of Article 13(1)(b)⁸⁸. The session highlighted the importance of careful assessment of domestic violence allegations and the need for well-trained judicial systems to handle such sensitive situations. Many experts emphasized that domestic violence is often difficult to prove, especially in transnational contexts where evidence of abuse, such as medical or police records, is not always available.

The psychological impact of domestic violence on victims, particularly children, was another relevant topic. Psychologists and trauma specialists discussed the long-term effects of exposure to domestic violence, such as post-traumatic stress disorder (PTSD), anxiety,

⁸³ HCCH. Prel. Doc. No 8A September, 2024, p. 4.

⁸⁴ *Ibid.*, p. 5.

⁸⁵ See 2025 CGAP, C&D, para 25 and 26: 25. CGAP took note of the reporting on the Forum on Domestic Violence and the Operation of Article 13(1)(b) of the 1980 Child Abduction Convention, held in June 2024, in Sandton, South Africa and thanked the Government of South Africa and the Centre for Child Law of the University of Pretoria for having hosted the Forum. 26 CGAP welcomed the holding of the second Forum in late October 2025, organized by the Government of Brazil and with the support of the PB, within available resources. In accordance with previous arrangements between the Government of Brazil and the PB, a Steering Committee will develop the substantive programme, with the understanding of the importance of ensuring balanced and diverse participation from all relevant actors. CGAP noted that, while in-person participation is encouraged, passive online participation will be ensured. CGAP also noted that the second Forum, like the first, will not result in any HCCH Conclusions and Recommendations (C&R). The PB will prepare a report on the second Forum for consideration by CGAP 2026. Any proposal for an additional Forum involving the HCCH, including the PB, shall be presented to CGAP for consideration. CGAP expressed its gratitude to the Government of Brazil for its initiative in hosting the second Forum. CGAP encouraged other States and interested parties to consider making a voluntary contribution to cover the costs of the second Forum.

⁸⁶ *Ibid.*, p. 8.

⁸⁷ *Ibid.*, p. 9.

⁸⁸ *Ibid.*, p. 9 e ss.

and behavioral disorders. Studies have shown that children exposed to domestic violence, even if they are not direct victims of abuse, often suffer serious emotional and psychological harm. Godbold noted that trauma is central to the Forum's discussions, as both the separation of parents and children and experiences of domestic violence are inherently traumatic⁸⁹.

During the discussion, it was emphasized that even if a child is not directly assaulted, merely witnessing violence places him or her at significant risk of psychological harm, which should be considered in judicial decisions.

The Forum also provided a space for emotional testimonies from mothers who fled abusive situations and were forced to return their children despite clear evidence of domestic violence. These mothers, often labeled as "abducting mothers", were portrayed as protectors fighting to save their children from dangerous situations. However, the inadequate recognition of domestic violence in courts and the improper application of protective measures frequently result in the re-victimization of mothers, placing children in even more perilous circumstances.

The Forum further addressed the complexity of judicial decisions regarding the return or non-return of children in cases involving domestic violence. Judges and experts shared their experiences on how allegations of domestic violence influence decisions and the difficulty of ensuring the child's safety during the return process. It was pointed out that while Article 13(1)(b) of the Hague Convention provides a mechanism to prevent return in cases of grave risk, the implementation of protective measures is not always effective. In many cases, protective measures intended to safeguard victims of domestic violence fail, leaving children and women in dangerous situations. The stories, through audio recordings of children, revealed traumas and accounts of violence and abuse, as well as the impact of return decisions⁹⁰.

Testimonies were also shared by mothers who fled abusive situations and were forced to return their children despite allegations of domestic violence⁹¹. The issue of ineffective protective measures and the risks of re-victimization of mothers was a central concern. Al-

though protective measures are often applied, they were deemed insufficient in many cases to prevent harm to victims.

The Forum underscored that while the 1980 Hague Convention remains an essential tool for addressing international child abduction, its application needs to be adapted to better protect victims of domestic violence. Key conclusions include the need for a more skilled judiciary to handle domestic violence cases and their implications for child return proceedings.

Additionally, the importance of considering "the best interests of the child" was highlighted, which must include protection from physical and psychological violence, even when the child has not been directly assaulted. The Forum further emphasized the urgency of improving protective measures and implementing more effective national protocols to support victims of domestic violence, especially migrant women, who are particularly vulnerable.

Considering the Forum's outcomes, the need for judicial training stands out, as judges must be better trained to deal with the complexity of domestic violence cases, especially when involving international issues. This training is essential for authorities to gain a deeper understanding of the effects of domestic violence on children and thus consider appropriate protective measures to ensure their safety in such delicate contexts.

Another relevant point was the revision of the interpretation of "grave risk". The Forum suggested that the definition of this concept should be expanded to include exposure to domestic violence as a form of grave risk to the child, even if they have not been directly assaulted. Domestic violence often affects the child in profound psychological ways, and this reality must be considered in decisions regarding the international return of children.

Furthermore, the need to enhance protective measures was emphasized. Although such measures are commonly applied in many cases, the Forum pointed out that, in several situations, they are insufficient to ensure the safety of victims. The implementation of more robust measures was advocated, as well as the necessity of continuous evaluation of their effectiveness over time to ensure they genuinely fulfill their role in protecting victims of domestic violence. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Pa-

⁸⁹ Ibid., p. 13.

⁹⁰ Ibid., p. 17.

⁹¹ Ibid., p. 16 e ss.

rental Responsibility and Measures for the Protection of Children constitutes a key international instrument to ensure the effectiveness of protective measures⁹².

The implementation of national protection protocols⁹³ is crucial for safeguarding victims of domestic violence. The Forum stressed the importance of countries adopting more effective domestic protection mechanisms that provide support both for victims and for preventing international child abduction. Such protocols should be applied both before and after any potential international abduction, ensuring that victims receive protection throughout the entire process of escape and return.

5.3 The Dialogue Between Legal Sources: The Conventions on the Rights of the Child, Women's Rights, and International Child Abduction

The dialogue between international sources, such as the 1980 Convention on the Rights of the Child (CRC)⁹⁴, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁹⁵, and the 1980 Hague Convention on International Child Abduction, is a central and relevant theme in the context of private international relations and human rights protection. These three conventions address interrelated issues, albeit often with different emphases, which generate challenges in their simultaneous application, particularly in cases of domestic violence and international child abduction.

According to General Recommendation No. 19 of the CEDAW Committee during its eleventh session in 1992, "gender-based violence is a form of discrimina-

tion that seriously impairs the ability of women to enjoy rights and freedoms on an equal footing with men"⁹⁶.

The application of Article 13(1)(b) of the 1980 Hague Convention must consider the context of domestic violence, as indicated in CEDAW, and must also respect the rights of the child as established in the CRC, particularly concerning their right to live in a safe and violence-free environment.

Article 3 of the CRC establishes that the best interests of the child must be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities, or legislative bodies.

In the context of the 1980 Hague Convention, the principle of the best interests of the child is also fundamental, especially when interpreting Article 13(1)(b), which provides for an exception to the child's return in cases where there is a grave risk of physical or psychological harm, such as in situations of domestic violence.

Furthermore, based on CEDAW's approach, which recognizes gender-based violence as a form of discrimination, this reinforces the need to consider women's safety when applying provisions such as those of the 1980 Hague Convention.

5.4 Gender, Domestic Violence, and Child Abduction: An Evolving Issue

Trimming et al. reveal statistical data on the application of the 1980 Hague Convention: 73% of parental child abductions are committed by mothers. Many of these mothers are fleeing domestic violence situations, reinforcing the urgent need for a more appropriate approach that prioritizes the safety of victims and their children⁹⁷.

Thus, international child abduction, often motivated by the need to escape domestic violence situations, is increasingly becoming a complex phenomenon, vastly different from when the convention was adopted over four decades ago. Gender and human rights issues call

⁹² Brazil is not yet a party to this convention.

⁹³ The development of national protection protocols for victims of domestic violence, with particular emphasis on the protection of migrant women, was presented by Silva (HCCH, *ibid.*, p. 11). Hunter highlighted the importance of ensuring the child's well-being following a return or non-return decision, emphasizing the need to implement security protocols and protective measures in return decisions, as well as to ensure meaningful access/contact in non-return decisions (*Ibid.*, p. 28).

⁹⁴ Promulgated by Decree No. 99,710 of 21 November 1990, approved by the National Congress through Legislative Decree No. 28 of 14 September 1990.

⁹⁵ Promulgated by Decree No. 4,377 of 13 September 2002, approved by the National Congress through Legislative Decree No. 26 of 22 June 1994.

⁹⁶ UNITED NATIONS. Committee on the Elimination of Discrimination against Women. Available in <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

⁹⁷ TRIMMINGS, Katarina; DUTTA, Anatol; HONORATI, Costanza; ŽUPAN, Mirela (Ed.). *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Cambridge: Intersentia, 2022, p. 222.

for a review of the application of Article 13(1)(b). Domestic violence, traditionally considered a private matter, has been progressively recognized as a human rights violation, with direct consequences for the safety and well-being of children, even when they are not direct victims of abuse.

In the context of international abduction, many mothers fleeing abusive situations are labeled as “abducting mothers” when they are seeking to protect their children from a violent environment. This scenario raises critical questions about how international norms address domestic violence allegations and their implications for the safety of both the child and the mother, which is often exacerbated by migration status.

Uatanabe asserts that the exception based on Article 13(1)(b) has generated extensive debate, particularly concerning the interpretation of “grave risk” and how domestic violence against the mother can affect the child, even if there is no direct abuse against him or her. The author points out “the difficulty of areas such as private international law adapting their theory and practice to the social dimension of problems like this”⁹⁸.

Furthermore, Uatanabe asserts that the supposed neutrality of the convention regarding the particularities of the States that are parties to it cannot serve to reinforce situations of injustice for women in family relations⁹⁹. The discussion on the application of Article 13(1)(b), therefore, is not limited to the issue of immediate return but involves a deeper analysis of the social reality and legal conditions affecting victims of domestic violence.

The Forum highlighted that courts worldwide face difficulties due to varying interpretations of “grave risk” and whether domestic violence against one parent should automatically be considered grounds for the child’s non-return. Consequently, different interpretations have been adopted by national courts, which at times recognized and at other times rejected the exception provided for in Article 13(1)(b) when the violence was directed exclusively at the mother, as noted by Schuz¹⁰⁰.

⁹⁸ UATANABE, Thassila. *A desigualdade de gênero e o direito internacional privado*. 2019. Dissertação (Mestrado) – Universidade de Brasília (UnB), Brasília, 2019.p. 101.

⁹⁹ Ibid., p. 103.

¹⁰⁰ SCHUZ, Rhonda. Disparity and the Quest for Uniformity in Implementing the Hague Abduction Convention. *Journal of Comparative Law*. v. 9, n. 1, 2014, p. 3-48, p. 17.

5.5 Challenges in the Use of Protective Measures in Cases of Domestic Violence and the Application of Article 13(1)(b) of the 1980 Hague Convention

Freeman and Weiner assert that both domestic violence and international child abduction have increasingly drawn the attention of lawmakers, policymakers, and society, prompting responses to offer greater protection and reparation to victims¹⁰¹. However, despite the frequent adoption of protective measures, they are often insufficient, particularly when court-ordered protective measures are difficult to implement or monitor in an international context. This factor limits the effectiveness of the 1980 Hague Convention and exposes domestic violence victims to greater risks, especially when the child’s return process is prioritized.

The concept of “protective measures” needs to be understood broadly, according to Trimmings, encompassing not only access to courts and legal services in the requesting state but also social assistance services provided by the state of residence, such as financial support, healthcare services, shelters for women, housing assistance, and other forms of aid for domestic violence victims¹⁰², regardless of migration status. Furthermore, the responses of local authorities, such as the police and the criminal justice system, must be assessed to ensure the existence of protective measures, such as restraining orders against violence, in the requesting state.

Judicial and administrative cooperation should be widely utilized to ensure that the support mechanisms available in the requesting state are not merely theoretical but practically accessible to the accompanying parent¹⁰³. This is crucial to ensure that protective measures are not merely formalities but can be effectively implemented, offering a tangible and effective support network to victims facing the threat of violence.

The POAM Project (*Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction*¹⁰⁴), conducted between 2019

¹⁰¹ FREEMAN, Marilyn; TAYLOR, Nicola. Domestic violence as an aspect of 1980 Hague Child Abduction Convention return proceedings, p. 49.

¹⁰² TRIMMINGS, Katarina. The interface between domestic violence and international parental child abduction: focus on the protection of abducting mothers in return proceedings, p. 36 e 37.

¹⁰³ Ibid., p. 37.

¹⁰⁴ See at <https://research.abdn.ac.uk/poam/>.

and 2021, developed a *Best Practices Guide*¹⁰⁵ to address the intersection of domestic violence, international child abduction, and the protection of mothers who are victims of gender-based violence. The project acknowledges that many women fleeing abusive relationships. The guide highlights the need for a gender perspective in the application of international law, particularly when interpreting Article 13(1)(b) of the Hague Convention, which allows for the non-return of the child in cases where there is “grave risk” to their safety.

Furthermore, the guide orients the application of European Union legal instruments, such as Regulation 606/2013, on the mutual recognition of protection measures in civil matters¹⁰⁶, and Directive 2011/99/EU, which governs the European Protection Order¹⁰⁷, allowing for the cross-border enforcement of protective measures for victims of gender-based violence. These mechanisms are essential to prevent women from being forced to return to situations of violence under the pretext of international cooperation in family law.

The POAM project reinforces the importance of integrating the protection of women’s rights into the interpretation of international norms, ensuring that gender-based violence is a central criterion in child return decisions, thereby preventing re-victimization.

5.6 Mediation and Appropriate Dispute Resolution Methods

The autonomy of the parties in family matters is often approached with great care and caution, according to Lopes¹⁰⁸, particularly when there is a power imbalance in negotiations or when one of the parties is in a vulnerable situation due to domestic violence.

The Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Hague Convention

highlighted the challenges of mediation in cases of international child abduction involving domestic violence¹⁰⁹. The Forum also stressed that power imbalances, coercion, and the lack of documented evidence can render mediation unfair. The use of shuttle mediation to prevent intimidation and the implementation of specialized training for mediators may be the most appropriate approach.

Furthermore, the need for an international mediation system adapted to cases of domestic violence was emphasized, along with the expansion of a global network of trained mediators, ensuring greater safety and effectiveness in resolving such disputes, particularly in cases of international child abduction.

5.7 Final Remarks

The Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Hague Convention highlighted the need for a more sensitive approach to gender issues and domestic violence in cases of international child abduction. The discussions underscored that a child’s exposure to domestic violence should be considered a grave risk under Article 13(1)(b), even when the violence is directed exclusively at the mother. Additionally, the lack of a uniform interpretation of the grave risk exception and the inadequacy of protective measures place women and children in situations of vulnerability and re-victimization. The state of habitual residence must provide legal protection services and social assistance for victims of domestic violence, including both woman and children.

The autonomy of the party’s will and the challenges of mediation in the context of power imbalance were also addressed, emphasizing that alternative dispute resolution methods should be applied with caution to avoid compromising the safety of victims. Another key point was the need for a more integrated dialogue between international treaties, ensuring that the protection of women who are victims of violence is considered when interpreting the best interests of the child principle.

There ought to be no dilemma between returning or protecting in domestic violence and child abduction cases, as human rights should be paramount. Howe-

¹⁰⁵ See at <https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/11/POAM-Best-Practice-Guide.pdf>.

¹⁰⁶ European Union, Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R0606>

¹⁰⁷ European Union, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0099>

¹⁰⁸ LOPEZ, Inez. Reconhecimento transfronteiriço e execução de acordos em disputas familiares envolvendo crianças: a ferramenta da Conferência da Haia, p.38.

¹⁰⁹ HCCH, *Ibid*, p. 20-21.

ver, courts continue to struggle to balance the Hague Convention's return principle with safeguarding victims. The lack of uniformity in interpreting "grave risk" under Article 13(1)(b) leads to inconsistent rulings, often exposing mothers and children to re-victimization. Strengthening protective measures, judicial training, and international cooperation is essential to ensure child welfare and justice. Thus, the holding of the Second Forum in Brazil, in 2025 will be welcomed.

6 Chronicle: Towards a new international instrument on the recognition of decisions on legal parentage: update on the HCCH's Parentage/Surrogacy Project. (Lalisa Froeder Dittrich)

6.1 Introduction

The Hague Conference on Private International Law (HCCH) - an intergovernmental organization with a long history of harmonizing private international law (PIL) - is currently engaged in a complex legislative project: exploring the feasibility of provisions for a new international instrument on the recognition of legal parentage, including parentage derived from international surrogacy arrangements. This text aims to provide an overview of the progress and key debates of the HCCH work on the Legal Parentage/Surrogacy Project, to the extent possible, since the Working Group's¹¹⁰ (WG) final report is only expected to be published by the end of 2025. It is important to note that at 2025 CGAP C&D the progress of the WK was welcomed and add in-person meeting in 2025 to the already scheduled April 2025 meeting¹¹¹.

¹¹⁰ 25 HCCH Member States, including Brazil, and three Observers are party to the Working Group.

¹¹¹ See 2025 CGAP C&D, para. 3 and 4: 3. CGAP noted the Aide-mémoire of the Chair of the Working Group (WG) and welcomed the progress made by the WG. To further develop provisions for a draft instrument and draft a final report of the work of the WG, CGAP invited the PB, in addition to the April 2025 meeting, to convene one further in-person meeting, with the possibility for online participation, within Financial Year (FY) 2025-2026, possibly in the second half of 2025, with intersessional work as required, as well as, if necessary, one online meeting before CGAP 2026. Intersessional work should take place online. 4. CGAP reiterated that any work

As Brazil has appointed a representative to participate in the discussions on this future instrument, taking part, first, in the Experts' Group and, currently, in the Working Group, the text will also briefly examine the current domestic legal framework and how a future treaty could be of interest for families living in Brazil or abroad.

6.2 Context

Family life has dramatically transformed in recent decades, characterized by increased mobility, evolving social norms, and advancements in reproductive technologies. These developments have led to the formation of various family configurations, including those established through international surrogacy arrangements (ISAs). Such arrangements raise additional legal considerations due to the involvement of multiple jurisdictions. The absence of clear and harmonized rules creates legal uncertainty, sometimes resulting in limping parentage for children born from surrogate mothers in a different country from that of their intended parents. Furthermore, the movement of individuals between different countries has also heightened the challenges faced by cross-border families, particularly regarding the legal status of children, which can significantly affect their rights.

For instance, a child born from a relationship between a mother residing in State A and a father residing in State B who has not acknowledged paternity in either State A or State B will experience not only a lack of child support but also a deprivation of all other rights stemming from this relationship, such as the right to obtain nationality in State B and inheritance rights. In such a case, the mother or the child would need to present a case in court, where paternity can be established either voluntarily or judicially, sometimes using DNA tests. The first challenge involves determining the appropriate jurisdiction and applicable law to ascertain parentage, which is typically based on the child's place of birth or habitual residence. However, there exists the possibility to request the establishment of parentage and child support in State B through an application made from State A under the Convention of 23 November 2007 on the International Recovery of Child Support and Other

by the HCCH in relation to private international law (PIL) matters related to legal parentage resulting from surrogacy arrangements should not be understood as supporting or opposing surrogacy.

Forms of Family Maintenance (2007 Child Support Convention)¹¹². This Convention can help with the establishment of parentage in State B, but only to obtain a decision on child support. After the confirmation of paternity in State B, it may also be necessary to recognize the decision in State A for the obtention of a new birth certificate for the child or the obtention of other rights derived from paternity, which can be burdensome for families, resulting in limping parentage for the child.

In another example, a same-sex couple living in State A, where surrogacy is not available or not permitted by law, wants to have a child and enters an ISA with a surrogate mother from State B. After the birth of the child, the family may decide to remain living in State B, move to State C or back to State A. In this case, establishing legal parentage in State A or C may be necessary to guarantee the child's rights to nationality, immigration status, custody, and other rights derived from the parental relationship. Again, the absence of PIL rules to navigate the complexities of different legislations may pose risks for the child, such as becoming stateless or deprived of other rights.

Therefore, recognizing the urgent need for a more robust and coherent international framework, HCCH embarked on the challenging project of discussing the viability and desirability of a new instrument on the recognition of legal parentage decisions in cases involving the use of ISAs back in 2010¹¹³. After reviewing studies¹¹⁴ that showed that surrogacy had been increasingly being used in different countries, where rules varied, and considering that problems related to legal parentage following ISAs have been reported, the HCCH's Council on General Affairs and Policy (CGAP) mandated the designation of an Experts' Group on the Parentage/Surrogacy, in its 2015 meeting¹¹⁵.

¹¹² HCCH. *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. In.: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>. Accessed on 12/02/2025.

¹¹³ HCCH. *Preliminary Document N° 1 of November 2022. Parentage / Surrogacy Experts' Group: Final Report "The feasibility of one or more private international law instruments on legal parentage"*. Pg. 7. In.: <https://assets.hcch.net/docs/6d8eeb81-ef67-4b21-be42-f7261d0cfa52.pdf>. Accessed on 12/02/2025.

¹¹⁴ HCCH. *Preliminary Document n° 3C (The Study) of March 2014*. In.: <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>. Accessed on 12/02/2025.

¹¹⁵ The Experts' Group on Legal Parentage/ Surrogacy comprised representatives of 24 HCCH Member States, including Brazil, and four observers.

The Expert's Group, composed of members representing different contracting States, met twelve times between 2016 and 2022 and presented its final report to the CGAP¹¹⁶ in 2023. In its conclusions, the group indicated that elaborating private international rules for legal parentage, in general, could pose feasibility problems given the different approaches to ISAs in different Contracting States; two approaches were therefore suggested: a) the elaboration of two separated instruments, with ISAs being treated in an optional Protocol or b) the elaboration of one instrument, with rules for ISAs treated in a separate chapter¹¹⁷.

In March 2023, CGAP mandated the establishment of a Working Group on PIL matters concerning legal parentage generally. The group's mission is to explore provisions for a new instrument that covers both general parentage and parentage arising from ISAs as a primary task, with the potential for developing two separate instruments should consensus on a single instrument be deemed unfeasible. The objective of the new instrument, according to the mandate, is "(...) to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the United Nations Convention on the Rights of the Child (UNCRC) and in particular their right that their best interests be a primary consideration in all actions taken concerning them"¹¹⁸.

The mandate also emphasizes that HCCH's work on legal parentage arising from international surrogacy arrangements should not be interpreted as either opposing or supporting ISAs¹¹⁹. In conclusion, the aim is to assist in finding common ground between Member States and Contracting Parties to prevent limping parentage and its detrimental effects on issues related to the non-recognition of a person's legal status. At 2025 CGAP C&D this interpretation was reiterated. At 2025 CGAP C&D this interpretation was reiterated.

¹¹⁶ HCCH. *Preliminary Document n° 1 of November 2022*.

¹¹⁷ Ibid Idem.

¹¹⁸ HCCH, *Conclusions and Decisions of the 2023 Council on General Affairs and Policy (CGAP)* In.: <https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf>.

¹¹⁹ Ibid Ibidem.

6.3 Key Aspects of the Parentage/Surrogacy Project

Taking into consideration its mandate and the principles that should guide its work, the challenge of the WG is to examine and discuss different aspects of provisions for a new instrument. The key aspects can be summarized as follows:

a) Jurisdiction and Connecting Factors: Determining the appropriate jurisdiction for establishing legal parentage in cross-border situations is complex. The Working Group has grappled with defining suitable connecting factors, such as the habitual residence of the child, the surrogate mother, or the intended parents, to prevent the removal of the surrogate mother to less strict jurisdictions. The challenge has been to elaborate provisions to avoid forum shopping and violations of women's and children's rights.

b) Interplay with other conventions: A key consideration is the interplay between the proposed instrument and the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993 Adoption Convention)¹²⁰. This ensures that the two instruments operate harmoniously and avoid unintended overlaps or conflicts. The WG has sought to clarify the distinction between domestic and international adoptions, with the latter falling under the 1993 Adoption Convention and the former being covered by the new instrument.

c) Possible Safeguards and Rights of the Parties: A central challenge lies in defining and discussing the feasibility of including safeguards in the provisions to protect the rights and interests of the child, the surrogate mother, and the intended parents. The WG has engaged in extensive discussions regarding the concept of consent, particularly the surrogate mother's informed and freely given consent to the surrogacy arrangement. The complexities of ensuring genuine consent, free from coercion or undue influence, have been examined. Alongside all parties' consent, another critical area related to safeguards is the child's right to identity, which includes access to information about their origins, medical history, and genetic parents.

d) Grounds for Non-Recognition: The WG has explored possible grounds for refusing recognition of legal parentage decisions issued in different Contracting States. The inclusion of a public policy exception is generally accepted as necessary to ensure the treaty's viability. However, the specific circumstances that would justify invoking the public policy exception remain a subject of discussion.

Other potential grounds for non-recognition include procedural irregularities, such as a lack of due process or failure to provide an opportunity for all parties to be heard. All parties' consent can also be included as grounds for refusal to recognize a decision on legal parentage.

e) Public Documents and Applicable Law: The inclusion of rules on the treatment of public documents, such as birth certificates and parentage acknowledgments, is also an issue that has been debated, along with the idea of creating an international certificate to help the circulation among states of these documents. There is concern about not creating any barriers to the acceptance of public documents in the context of international legal cooperation involving other international instruments, such as the 1980 Child Abduction and the 2007 Child Support Convention, as birth certificates and parentage acknowledgments are regularly used to sustain the right to apply for the return of the child or to recover or obtain child support.

f) Applicable Law: rules on the applicable law for recognizing parentage decisions is another complex issue, particularly considering the various conditions for recognition and grounds for non-recognition. Therefore, the group has been exploring whether automatic recognition is feasible, given the need to analyze these conditions and grounds in each case.

g) Models of Treaty Relations: there are different models for how states will interact with the treaty that can be considered, particularly to surrogacy arrangements. One proposed model is an "opt-in/opt-out" system, allowing states to choose whether to apply the treaty to parentage decisions arising from ISAs. This approach reflects the wide divergence in national laws and policies on this issue. Other models derived from different Hague Conventions, such as the 2019 Convention on Judgments and the 1980 Convention on Child Abduction, can be used in the new instrument.

6.4 Brazil's Participation in the WG

Imbued with the same objectives as the HCCH regarding the protection of children's rights in all their dimensions, the Ministry of Justice and Public Safety, through its Department of Assets Recovery and International Legal Cooperation (DRCI), has actively participated in the Parentage/Surrogacy Project since 2016. This participation aims to ensure that a future text on legal parentage conforms to Brazilian law to the extent possible.

In Brazil, even though the use of Artificial Reproductive Techniques (ART) is seen as highly developed and has been aiding individuals in successfully achieving

¹²⁰ HCCH. *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. In.: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>

their goal of having a child for decades, there are still no laws regulating the practice of surrogacy. Due to the lack of legislative action on this matter — drafts of bills have been pending discussion for years in Parliament¹²¹ — there are currently Resolutions from the Federal Council of Medicine (CFM) establishing standards for the use of ART and surrogacy in Brazil. According to the latest CFM regulation, which dates from 2022¹²², doctors may only provide ART in surrogacy arrangements when it does not involve compensation for the surrogate mother (“solidary surrogacy”), who must be related to one of the prospective parents up to the fourth degree. These guidelines, which do not possess the status of law, have been the subject of court disputes, and there is no legal certainty for individuals wishing to become parents through domestic or international surrogacy that does not comply with the CFM regulation¹²³.

In complement to the CFM’s Resolution, the Council of National Justice has set forth rules (Provisions 63/2017 and 83/2019)¹²⁴ to harmonize the registration of children born via ART by Brazilian Civil Registry Offices in the country. Those provisions and regulations follow the same principles that base the Parentage/Surrogacy Project and reflect a common concern

to set standards to minimally guarantee respect for the rights of the parties, especially the child, who must have his/her legal parentage immediately defined following ART¹²⁵. The non-commercial nature of surrogacy, along with the necessity for obtaining free and informed consent from all parties involved, also permeates the discussions of the working group and is evident in the conversations surrounding the need for safeguards and grounds for refusal regarding decisions on legal parentage involving ISAs.

On the other hand, there is also a need to provide more certainty and predictability in the recognition of decisions on legal parentage that do not involve ISAs. As a signatory of different Hague Conventions, including the 2007 Child Support, Brazil can benefit from PIL rules for easier recognition of legal parentage cross-borders, considering that it is estimated that more than 5% of the children born in Brazil do not have legal paternity established¹²⁶ and that around 5 million Brazilians are living abroad.

It is important to highlight the progressive nature of Brazilian family law, which tends to be quite liberal about family relations, embracing and acknowledging all kinds of its configurations. For instance, the Brazilian Federal Constitution of 1988, in Article 227, paragraph 6, already prohibited any discrimination or differentiation of children’s legal rights based on their parents’ civil status or how parentage was established. Meanwhile, the Brazilian Civil Code of 2002, in Article 1.596, established that all children, regardless of their origin, possess the same rights. This may facilitate the internationalization of a future instrument on legal parentage, and no relevant conflicts between a future instrument and domestic law are expected at this point.

6.5 Progress and Future Direction

The Working Group on Parentage/Surrogacy has made significant progress in identifying the key issues,

¹²¹ CÂMARA DOS DEPUTADOS. Projeto de Lei 1184/2003. In.: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=118275#:~:text=PL%201184%2F2003%20Inteiro%20teor,Projeto%20de%20Lei&text=Disp%C3%B5e%20sobre%20a%20Reprodu%C3%A7%C3%A3o%20Assistida,os%20experimentos%20de%20clonagem%20radical>. Accessed on 10/02/2025. The Draft of Bill defines rules for carrying out artificial insemination and in vitro fertilization, prohibiting surrogate pregnancy (surrogacy) and radical cloning experiments. In the years that followed since the presentation of this bill, 20 other suggestions were appended to the project, the last one dating from 2023. The draft pends analysis of the Constitution, Justice and Citizenship Committee (CCJC).

¹²² CONSELHO FEDERAL DE MEDICINA. Resolução No. 2.320 de 1º de Setembro de 2022. In.: <https://in.gov.br/web/dou/-/resolucao-cfm-n-2.320-de-1-de-setembro-de-2022-430447118>. Accessed on 10/02/2025.

¹²³ For a more in-depth presentation of the Brazilian legal framework on legal parentage involving ART see, for example, DIAS, Maria Berenice; OPPERMANN, Marta Cauduro. As inconstitucionalidades da Resolução 2.294/2021 do CFM sobre a utilização das técnicas de reprodução assistida. In.: <https://berenedias.com.br/as-inconstitucionalidades-da-resolucao-2-294-2021-do-cfm-sobre-a-utilizacao-das-tecnicas-de-reproducao-assistida/>. Accessed on 10/02/2025.

¹²⁴ CONSELHO NACIONAL DE JUSTIÇA. Provimento 63 de 14/11/2017, in <https://atos.cnj.jus.br/atos/detalhar/2525> and Provimento 83 de 14/08/2019, in <https://atos.cnj.jus.br/atos/detalhar/2975>. Accessed on 11/02/2025.

¹²⁵ Part IV, 3, C of the CFM Resolution of 2022 states that the surrogate mother needs to sign a “*Commitment term between the patient(s) and the temporary donor of the uterus who will receive the embryo in her uterus, clearly establishing the issue of the child’s filiation (...)*”. CFM, op. cit.

¹²⁶ BRASIL. Transparência Civil. In.: <https://transparencia.registrocivil.org.br/painel-registral/pais-ausentes>. Accessed on 10/02/2025. According to the data, between 2016 and 2025, 1,371,329 children in Brazil were registered without their father’s name on their birth certificate.

exploring potential solutions, and drafting preliminary provisions for a new international instrument per the CGAP's mandate. The upcoming meetings of the Working Group in 2025 will focus on the drafting of the Final Report, which is expected to be concluded by the end of the year for consideration, as 2025 CGAP approved two meetings with intersessional work before the report on 2026 CGAP.

6.6 Final Remarks

The HCCH's objective of exploring the feasibility of a new international instrument on parentage represents a crucial step towards addressing the legal complexities of modern family life and filling the gaps not addressed by the existing Hague Conventions. The active participation of Member States and observers in the Working Group has been vital in ensuring that a new instrument reflects a broad range of perspectives and meets the needs of all parties affected in these complex situations. Continued dialogue, compromise, and a genuine commitment to protecting the rights and well-being of all parties, particularly children, will be essential for achieving a treaty that effectively helps to prevent incomplete parentage.

7 Chronicle: Hague Conference on Private International Law and Codifi: an overview of the Expert Group on Digital Currencies (CBDCs) and the Digital Tokens Project (Fabricio Bertini Pasquot Polido)

7.1 Digital economy and the future of HCCH at Codifi

Since 2020 the Hague Conference has been exploring several sectoral issues involving the interface between Private International Law, new technologies, and the digital economy, taking into account the developments of emerging technologies (e.g. distributed ledgers (DLTs), blockchain, crypto assets and tokenization) on their original institutional mandate at global level, which is to promote the progressive unification of the PIL

standards¹²⁷. In 2021, HCCH's efforts were formalized under the rubric of a broader Digital Economy project, from which the initiatives conducted by the Permanent Bureau (the 'PB') emerged, such as the series of events of the HCCH Conference on Cross-Border Commercial, Digital and Financial Law, also known as 'Codifi'¹²⁸, led by the Division of International, Digital and Financial Trade Law of the Permanent Secretariat and following a mandate from the General Affairs and Political Council (CGAP)¹²⁹.

The initiative under Codifi allowed six thematic axes to be structured, conceived from the responses of HCCH Members to a survey carried out by the Permanent Secretariat at the end of 2021. Of these thematic axes, three focus on existing instruments of the Conference, while the other three address PIL issues related to the digital economy¹³⁰. The axes related to the existing instruments focus on (i) the 1985 Trusts Convention; (ii) Securities Convention 2006, specifically on the law applicable to certain rights relating to securities held with intermediaries; and (iii) Hague Principles on Choice of Law in International Commercial Contracts

¹²⁷ Cf. art. 1 of the Statute of the Hague Conference on Private International Law, adopted during the Seventh Session of the Conference on 31/10/1951, in force since 15/07/1955. Available at: <Available at: <https://www.hcch.net/pt/instruments/conventions/full-text>> After the decision of the Council on General Affairs and Policy of the HCCH (CGAP), the Permanent Bureau was mandated to study the impact of recent developments in the fields of distributed ledger technology on PIL ("CGAP invited the PB, subject to available resources, to monitor developments with respect to the private international law implications of DLT. The PB will report to CGAP at its 2021 meeting"). See HCCH. *Conclusion and Decisions of the Council on General Affairs and Policy*. 3-6 March, 2020. Available at: <<https://assets.hcch.net/docs/70458042-f771-4e94-9c56-df3257a1e5ff.pdf>>

¹²⁸ The CODIFI Conference was held between September 12 and 16, 2022, online, an opportunity in which participants discussed implications of the digital economy for Private International Law, such as those related to digital platforms, applications of 'Distributed Ledger Technology' (DLT) and fintechs.

¹²⁹ A relatoria completa encontra-se em HCCH. *Digital Economy and the HCCH Conference on Commercial, Digital and Financial Law Across Borders* (CODIFI Conference): Report. Prel. Doc. No 3/A of January 2023. Available in: <<https://www.hcch.net/en/governance/council-on-general-affairs>>

¹³⁰ It is important to highlight that PB is currently tasked, and subject to available resources, to monitor developments with respect to the digital economy, with a view to identifying private international law issues for potential future work. The mandate also deals with the monitoring of developments with respect to digital platforms, artificial intelligence and automated contracting, and immersive technologies (in partnership with subject-matter experts and with UNCITRAL. See HCCH. *Conclusion and Decisions of the Council on General Affairs and Policy*. March 2024. Esp. No 11.

2015 (the ‘Hague Choice of Law Principles’)¹³¹. The other thematic axes related to new PIL issues in the digital economy cover issues of jurisdiction, applicable law, choice of forum, party autonomy, recognition and enforcement, and international cooperation mechanisms¹³², in three pillars.

- **Frameworks:** PIL issues in the decentralized economy, e.g., applications based on distributed ledgers which are decentralized and operate in a cross-border manner, so objective connecting elements based on traditional geographic locations will not be applicable in most cases. Likewise, transactions on the DLT can be immutable (with no possibility of on-chain intervention) and highly automated, which can challenge existing legal structures and complicate the exercise of the rights of asset holders or possessors in a system of such magnitude.
- **Relationships:** the use of DLT and other emerging technologies in the digital economy can serve as building blocks for corporate governance, offering new dynamics and interactions for parties based in different States, in the legal business, financial services, dispute resolution, transaction management, and sustainable development.
- **Redefine (“Reset”):** Redefine is at the forefront of PIL in tackling certain innovations, for example, in the Fintech sector¹³³, including perspectives

¹³¹ Regarding the 1985 Trust Convention, the experts present at Codifi agreed that the instrument can play a role in relation to DLTs, blockchain, and tokenized assets. Regarding the Choice of Law Principles, the experts considered it possible to apply the rules of the instrument to new issues, such as smart contracts based on DLT systems and to transactions involving international data transfers, which remain largely subject to different national privacy and data protection laws and regulations. For in-depth discussion, see News from the Hague Conference on Private International Law (HCCH). *Uniform Law Review*, v. 27, n. 4, p. 622-631, 2022;

¹³² A esse respeito, ver distintas abordagens em BONOMI, Andrea; LEHMANN, Matthias; LALANI, Shaheez. Introduction: The Blockchain as a Challenge to Traditional Private International Law. In: *Blockchain and Private International Law*. The Hague: Brill, 2023. p.1-9; ESCOLAR, Gérardine Goh. The Role and Prospects of Private International Law Harmonisation in the Area of DLT. In: *Blockchain and Private International Law*. The Hague: Brill, 2023. p. 10-48; e VERSTAPPEN, Jasper. Private International Law. In: *Legal Agreements on Smart Contract Platforms in European Systems of Private Law*. Cham: Springer, 2023. p. 321-389.

¹³³ In the academic literature, fintechs are generally characterized as companies that intensively use new technologies to innovate and improve the development and supply of financial services, providing efficient and affordable alternatives compared to traditional or incumbent models. In this regard, cf. SCHUEFFEL, Patrick. Taming the beast: A scientific definition of fintech. *Journal of Innovation Management*, v. 4, n. 4, p. 32-54, 2016. For PIL, the more decentralized, cross-linked or cross-border the relationships based on fintechs (goods, services, solutions) and their offer in different domestic markets, the greater the interactions with varieties of connecting elements, and therefore, issues of applicable law, jurisdiction

and approaches specific to home systems in relation to digital commerce, data- and machine learning-driven applications, Artificial Intelligence (AI), Internet of Things (IoT), regulatory technologies services, tokenization of physical goods for authentication purposes or management of the supply chain, financial services, and augmented reality and metaverse.

Distinct groups of experts and exploratory projects flourished within the scope of the thematic axes involving new technologies and the digital economy under HCCH Codifi, currently sequenced under mandates established by the CGAP, such as in Expert Group on Central Bank Digital Currencies (CBDCs) and the Digital Tokens Project. Some of their main nuances and development will be explored in the sections below. Brazil has actively participated in HCCH’s work in these areas, to offer practical input and technical contributions based on the nascent legislative experiments in force at the domestic level, specifically the Brazilian Virtual Assets Act¹³⁴, the Guidelines for ‘Drex’, the Brazilian digital currency developed by the Central Bank of Brazil (‘Bacen’)¹³⁵, and the rules issued by the Brazilian Securities and Exchange Commission providing for cryptoassets, which have become a reference in regulatory sandboxes and processes related to tokenization¹³⁶. It is

and recognition.

¹³⁴ Cf. Law 14,478/2022, which establishes the guidelines to be observed in the provision of virtual asset services and in the regulation of virtual asset service providers and Regulatory Decree – Decree 11,563/2023. Available at: <https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/114478.htm>

¹³⁵ Cf. BACEN Guidelines for Drex 2023. Available at: <<https://www.bcb.gov.br/estabilidadefinanceira/drex>> The guidelines refer to a series of commands relevant to the sector: (i) compliance with guarantees to the principles and rules of privacy and security, banking secrecy legislation and the General Data Protection Law / LGPD; (ii) full compliance with international recommendations and legal standards on combating money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction; (iii) adoption of a DLT-based technological solution that allows registration of assets of different natures, decentralization in the provision of products and services, as well as interoperability with legacy domestic systems and with other systems of registration and transfer of information and trading of regulated digital assets and the integration of Drex with systems in other jurisdictions, for cross-border payments.

¹³⁶ Cf. CVM Guidance Opinion No. 40/2022 establishing the current CVM’s understanding of the rules applicable to cryptoassets considered securities, characterization of different types of tokens, such as payment, utility and asset-referenced tokens, and provides guidance on the need for registration and compliance with current legislation for public offerings of these assets. Available at: <<https://conteudo.cvm.gov.br/export/sites/cvm/legislacao/pareceres-orientacao/anexos/Pare040.pdf>>

important to note that 2025 CGAP C&D (para. 13 to 19) approved the reports presented and mandated the EG to continue its work.

7.2 EG on Central Bank Digital Currencies (CBDC 2024)

An Expert Group on Central Bank Digital Currencies was established under the mandate established after the 2024 CGAP Meeting in March. The mandate was set to review the issues of jurisdiction and applicable law related to the cross-border use of CBDCs.¹³⁷ CBDCs are designed and issued by state central banks, such as Drex in Brazil, and have the potential for various applications, including cross-border payments and smart contracts. However, domestic regulation still faces challenges, especially regarding the prevention of financial crimes at the global level, such as money laundering, tax evasion, and fraudulent transactions. The application of PIL rules and categories to CBDCs raises questions about the law applicable to cross-border payments, the reversal of improper transactions, possession of illicitly stolen coins, as well as PIL aspects involving cross-border succession and bankruptcies. Similarly, the absence of a global consensus on the legal classification or characterization of ‘cryptocurrency’ and the use of blockchain-based technologies offer further uncertainties from a domestic regulatory perspective, which makes normative harmonization in the PIL even more truncated¹³⁸.

The Permanent Secretariat organized the kick-off meeting of the Expert Group of CBDC in May 2024, following a structured and collaborative process, to analyze emerging PIL issues associated with digital currencies, considering the absence of global consensus on their legal classification and the effects of decentralization on determining applicable law and jurisdiction. Throughout the year, discussions were held in two meetings (24-26 June and 12-14 November 2024) and intersessional work¹³⁹.

¹³⁷ HCCH. *Conclusions and decisions of the General Affairs and Political Affairs Council (CGAP)* of 5-8 March 2024. Available at: <<https://www.hcch.net/en/governance/council-on-general-affairs>>.

¹³⁸ In this regard, see also HCCH. *Exploratory Work: Private International Law Aspects of Central Bank Digital Currencies (CBDCs)*. (Prel. Doc. No 4 of January 2024). Available at: www.hcch.net (“Governance” then “Council on General Affairs and Policy” and “Archive (2000-2024)”).

¹³⁹ A full description of the mandate and sequence of meetings

The Expert Group went on to analyze types of CBDCs, current and emerging legal frameworks, taxonomy, and key public policy issues related to CBDCs. As to the intersections with PIL, participants expressed different approaches to connecting factors, intermediaries, and third parties, the relevant approaches to characterization in CBDCs, the (non-)recognition of digital currencies as legal tender in different legal systems, and their use as a means of payment. From the PIL perspective, issues of applicable law and jurisdiction must be attuned to the functions of digital currencies, the roles of the actors (including intermediaries and third parties) that can participate in CBDC systems, and the relationship between the parties in these systems¹⁴⁰. Likewise, a possible conflict rule in applicable law for cross-border transactions involving digital currencies should be discussed in the future, in addition to interfaces with public policy and mandatory rules of the forum and bases of jurisdiction to determine the competent courts in the States for settling cross-border disputes involving digital currencies and related transactions¹⁴¹. The Expert Group recommended that the CGAP approve the continuation of EG’s work in 2025, as well as intersectional work, basically in two PIL sectors, namely applicable law and jurisdiction¹⁴². The 2025 CGAP C&D approved the continuation of the work and a report for 2026.¹⁴³

under the CBDC legislative project is available at: <<https://www.hcch.net/en/projects/legislative-projects/cbdc>>

¹⁴⁰ During the November 2014 Meeting, for example, there was a presentation by the Bank for International Settlements (BIS) on cross-border payments using tokenized deposits, as well as PIL challenges related to the legal status of smart contracts, including different types of smart contracts and whether they should be subject to PIL rules that would normally apply to an equivalent off-chain legal contract.

¹⁴¹ Cf. HCCH, Experts’ Group on Central Bank Digital Currencies: Report (Prel. Doc. No 3 of December 2024). Available in: <https://assets.hcch.net/docs/bb682dbc-2029-458c-b29e-05a9a9091465.pdf>

¹⁴² Here it is worth noting that the EG recommended continuing to fork the work to focus first on the issues of applicable law and jurisdiction around CBDCs (“Wholesale CBDCs”) before moving on to consider retail digital currencies (“Retail CBDCs”). The former are types intended primarily for transactions between financial institutions, such as banks and other licensed entities. They are used for interbank payments and securities transactions, unlike retail digital currencies, which are used by the general public for current transactions. EG also considered whether the language of relevant existing frameworks could be used as a model for EG’s future work in drafting certain PIL rules on CBDCs, in particular regarding definitions, public order, and imperative rules.

¹⁴³ See 2025 CGAP C&D para. 13: “CGAP took note of the reports of the Experts’ Group (EG) on CBDCs and mandated the

Regardless of future work, the legal nature of digital currencies – as opposed to fiat currencies – brings difficulties in framing aspects of the PIL issues related to the applicable law, and it is not clear whether they should be classified as hybrid assets, ‘sui generis’ property rights or movable property (for legal purposes). One solution could involve adapting existing rules on monetary, contracting, and succession at domestic levels to create a balance between emerging technologies and regulatory intervention, on which PIL policy choices will also depend. The harmonization of PIL rules for digital currencies must also consider potential ‘regulatory conflicts’ with other legal regimes, including securities, anti-corruption, anti-money laundering, data protection, and cybersecurity, as well as technical aspects related to recognition in different jurisdictions¹⁴⁴.

7.3 Digital Tokens Exploratory Project (2024)

Initiated in March 2024, HCCH’s Digital Tokens Exploratory Project was established to study private international law issues related to digital tokens, coping with the mandate conferred by CGAP at its March 2024 meeting¹⁴⁵.

Under the supervision of the Permanent Bureau, the work brought together experts and observers to identify the main intersections between PIL and tokenization of the economy and cross-border trade and fi-

EG to continue its study of the applicable law and jurisdiction issues raised by the cross-border use and transfers of CBDCs. CGAP invited the PB to convene two further EG meetings before CGAP 2026, the first in March 2025 and the second before the end of 2025, with intersessional work as required. These meetings should preferably be held in person and intersessional work should take place online. The EG will report to CGAP 2026”.

¹⁴⁴ The experts concluded that it is essential to develop PIL frameworks that ensure legal certainty and predictability in transactions with CBDCs, especially when intermediated by private digital wallets. They also emphasized the need to enhance legal and regulatory frameworks to protect users’ privacy and strengthen the cybersecurity of these systems. Cf, e.g. HCCH, *Experts’ Group on Central Bank Digital Currencies: Report* (Prel. Doc. No 3 of December 2024), items 25, 52

¹⁴⁵ HCCH. Report on Exploratory Work: Digital Tokens Project (Prel. Doc. No 4 of November 2024). Available at: <https://assets.hcch.net/docs/8aad1b4d-c3a7-46b5-99c4-1ee589115685.pdf>. Cf. Conclusion and Decision, n.12: “Recognising the importance of avoiding fragmentation among legal instruments developed by different intergovernmental organisations on related subject matters, including the UNIDROIT Principles on Digital Assets and Private Law, CGAP mandated the PB, in partnership with relevant subject-matters experts and Observers, to study the PIL issues relating to digital tokens”.

ancial relations. In May 2024, a kick-off meeting was held, with the discussion of a preliminary document (iterated Scope Paper,) outlining the main topics of discussion that served as the basis for the scope of the exploratory project: (i) preliminary mapping of PIL issues related to digital tokens, including jurisdiction, applicable law, recognition and enforcement of judgments; (ii) identification of regulatory challenges from national jurisdictions, such as the debate on the decentralization of tokens and the obstacles to the application of traditional PIL rules; (iii) discussion of priority use cases, with the selection of concrete examples of digital token applications for analysis, considering their legal features and main impacts on cross-border transactions; (iv) avenues of cooperation with other organizations, such as proposals to align the topic with ongoing normative agendas of UNCITRAL, UNIDROIT and other international organizations to avoid normative fragmentation in the field of digital assets.

The first meeting (June 10-14, 2024) and the second meeting (October 7-8, 2024) of experts were held, in addition to the inter-sessional work with the presentation of joint research between HCCH and the American Association of Private International Law (ASADIP) to gather contributions from Latin America on the legal aspects of digital tokens and potential PIL issues involved. Throughout the work, potential categories of tokens were discussed, for characterization in the PIL, the use cases of digital tokens, and associated regulatory challenges. Participants expressed different views and approaches on the PIL implications for decentralization and tokenization, considering that PIL analytical methods based on objective connecting factors and the “situs” (location) could be challenged by the decentralized structure of cross-border transactions¹⁴⁶. Similarly, during the meetings, participants explored a range of issues involving the types of tokens and functional classifications (e.g. payment, utility, and asset-backed); the potential normative distinctions between tokens and financial instruments and securities; the category

¹⁴⁶ Decentralization minimizes the influence of central actors or institutions in a network, especially because decentralized systems are omni- and multi-territorial par excellence, making it difficult to identify a single main headquarters or location that characterizes and inspires objective connection rules in PIL. Likewise, the use of pseudonymous addresses makes it difficult to identify relevant parties/subjects and institutions in the chain of tokenization relationships. On this, see HCCH. *Report on Exploratory Work: Digital Tokens Project*, cit., item IV.34.

of ‘linked assets’, with the caveat that “link-specific aspects” are excluded from the scope of the Project¹⁴⁷, as well as functional categories of issuers, service providers, and platforms¹⁴⁸, and debates on party autonomy and connecting factors¹⁴⁹. A preliminary conclusion was reached by the exploratory project, namely around a description of digital tokens for further discussion should CGAP decide to establish an Expert Group (EG), as recommended by the participants: (i) exclusively assigned data, including data representing a right or title; (ii) that are stored electronically; (iii) with characteristics based on decentralized mechanisms, such as distributed ledger (DLT)-based technologies¹⁵⁰.

7.4 Final Remarks

With the conclusion of the work of the Expert Group on Digital Currencies and Exploratory Project on Digital Tokens, 2025 CGAP has approved the continuation of the work of experts, from different perspectives. In the case of CBDCs, the EG is expected to decide on the continuation of the study of the applicable law and jurisdiction issues raised by the cross-border use and transfers of CBDCs, with a first meeting in March 2025 and a second in September 2025, with intersessional work as needed. The EG will focus its work on the existing intersection between CBDCs, applicable law and jurisdiction, with a particular interest in intersectoral issues involving PIL, cross-border uses, and mobility of digital currencies (e.g. exchange transactions and cross-border digital payments), as highlighted by the experts and stakeholders.

In the case of the Digital Tokens Project, there is a recommendation for CGAP to establish an Expert

¹⁴⁷ This is one of the main objections brought by virtue of Principle 5 of the Unidroit Principles on Digital Assets, with linked or connected assets being those that are in some way linked to digital tokens, with whose applicable law they are not to be confused

¹⁴⁸ The scope of the Project is to study PIL issues related to digital tokens (and not digital platforms); there is recognition of the ongoing work at UNCITRAL in relation to digital platforms, but also the perception of platform decentralization as one of the reasons why existing PIL rules are insufficient for tokens. HCCH. *Report on Exploratory Work: Digital Tokens Project*, cit., item 16(d).

¹⁴⁹ Idem, items 20 ff.

¹⁵⁰ Cf. HCCH. *Report on Exploratory Work: Digital Tokens Project*, cit., item 24. At the end of the exploratory phase, the participants unanimously agreed to recommend to CGAP the continuation of the studies through the creation of an Expert Group to analyze PIL issues related to digital tokens.

Group (EG) to further study PIL issues related to digital tokens, to conduct them according to a holistic approach, considering jurisdiction, applicable law and recognition/enforcement of decisions, that was approved. Likewise, the importance of developing an international cooperation mechanism to address the legal challenges arising from the use of digital tokens is emphasized.

8 Chronicle: Current Scope of the Jurisdiction Project. (Marcelo De Nardi and Nereida de Lima Del Águila)

8.1 Introduction

The Hague Conference on Private International Law is an international intergovernmental organization whose statutory objective is to work towards the progressive unification of the rules of Private International Law. Its origins all go back to the significant international conferences sponsored by the Government of the Netherlands at the end of the nineteenth century, a discipline of law in rapid development at that era. The first conference on PIL of 1893, chaired by the lawyer Tobias Asser, 1911 Nobel Peace Prize winner for that initiative, resulted in the 1896 Convention on Civil Procedure (not in force anymore), the content of which would today be classified as international legal cooperation. Following a history of meetings conducted in the format of international conferences, with irregular periodicity and without institutionalization, the international organization was formally established by treaty in 1951, entering into force in 1955 with the establishment of a permanent Secretariat with headquarters in The Hague. Brazil has been a member of the HCCH since 2001 and is a party to seven conventions and an additional protocol.

The Jurisdiction Project has its origins in an ambitious proposal from 1992, formulated by the lawyer and scholar Arthur von Mehren, from the United States of America, after some studies in Europe. His proposal suggested the development of a dual convention on jurisdiction, which would involve establishing rules of direct jurisdiction and for recognition and enforcement of foreign judgments. These rules were envisaged to harmo-

nize the conditions under which Courts of Contracting States would assume jurisdiction over cases and would defer jurisdiction to other States, as well as outline the conditions for the recognition and enforcement of judgments from one Contracting State in others. The project effectively commenced in 1995, with the first stage concluding in 2001 in a debacle, when a convention was not adopted at the HCCH Diplomatic Conference that year. Subsequently, the initiative was split into smaller projects, leading to the 2005 Convention on the Choice of Court Agreements and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments.

Upon the adoption of the 2019 Convention on Foreign Judgments, the HCCH Council on General Affairs and Policy (CGAP), the body that directs the international organization's activities, formed an Experts Group (EG) to address jurisdiction-related issues and prepare a new instrument. In HCCH's legislative production system, the EG is composed of renowned experts in the specific subject to suggest guidelines for action on future international instruments, including the analysis of the feasibility and desirability of pursuing these efforts. The EG convened twice to continue the work that was interrupted in 2013 to give room to what became de 2019 Judgments Convention, thereby advancing the project on judgments and recommending its continuation.

In 2021 CGAP noted the recommendations of the EG and established the current Working Group (WG)¹⁵¹, composed of government representatives and experts from interested HCCH Members, which met eight times between October 2021 to February 2025, with the mandate to address *matters related to jurisdiction in transnational civil or commercial litigation, and to develop draft provisions on the matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings, to further inform policy considerations and decisions in relation to the scope and type of any new instrument*. The WG was recommended to conduct its work *in an inclusive and holistic manner, with an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims) and acknowledging the primary role of both jurisdictional rules and the doctrine of forum non conveniens, notwithstanding other possible factors, in developing such rules, and also to explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent*

*proceedings and jurisdiction in transnational civil or commercial litigation*¹⁵². This chronicle authors were part of both the EG and the WG as members of the Brazilian Delegation in all events and the inter-sessional discussions.

The activities of the WG seem to be coming closer to completion, with the next step involving HCCH's convening of a Special Commission to prepare a draft convention for eventual adoption at a future Diplomatic Conference. The Special Commission responsible for drafting the convention typically meets three times, each for two weeks, while the Diplomatic Conference takes one meeting on a three-week session.

At the conclusion of the eighth meeting of the WG, a preliminary document was sent to CGAP with recommendations for the Council's information and decision, along with two annexes: 1) the WG Chairman's report, which was collaboratively prepared by all participants and summarizes the key points discussed in the last two meetings held after the previous report; and 2) the draft text as it was at that point, including alternative provisions and notes for future consideration. The report recommended holding at least one more meeting of the WG, concentrating on a specific theme. At its March 2025 meeting, CGAP granted authorization to conduct another WG meeting in 2025¹⁵³. Additionally, the WG's Chairman, following informal consultations among the WG members, sent another preliminary document to CGAP seeking the Council's clarification on the extension of the mandate

This study examines sensitive issues through the lens of the Brazilian State and its interests.

¹⁵² According to the conclusions and decisions of the CGAP2021-HCCH, items 8 and 9. Available at: <https://assets.hcch.net/docs/94e2d886-1cbf-4250-b436-5c1899cb942b.pdf>. Accessed on: 20Feb.2025.

¹⁵³ See 2025 CGAP C&D, para. 5 to 7: 5 CGAP noted the Report of the Chair of the WG on matters related to jurisdiction in transnational civil or commercial litigation, and the progress made by the WG to further develop provisions for a future Convention. 6 CGAP thanked the Government of Japan for hosting the seventh WG meeting in Tokyo, Japan. 7 CGAP invited the PB to convene one additional WG meeting in the second half of 2025, with a targeted agenda specifically focused on Article 8(2) of the Draft Text. In this meeting the WG will also review and fine-tune the entire Draft Text, without reopening or introducing discussion on policy issues. This meeting will be held in person, with the possibility for online participation.

¹⁵¹ HCCH. C&D n° 8. CGAP 2021.

8.2 A Sensitive Issue: the mandate

The contents of the mandate to the WG, extensively debated during CGAP's meeting of 2021, are a sensitive point of interest and require careful analysis. At the Seventh Meeting of the WG, held in Tokyo, Japan, an informal discussion among WG members addressed the issue of the substantive extension of the mandate granted to the WG, particularly if it encompassed the drafting of direct jurisdiction rules. These rules would establish the factors connecting the case to national courts, thereby legitimizing their actions, akin to Articles 21 to 23 and 25 of the Brazilian Code of Civil Procedure of 2015 (BCCP 2015). The debate presented various opinions, notably, on three viewpoints: a) the mandate does not cover the development of direct jurisdiction rules; b) the development of direct jurisdiction rules is included in the mandate; and c) the mandate covers the development of direct jurisdiction rules to resolve concurrent procedures problems. Based on the progress and the preliminary draft rules prepared by the WG to date, it is the opinion of the here authors that it is no longer necessary or feasible to develop rules of direct jurisdiction under the current legislative exercise. The effort to reach a minimum consensus over the current draft text, limited to resolving questions on parallel proceedings and on related actions, and to establish a communication system among the Courts involved seem to have exhausted the WG's ability to produce content further possible to be interpreted within the mandate.

In this context, the group proposed that the rules of direct jurisdiction could be formulated in a separate and subsequent project, subject to the decision of CGAP. That was the recommendation embedded in the second document prepared by the WG's Chairman, and it was adopted by CGAP in its March 2025 meeting.

The WG recurrently discussed the mandate's scope concerning direct jurisdiction. The mandate is broad, as one can read from the above transcription. While it could encompass the issue of direct jurisdiction, most members of the WG present at the meetings, including the Brazilian Delegation (particularly regarding the topic of jurisdiction on proceedings related to real estate), rejected the elaboration of rules on this topic.

Delegations of common law traditions rejected vehemently the inclusion of direct jurisdiction rules in the draft text, disputing the extension of the manda-

te. That position gathered support from delegates of some States within the civil law system; few delegations, however, advocated for addressing direct jurisdiction rules in the current draft text.

The decision not to support the inclusion of direct jurisdiction in this instrument may lead to the need for the insertion of rules to prevent the effect of exorbitant grounds for jurisdiction. These rules could hinder Courts in a Contracting State from exercising its jurisdiction according to national rules of a specific nature or force them to proceed on cases that they would not typically accept under its national law. This effect needs to be further clarified during discussion, with the view to fostering a minimum agreeable set of rules on the topic. For Brazil, the real estate rule of direct jurisdiction is sensitive due to the provisions of exclusive jurisdiction from limb I of article 23 of the BCCP2015, as has been extensively discussed in the meetings of the Judgments Project, which culminated in the 2019 Convention on Judgments.

From the outset of the meetings, the Brazilian delegation concurred to refrain from addressing direct jurisdiction rules during the working group's discussions, since those rules might compromise the sovereignty of the Brazilian State, particularly regarding jurisdiction over real estate situated in Brazilian territory.

Given the situation presented above, it appears reasonable that the rules of direct jurisdiction are not included in this future instrument, which will solely tackle parallel proceedings and related actions problems, along with the Courts communications mechanism.

As already mentioned, the authors of this chronicle believe that the best way to proceed is to endorse the solution pointed by the majority of the WG members, in the sense that, considering the divergent views on the development of direct jurisdiction rules, following the completion of the current WG efforts and any potential continuation until a convention is established, the consideration of direct jurisdiction rules could be developed in a separate and subsequent draft, but not within this project and without any limitation on the proposed instrument to be developed. That was CGAP's decision in March 2025.

8.3 Draft text structure

The revised draft text considers parallel proceedings and related actions as the scope of application for the new document, along with a court communication mechanism.

On the issue of parallel proceedings, the model situation underlying is that the future convention shall encompass cases in which the Courts of two or more Contracting States have been seized for identical legal cases. If only one Court has jurisdiction to proceed according to the connecting factors listed in the draft text, it will be given priority to proceed, and the others shall stall their cases. If more than one Court has jurisdiction according to these rules the Court to proceed is identified according to chronological priority (*first in time rule*).

Where two or more Courts in different Contracting States are seized for related actions, meaning that they are connected among them by relevant facts, the draft rules give each Court the powers to decide whether they are the most appropriate forum to hear the case, based on considerations from the *forum non conveniens* doctrine, mostly. Any discrepancy in the Courts' rulings would be resolved through the first-in-time rule.

Regarding communications in the specific cases in which the convention would apply, the understanding stands out that there must be cooperation between the courts based on exchanging information at any time through the communication mechanism established in the text. The communication mechanism values flexibility in the ways to exchange information between Courts in different States, which can be i) directly (Court to Court), ii) indirectly, through a competent authority, iii) a combination of the preceding forms, or iv) indirectly through the parties, this last one suggested to be the default means of communication when the Contracting State does not indicate which ones are allowed by it. The issue remains under debate.

At the Eighth Meeting, the group reviewed the introductory text reached at the Seventh Meeting, but its content still needs improvement. To date, the structure has 23 articles in 5 chapters, namely: Chapter I Scope and Definitions (Articles 1 to 4), Chapter II Parallel Proceedings (Articles 5 to 10), Chapter III Related Actions (Articles 11 to 15), Chapter IV Cooperation and Communication (Articles 15 to 18) and Chapter V General Clauses (Articles 19 to 23).

8.4 Status of the project

To date, 55 working documents have been analyzed, including some study documents of the WG's Chairman and studies brought by the Secretariat and the observers International Bar Association and the Union Internationale des Avocats.

The documents included proposals on several complex and challenging issues relevant to developing the draft for a future instrument. The WG members made solid progress on the draft over the seventh and eighth meetings and worked on some of the future instrument's key mechanisms and features.

The WG Chairman's report highlights the points on which consensus was reached during these meetings and identifies issues that still require further analysis. The report also describes the next steps recommended by the WG to complete the development of the preliminary project and proposes the next steps for the Jurisdiction Project.

During the seventh and eighth meetings, the WG's Chairman reordered several articles and paragraphs of the draft text, in an action to organize the content. The most recent version is referred to in the latest report as the "revised draft text".

At its March 2025 meeting, CGAP followed WG's recommendations to convene an additional meeting to review the draft text with a focus on Article 8(2) that lists the connecting factors that resolve jurisdictional priority at the first tier of the future convention's operation, and also, that the text resulting from this additional meeting be subject to a written consultation process to be monitored by the Secretariat, with the assistance of the WG members. A virtual event will be held to discuss the practical operation of the project, the result of which will be presented to all HCCH members prior to the March 2026 meeting of CGAP.

The WG comprises specialists from states with extensive participation in HCCH's activities, including Brazil. It is a heterogeneous group composed of countries with *civil law* and *common law* systems, which, although of very different legal cultures, have arrived at a base text incorporating procedural elements from both.

Another essential point that draws attention is whether the text was mature enough to be taken to the Special Commission. The group, for the most part, un-

derstood that more debates were needed, at least in one more meeting, although some experts understood that the step towards the Special Commission could already be taken at that point. The Brazilian delegation initially was in the position to proceed to the Special Commission, however, considering that the draft text was not sufficiently evolved and contained many reservations and alternatives, and taking into account the issue of the budget allocated to the project by the HCCH, the position taken was in favor of having another meeting to examine points that do not involve questions of conceptual policy of the Preliminary Draft.

The group then agreed to suggest holding a further meeting focusing on Article 8(2), which establishes the connecting factors to a Contracting State, drawn from the acknowledged bases of jurisdiction, the content of which derives from the bases for recognition and enforcement contained in Articles 5 and 6 of the 2019 Convention on Judgments.

Holding written consultations in the states participating in the WG is an interesting idea, as it may bring more subsidies to support the discussions on the subject at the Special Commission level, particularly.

Likewise, the suggested online event has value because it can give the stakeholders on the subject visibility on the draft text of the convention proposal that is under discussion. The recommendations were adopted by CGAP at its March 2025 meeting.

8.5 Final Remarks

The work accomplished thus far is noteworthy, as considerable discussion has taken place in pursuit of developing a draft that can be utilized by States with different legal systems.

The recommendations of the Working Group reflect the thorough analysis conducted by the experts, ensuring that States may benefit from an international treaty that grants advantages to its signatories, particularly by reducing litigation costs through the promotion of predictability and legal certainty for parties involved in civil and commercial disputes across different Contracting States. That view of the benefits of a future convention on parallel proceedings and related actions, as well as on Courts communications mechanism, was ad-

ressed by the Member States of HCCH with some reservations, but the WG's recommendations were fully adopted by CGAP in its meeting of March 2025. CGAP 2026 will be of utmost importance for the project to gather the support of the members, driving momentum to proceed to the Special Commission stage.

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Chiara Macchi

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Rethinking corporate human rights responsibility: a functional model*

Repensando a responsabilidade corporativa em matéria de direitos humanos: um modelo funcional

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Abstract

In the contemporary economic order, businesses often control key resources and services necessary for realizing human rights. However, the scope of their responsibilities, as outlined by the UN Guiding Principles on Business and Human Rights (UNGPs), remains unclear, leading to inconsistent or minimalist interpretations. Building on the academic debate on States’ ‘human rights jurisdiction’ as a condition for the emergence of human rights responsibility, we propose a ‘functional model of corporate responsibility’ that focuses on companies’ functions, and the resulting power relationships, as the basis for assigning responsibility for human rights, including the responsibility to fulfil under certain circumstances. The model offers a unifying theory of interpretation of the corporate ‘responsibility to respect’ under the UNGPs grounded in the normativity of international human rights law. In doing so, it overcomes the inconsistent normative foundations of the UNGPs, which ground the corporate responsibility to respect in the non-legal concept of ‘societal expectations’. The article presents the core features of the proposed functional model and, through practical examples, it shows how the model clarifies the respective negative and positive responsibilities of States and corporations. It elaborates on the potential added value of the model and discusses its limitations.

Keywords: positive human rights obligations; functional model; duty to fulfil; responsibility to respect; UNGPs.

Resumo

No atual ordenamento econômico, as empresas frequentemente controlam recursos e serviços essenciais para a realização dos direitos humanos. No entanto, o alcance de suas responsabilidades, conforme delineado pelos Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos (UNGPs), permanece pouco claro, o que leva a interpretações inconsistentes ou minimalistas. Com base no debate acadêmico sobre a jurisdição dos direitos humanos dos Estados como condição para o surgimento

da responsabilidade em matéria de direitos humanos, propomos um “modelo funcional de responsabilidade corporativa”, que se concentra nas funções desempenhadas pelas empresas e nas relações de poder daí decorrentes, como base para atribuir a responsabilidade pelas obrigações relativas aos direitos humanos, incluindo, em determinadas circunstâncias, a responsabilidade de promover e realizar esses direitos. O modelo oferece uma teoria unificadora para a interpretação da “responsabilidade de respeitar” das empresas segundo os UNGPs, fundamentada na normatividade do direito internacional dos direitos humanos. Ao fazer isso, supera as bases normativas inconsistentes dos UNGPs, que fundamentam a responsabilidade corporativa no conceito não jurídico de “expectativas sociais”. O artigo apresenta as principais características do modelo funcional proposto e, por meio de exemplos práticos, demonstra como o modelo esclarece as respectivas responsabilidades negativas e positivas dos Estados e das corporações. Também explora o potencial valor agregado do modelo e discute suas limitações.

Palavras-chave: obrigações positivas em direitos humanos; modelo funcional; dever de promover; responsabilidade de respeitar; UNGPs

1 Introduction

Within the contemporary economic order, it is often business entities that supply, distribute, and control the resources and services necessary for the realization of human rights. The power of corporations to significantly influence access to essential rights became particularly evident through vaccine distribution during the Covid-19 pandemic.¹ It is also evident daily through

evictions,² medical bankruptcies,³ privatized social care,⁴ and the global food supply.⁵

There is a gap between the reality of corporate influence over human rights and their human rights responsibility, both under the UN Guiding Principles on Business and Human Rights (UNGPs) and under international law more broadly. Corporations are not, at present, bearers of direct human rights obligations under international law, and their human rights responsibility under the UNGPs is narrowly construed as a ‘responsibility to respect’, or to ‘do no harm’,⁶ obfuscating the central role of business in providing, and sometimes denying, essential resources.

In this article, we propose a re-conceptualization of corporate responsibility toward human rights to more accurately account for the role that corporations play in contemporary societies. The fundamental question is how human rights responsibility should be conceived when businesses control access to an essential resource. Is this responsibility limited to the avoidance of proactive violations of human rights, such as engaging in modern slavery, or do the standards also commit companies that control access to a resource to more fully realise access to that resource, within the scope of their authority?

Different approaches will yield different answers to these questions. Of these, three are most evident in international legal thought. First, the ‘statist’ approach. It is generally assumed within international human rights law, as well as the law of State responsibility more generally, that States hold the authority and the responsibility over resource distribution within their jurisdictions.⁷

² BIRCHALL, David. Human rights on the altar of the market: the Blackstone Letters and the financialisation of housing. *Transnational Legal Theory*, [s. l.], v. 10, n. 3-4, p. 446-471, 2019.

³ HIMMELSTEIN, David U. *et al.* Medical bankruptcy: still common Despite the Affordable Care Act. *American Journal of Public Health*, [s. l.], v. 199, n. 3, p. 431-433, Mar. 2019.

⁴ GUPTA, Atul; HOWELL, Sabrina T.; YANNELIS, Constantine; GUPTA, Abhinav. Does private equity investment in healthcare benefit patients? evidence from nursing homes. *National Bureau of Economic Research Working Paper 28474*, 2021. Available at: <http://www.nber.org/papers/w28474.pdf>. Access on: 20 Oct. 2024

⁵ ROBIN, Marie-Monique. *The world according to Monsanto: pollution, corruption, and the control of our food supply*. New York: The New Press, 2014.

⁶ BIRCHALL, David. Human rights on the altar of the market: the Blackstone Letters and the financialisation of housing. *Transnational Legal Theory*, [s. l.], v. 10, n. 3-4, p. 446-471, 2019.

⁷ MÉGRET, Frédéric. Are there ‘inherently sovereign functions’ in international law? *American Journal of International Law*, [s. l.], v. 115,

¹ GOLAN, Maureen S.; TRUMP, Benjamin D.; CEGAN, Jeffrey C.; LINKOV, Igor. Supply chain resilience for vaccines: review of modeling approaches in the context of the COVID-19 pandemic. *Industrial Management and Data Systems*, [s. l.], v. 121, n. 7, p. 1273-1746, 2021.

Distributional questions can only be answered by the comprehensive authority of the State. This view is therefore predicated on implacable responsibilities grounded in the nature of the State. Although it does not dictate a particular view of corporate responsibility, it does imply a more limited role for corporate responsibility.

Second, the traditional approach to business and human rights (BHR), evident in the UNGPs, is to focus on a negative and voluntary ‘responsibility’ to ‘do no harm’. This is generally taken to imply non-violation of rights,⁸ which is in turn generally taken to cover proactive violations, such as compelling individuals into modern slavery. According to this view, corporations, no matter their size, hold neither the power or authority, and therefore lack the moral responsibility, to fairly distribute resources.⁹

Third, some interventions have focused on the size, power, and authority of corporations to argue that this represents a new social reality to which law and regulation must respond. Corporations have been argued to have become ‘quasi-governmental institutions’ capable of holding the responsibility to fulfil rights within some contexts.¹⁰ This view relates not just to rising corporate size and wealth, but also changing governance structures. The rise of privatization and market-based provision for essential goods and services has potentially changed the nature of responsibility, bringing corporations into much more direct relationships with rights-holders, and at least indicating a possible co-existence of corporate responsibilities alongside those of the State.

This paper embraces the third approach and grounds an interpretative model of corporate responsibility in international law categories, starting from the concept of ‘human rights jurisdiction’ as a condition for the emergence of human rights responsibility.¹¹ More specifically, we propose a functional model that focu-

ses on companies’ functions, and the resulting power relationships, as the basis for assigning responsibility for human rights, including the responsibility to fulfil under certain circumstances. We start with explaining the limitations of the current model, embodied in the UNGPs’ corporate responsibility to respect human rights (section 2). We then proceed with presenting the key features of our proposed functional model and we show its application using practical examples (section 3). In section 4, we explore the role and limitations of the model, addressing the possible critiques. We briefly conclude in the final section.

2 A critique of the UNGPs’ corporate responsibility to respect human rights

The UNGPs were endorsed in 2011, and the ‘Protect, Respect, Remedy’ framework that they implement was published in 2008. This framework was immediately criticized as being minimalistic, on two primary grounds: that corporations held only a voluntary ‘responsibility’ towards human rights grounded in ‘societal expectations’; and that their responsibilities were limited to ‘respecting’ rights. An influential edited volume published in 2013 laid out these critiques, starting with the J non-binding framing of the responsibility to respect human rights.¹² Nolan addresses the utility of the soft-law approach, asking ‘does it have the potential to generate compliance by significant stakeholders?’¹³ While open to the possibility that that the approach may engender the flexibility required to target diverse business targets, Nolan also argues that ‘the looseness of the language is perhaps more likely to invite inaction and a business-as-usual approach from companies that remain hesitant about their responsibility to act.’¹⁴

n. 3, p. 452-492, Jul. 2021.

⁸ WETTSTEIN, Florian. Normativity, ethics, and the UN guiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, [s. l.], v. 12, n. 2, p. 162-182, 2015.

⁹ BRENKERT, George G. Business ethics and human rights: an overview. *Business and Human Rights Journal*, [s. l.], v. 1, n. 2, p. 277-306, Jul. 2016.

¹⁰ KARP, David Jason. *Responsibility for human rights: transnational corporations in imperfect States*. Cambridge: Cambridge University Press, 2014.

¹¹ BESSON, Samantha. Due Diligence and extraterritorial human rights obligations: mind the gap! *ESIL Reflections*, [s. l.], v. 9, n. 1, p. 1-9, 2020.

¹² DEVA, Surya; BILCHITZ David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. On this point, see also ČERNIČ, J. Letnar. Two steps forward, one step back: the 2010 report by the UN special representative on business and human rights. *German Law Journal*, [s. l.], v. 11, p. 1264-1280, 2010.

¹³ NOLAN, Justine. The corporate responsibility to respect human rights: soft law or not law? In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* England: Cambridge University Press, 2013. p. 157.

¹⁴ NOLAN, Justine. The corporate responsibility to respect human rights: soft law or not law? In: DEVA, Surya; BILCHITZ, Da-

More positively, Mares highlighted the ‘strategic ambiguity’ of the UNGPs as a means by which to achieve both consensus and meaningful future evolution.¹⁵ Backer, working in a transnational governance framework, highlighted methodological strengths of the UNGPs.¹⁶ Macchi, while criticizing the normative foundations of the corporate responsibility to respect, inscribes Ruggie’s approach within his constructivist project, aimed at facilitating a process of ‘norm emergence’ and at catalyzing an unprecedented ‘overlapping consensus’ over the ‘responsibility to respect’ norm.¹⁷ However, the absence of a clear normative foundation firmly anchoring the UNGPs in international human rights law creates a risk of inconsistent interpretations and regulatory uncertainty. Such uncertainty could also affect those pieces of legislation that are gradually transposing the UNGPs’ soft law standards into hard law at the domestic and EU levels.

The functional model proposed herein aims at providing a coherent understanding of corporate human rights responsibilities within the UNGPs framework. Before presenting the functional model, we first turn to two concrete limitations of the UNGPs, which our model will arguably address. We begin with a critique of the conceptual incoherence of the UNGPs and then focus on the conceptualization of the corporate responsibility to respect, showing how an international law-consistent reading of the UNGPs allows to go beyond a narrow understanding of ‘do no harm’.

2.1 Apples without a tree: the conceptual incoherence of the UNGPs

The role of corporations in international human rights law has sparked ongoing debates in the BHR field, especially as corporate power sometimes surpasses that

of states. Some scholars argue that corporations should have human rights duties,¹⁸ potentially under a BHR treaty,¹⁹ and point out that companies already hold international obligations in other legal areas.²⁰ Additionally, it is contended that corporations at least have obligations not to commit international crimes.²¹ However, from a purely positivist view, human rights treaties create obligations only for states, not for corporations.²²

The UNGPs ‘are the first international document in which the corporate responsibility to respect human rights as a duty independent of the State has been expressly set forth’,²³ although, as a soft-law instrument, they do not give rise to international obligations. The UNGPs recognize corporations as bearers of a human rights ‘responsibility’ and identify ‘internationally recognized human rights’ as the relevant standards.²⁴ Logically, then, this responsibility should be analysed and interpreted through the lens and categories of international human rights law. We can imagine human rights norms as apples that are supported by the tree of international human rights law, a tree that has developed and branched out since 1948 giving rise to a complex normative structure rooted in universal principles. The contours

¹⁸ RATNER, Steven R. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, [s. l.], v. 111, n. 3, p. 443-545, Dec. 2001.

¹⁹ BILCHITZ, David. The necessity for a business and human rights treaty. *Business and Human Rights Journal*, [s. l.], v. 1, n. 2, p. 203-227, Jul. 2016.

²⁰ DEVA, Surya. Multinationals, human rights and international law: time to move beyond the ‘State-Centric’ conception? *In: ČERNIČ, J. Letnar; VAN HO, Tara. Human rights and business: direct corporate accountability for human rights*. Groningen: Wolf Legal Publishers, 2015. p. 27; BERNAZ, Nadia; PIETROPAOLI, Irene. Developing a business and human rights treaty: lessons from the deep seabed mining regime under the United Nations Convention on the Law of the Sea. *Business and Human Rights Journal*, [s. l.], v. 5, n. 2, p. 200-220, Jul. 2020.

²¹ CLAPHAM, Andrew. *Human rights obligations of non-state actors*. Oxford: Oxford University Press, 2006. p. 86; HUMAN RIGHTS COUNCIL. *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*. 2007. para 21.

²² See: VAN HO, Tara. “BandAids don’t fix bullet holes”: in defence of a traditional State centric approach to the treaty. *In: ČERNIČ, J. Letnar; CARRILLO-SANTARELLI, Nicolas. The future of business and human rights: theoretical and practical challenges for a UN treaty*. Belgium: Intersentia, 2018. p. 111.

²³ LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [s. l.], v. 5, n. 1, p. 56-83, Jan. 2020. p. 71.

²⁴ HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*. 2011.

vid. *Human rights obligations of business: beyond the corporate responsibility to respect?* England: Cambridge University Press, 2013. p. 158.

¹⁵ MARES, Radu. “Respect” human rights: concept and convergence. *In: BIRD, Robert C. et al. Law, business and human rights: bridging the gap*. United Kingdom: Edward Elgar, 2014. p. 3.

¹⁶ BACKER, Larry Cata. On the evolution of the United Nations Protect-Respect-Remedy project: the State, the corporation and human rights in a global governance context. *Santa Clara Journal of International Law*, [s. l.], v. 9, n. 1, p. 37-80, jan 2011.

¹⁷ MACCHI, Chiara. The normative foundation of the corporate responsibility to respect: a critical analysis. *In: MACCHI, Chiara. Business, human rights and the environment: the evolving agenda*. Berlin: Springer, 2022. p. 45.

of human rights norms (the ‘apples’ of this tree) and of corresponding State obligations have been interpreted and clarified thanks to the cumulative contributions of legislation, jurisprudence, and scholarly analysis. Such contributions have fed the apples of our metaphor and progressively shaped the content, scope and applicability of human rights norms, sometimes determining the emergence of new ones. The challenge, identified by several authors,²⁵ when it comes to the normative foundations of the UNGPs, is that, while the UNGPs deem human rights norms normatively relevant to corporations, they interpret their foundation, content and scope through concepts – such as ‘societal expectations’ – that are extraneous to international human rights law. In other words, while the UNGPs consider the ‘apples’ relevant for the definition of corporate responsibility, they do not root the interpretation of such responsibility and of its scope in international law categories, but rather in an indeterminate concept of ‘societal expectations’ that partly depends on the company’s ‘enlightened self-interest’.²⁶ We affirm that this disconnect between ‘the apples and the tree’ is incoherent at the conceptual level and fails to provide a unifying theory of interpretation of corporate responsibility. This foundational incoherence was criticized by Lopez, who pointed at Ruggie’s limited engagement with ongoing debates

around binding corporate obligations in international law, describing the UNGPs as ‘CSR with an added element of human rights’.²⁷ Kolstad, too, criticized the UNGPs’ anchoring of the corporate responsibility to respect into the corporate ‘social license to operate’ as shaped by societal expectations, instead of grounding it into the ethical principles that underlie the human rights perspective.²⁸ Bilchitz recalls the more rigorous and forward-looking approach taken by the UN Norms on the Responsibilities of Transnational Corporations, which combined ‘the claim that corporations have existing human rights responsibilities and the proposition that the nature of such responsibilities at international law was in the process of being developed’.²⁹ He warns that Ruggie’s lack of engagement with the moral and conceptual foundations of human rights creates a ‘lacuna at the international level which has significant implications given the potential role of business in helping to address important challenges such as global poverty and environmental sustainability.’³⁰ Such gap, besides creating conceptual ambiguity, does not contribute to the progressive development of international law towards the emergence of ‘more concrete binding legal responsibilities of corporations.’³¹

Ruggie reimagined international human rights standards to better fit the contemporary business context, a choice that was successful in ushering in a new BHR era and preparing the ground for unprecedented policy developments. However, the loss of connection, at the foundational level, to long-developed human rights standards meant that a new interpretative battle had

²⁵ BILCHITZ, David. A chasm between ‘is’ and ‘ought’? a critique of the normative foundations of the srsg’s framework and the guiding principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* England: Cambridge University Press, 2013. p. 107; CRAGG, Wesley. Ethics, enlightened self-interest, and the corporate responsibility to respect human rights: a critical look at the justificatory foundations of the UN framework. *Business Ethics Quarterly*, [s. l], v. 22, n. 1, p. 9-36, 2012.; KOLSTAD, Ivar. Human rights and positive corporate duties: the importance of corporate-State interaction. *Business Ethics: A European Review*, [s. l], v. 21, n. 3, p. 276-285, May 2012. LÓPEZ, Carlos. The “Ruggie Process”: from legal obligations to corporate social responsibility? In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. p. 58; MACCHI, Chiara. The normative foundation of the corporate responsibility to respect: a critical analysis. In: MACCHI, Chiara. *Business, human rights and the environment: the evolving agenda*. Berlin: Springer, 2022.; MCCORQUODALE, Robert. Corporate social responsibility and international human rights law. *Journal of Business Ethics*, [s. l], v. 87, n. 2, p. 385-400, 2009.

²⁶ CRAGG, Wesley. Ethics, enlightened self-interest, and the corporate responsibility to respect human rights: a critical look at the justificatory foundations of the UN framework. *Business Ethics Quarterly*, [s. l], v. 22, n. 1, p. 9-36, 2012. p. 13; MACCHI, Chiara. The normative foundation of the corporate responsibility to respect: a critical analysis. In: MACCHI, Chiara. *Business, human rights and the environment: the evolving agenda*. Berlin: Springer, 2022. p. 51.

²⁷ DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. p. 66-74-77.

²⁸ KOLSTAD, Ivar. Human rights and positive corporate duties: the importance of corporate-State interaction. *Business Ethics: A European Review*, [s. l], v. 21, n. 3, p. 276-285, May 2012.

²⁹ BILCHITZ, David. A chasm between ‘is’ and ‘ought’? a critique of the normative foundations of the srsg’s framework and the guiding principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* England: Cambridge University Press, 2013. p. 115.

³⁰ BILCHITZ, David. A chasm between ‘is’ and ‘ought’? a critique of the normative foundations of the srsg’s framework and the guiding principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* England: Cambridge University Press, 2013. p. 108.

³¹ BILCHITZ, David. A chasm between ‘is’ and ‘ought’? a critique of the normative foundations of the srsg’s framework and the guiding principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* England: Cambridge University Press, 2013. p. 115.

begun. Indeed, the described conceptual ambiguity reverberates further in the UNGPs' architecture. Ruggie developed a three-pillar approach grounded in the State duty to protect, the corporate responsibility to respect, and access to remedy. In doing so, he cleaved the traditional tripartite respect, protect, fulfil delineation under international human rights law to posit that, for corporations, only 'respect' is relevant, and that for State regulation of corporations, only 'protect' is relevant (at least for the purpose of the UNGPs). Additionally, he developed several entirely new concepts, such as the 'cause, contribute, linked to' framework, 'adverse human rights impacts' and 'human rights due diligence'. 'Adverse impacts' are defined in the official guidance as occurring when a 'business act removes or reduces an individual's enjoyment of his or her human rights'. For Deva, '[t]his definition clearly shows how the impact terminology shifts the focus from the breach of obligations implicit in the notion of 'violation' to companies merely affecting adversely the ability of a person to enjoy human rights.³² This is seen as a normative weakening of the paradigm of human rights responsibilities, away from the legal and moral firmness of 'violation' to a looser definition that may fail to engender significant social expectations even as social expectations ground the entire edifice of the UNGPs. In sum, while the term adverse impact appears to be an expansive standard – covering acts (including omissions) that 'reduce' enjoyment of rights – in reality it has most often been interpreted as covering the most paradigmatic human rights violations only. This minimalism grounded in negative responsibility was perhaps the most significant early critique of the UNGPs.

Equally, 'cause, contribute, linked to' provides a useful means by which to understand the different connections that a business may have to an adverse impact, but the lines between them are blurred, and companies have often tried to construe their involvement in harmful conducts as only 'linked to' when in fact the circumstances of the case indicated causal or contributory responsibility.³³

³² DEVA, Surya. Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. p. 78-98.

³³ VAN HO, Tara. Defining the relationships: "cause, contribute, and directly linked to" in the UN guiding principles on business and human rights. *Human Rights Quarterly*, [s. l.], v. 43, n. 4, p. 625-658,

We argue that this lack of clear grounding has hampered a conceptually sound understanding of the 'responsibility to respect' standard and, ultimately, an implementation of the UNGPs to their full potential. Indeed, this ambiguity leaves the door ajar to contradictory readings of the UNGPs: they can be read as ambitious; or, focusing on the term 'respect', as applying only to paradigmatic human rights violations. The indeterminacy of their normative foundation allows for exculpatory arguments from stakeholders, and where there is doubt, it is likely that the more powerful actor will determine the interpretation.

2.2 The corporate responsibility to respect as 'Do No Harm'

Almost 20 years ago, Ratner affirmed that to extend the responsibility of corporations 'away from a dictum of "doing no harm" [...] toward one of proactive steps to promote human rights outside their sphere of influence seems inconsistent with the reality of the corporate enterprise'.³⁴ Corporations cannot be expected to fulfil rights universally, nor can they hold comprehensive responsibilities to protect rights. As mentioned above, the UNGPs define the corporate responsibility to respect human rights as the responsibility of corporations to avoid causing, contributing, or being linked to adverse human rights impacts. At first glance, therefore, they embrace the do no harm approach. This statement, however, must be nuanced. Firstly, the UNGPs do not merely commit corporations to non-interference. Two obvious sources of positive responsibilities are the commitment to undertake human rights due diligence and to publish human rights policies, as well as the responsibility that the company has, in some cases, to provide or collaborate in the remediation of adverse impacts. Secondly, we argue below that the formulation of the UNGPs clearly establishes more than a responsibility towards non-violation.

Wettstein critiques the UNGPs' separation of corporate responsibility to 'respect' rights from the responsibility to 'protect' rights. He argues that the concept of silent complicity—acknowledged by Ruggie as a significant non-legal form of complicity—implies an

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³⁴ RATNER, Steven R. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, [s. l.], v. 111, n. 3, p. 443-545, Dec. 2001. p. 518.

obligation for companies to protect rights, which involves actively reaching out to victims, rather than merely avoiding harm.³⁵ This ‘silencing’ of State and corporate responsibility, therefore, reveals a conceptual inconsistency within the UNGPs framework.³⁶ Ruggie argued that corporations as ‘specialized economic organs’ cannot be bearers of duties akin to those of States. While this is correct, Wettstein suggests that Ruggie’s focus on the corporate duty ‘to do no harm’ overlooks the unique, context-specific responsibilities that stem from corporations’ societal roles.³⁷ He concludes that Ruggie missed the more complex question of how to allocate shared responsibility within society’s power structures, especially given the political influence that corporations, as ‘social institutions’, often wield.³⁸

Deva focuses instead on the narrower issue of translating the responsibilities around specific rights, asking pertinent questions about exactly what it means for a company to ‘respect’ the right to health. The right to health under the International Covenant on Economic Social and Cultural Rights (ICESCR) is defined as the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Deva questions whether this entails providing insurance for workers and providing adequate breaks and rest days.³⁹ These questions of scope, Deva notes, were almost completely avoided in the UNGPs drafting process and later documents in favour of process-oriented questions such as around human rights due diligence.⁴⁰

³⁵ WETTSTEIN, Florian. Making noise about silent complicity: the moral inconsistency of the “Protect, Respect, and Remedy” framework. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. p. 243-250.

³⁶ WETTSTEIN, Florian. Making noise about silent complicity: the moral inconsistency of the “Protect, Respect, and Remedy” framework. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. p. 253.

³⁷ WETTSTEIN, Florian. Normativity, ethics, and the UN guiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, [s. l.], v. 12, n. 2, p. 162-182, 2015. p. 170.

³⁸ WETTSTEIN, Florian. Normativity, ethics, and the UN guiding principles on business and human rights: a critical assessment. *Journal of Human Rights*, [s. l.], v. 12, n. 2, p. 162-182, 2015. p. 170.

³⁹ DEVA, Surya. Treating human rights lightly: a critiques of the consensus rhetoric and the language employed by the Guiding Principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013.

⁴⁰ DEVA, Surya. Treating human rights lightly: a critiques of the consensus rhetoric and the language employed by the Guiding Principles. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations*

However, looking in more detail at the construction of the responsibility to respect, there is certainly more to it than a mere responsibility toward non-violation. The early critics of the UNGPs focused on the phrase ‘do no harm’ and the reliance on negative responsibilities that it seems to suggest. In reality, the innovative, even idiosyncratic, approach that Ruggie took led to a version of a responsibility to respect that goes far beyond a traditional understanding of the term.

The basic understanding of the respect, protect, fulfil delineation in international law is that respecting rights entails non-interference (or non-violation, non-deprivation), protecting rights entails preventing interference by third parties, and fulfilling rights entails positive policies to ensure universal access to the right. But there is naturally more nuance to these standards than such brief definitions allow. The State obligation to respect under the ICESCR contains two elements, first, the prohibition on State interference with existing access or enjoyment of human rights, and second, a more positive State duty ‘to ensure that existing access is not disrupted’.⁴¹ This second element of the duty may appear similar to an obligation to protect. However, the distinction is that it does not address third party disruption, but rather disruption that may be caused by less direct State policies. For example, a State engaged in a trade war might raise tariffs on essential foodstuffs, or even on petrol or other relevant aspects of food distribution, such as to have the practical effect of restricting access to food. Here, the State has not directly interfered with any individuals access to food, but the State has implemented policies that have the effect of disrupting access. The distinction between the two could be defined as the distinction between ‘direct’ interference and ‘effective’ or a more structural form of interference. The State is obligated to avoid both directly interfering in an individual’s access to rights – the general scope of legally remediable human rights violations – and the State must avoid creating laws and policies that have the effect of restricting access to rights. The former is likely to be deliberate and targeted, the latter may be no more than an unforeseen externality of a policy in a different area, such as tariffs. Both are covered by the internatio-

of business: beyond the corporate responsibility to respect? Cambridge: Cambridge University Press, 2013. p. 88-89.

⁴¹ NOLAN, Aoife; DUTSCHKE, Mira. Article 2 (1) ICESCR and states parties’ obligations: whither the budget? *European Human Rights Law Review*, [s. l.], v. 3, p. 280-289, Jan. 2010. p. 282-3.

nal legal definition of ‘respect’. This is coherent both on the grounds that such structural interferences can make a significant impact on access to rights, and that preventing such interferences neither protects rights-holders from third parties nor further realizes access to the right.

UNGPs’ Principle 13, described by Ruggie as ‘the central Guiding Principle regarding the corporate responsibility to respect human rights’,⁴² defines that the responsibility of businesses is to ‘[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur [and] [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations’.⁴³ The corporate responsibility to respect is therefore defined by ‘human rights impacts’, which themselves are defined as occurring ‘when an action removes or reduces the ability of an individual to enjoy his or her human rights.’⁴⁴ Principle 13 thus appears to encompass both forms of respect. A company could breach its responsibility to respect either by proactively violating a human right, breaching its negative responsibility to avoid harmful acts, or it could cause a human rights impact via disrupting access to a right on the grounds that this equally ‘removes or reduces’ rights enjoyment. The UNGPs in this sense accurately follow international human rights law and present a comprehensive version of the corporate responsibility to respect. A company can directly interfere with individuals rights in a variety of ways, from modern slavery to privacy violations at work. But companies with structural control over resources, or online speech, or over individuals in private detention facilities, can create policies that restrict individuals’ access to rights in more structural ways. So long as such a policy can be shown to ‘remove or reduce’ individuals’ enjoyment of rights, that policy is covered just the same as a more direct violation.

As stated above, corporations, as economic entities, cannot owe universal responsibilities to protect or to fulfil rights. A corporation cannot be expected to gua-

rantee a fair wage to a national population. But all corporations have certain individuals within their functional ambit, and this, in domestic law and international human rights law, obligates them to guarantee fair wages to their employees, including that they do not deprive individuals of fair wages by, for example, demanding unpaid time to go through security checks. This second meaning of ‘respect’ however, also suggests that other corporate policies may be relevant. Today, countless individuals rely on corporate-controlled food supplies, corporate-owned housing, and corporate health insurance policies. These companies hold a responsibility to ensure that their policies do not ‘remove or reduce’ access to rights. Thus, a corporation would appear to meet the doctrinal standard of causing an adverse human rights impact if a change in production schedule or pricing caused a reduction in enjoyment of rights for some individuals. We now turn to proposing a unifying theory of interpretation of the corporate responsibility to respect with the goal of grounding such responsibility in international law in a way that captures its nuances beyond a narrow and arbitrary focus on negative responsibilities.

3 Corporate responsibility: a functional model

It has been argued that human rights jurisdiction always originates in a *de facto* power relationship between the State and an individual or group thereof.⁴⁵ Such power relationship, in turn, can be determined by either the State’s exercise of a lawful competence or by the commission of an unlawful act under international law – in other words, by the exercise of a function.⁴⁶ This debate has largely revolved around the extraterritorial reach of States’ human rights obligations (ETOs), and has developed around the need to develop a coherent

⁴² RUGGIE, John R. Comments on thun group of banks: discussion paper on the implications of UN guiding principles 13 & 17 in a corporate and investment banking context. *Harvard Kennedy School Discussion Paper*, [s. l.], Feb. 2017.

⁴³ HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*. 2011.

⁴⁴ OHCHR. *The corporate responsibility to respect human rights: an interpretative guide*. 2012. p. 5.

⁴⁵ AUGENSTEIN, Daniel; KINLEY, David. When human rights “responsibilities” become “duties”: the extra-territorial obligations of States that bind corporations. In: DEVA, Surya; BILCHITZ, David. *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2013. p. 271.

⁴⁶ KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [s. l.], v. 9, n. 4, p. 521-556, 2009. p. 522; SHANY, Yuval. Taking universality seriously: a functional approach to extraterritoriality in international human rights law. *The Law and Ethics of Human Rights*, [s. l.], v. 7, n. 1, p. 47-71, 2014. p. 56.

legal justification for the existence and scope of such obligations. According to the functional model, a State issuing a passport, administering an occupied territory or killing an individual abroad through its own agents establishes a factual power relationship that generates corresponding human rights obligations. Importantly, while this article will refer to some judgments, legal frameworks and scholarly works that embrace a functional approach to human rights jurisdiction, this model is not, as yet, consolidated under international law. However, since this model captures all rights-impacting activities – whether lawful or unlawful – and provides a limiting principle for the corresponding positive responsibilities, it offers, by analogy, a useful interpretative lens for the corporate responsibility to respect under the UNGPs.

Under the functional model, human rights jurisdiction attaches to all State functions that concern the protection of human rights,⁴⁷ while positive obligations will vary depending on the extent of the State's lawful competence under international law and on the factual circumstances of each case.⁴⁸ This paradigm is also consistent with EU law, under which fundamental rights obligations attach to all actions exercised by EU institutions as well as to Member States' actions aimed at the implementation of EU law.⁴⁹ Importantly, what grounds the State's obligations is not its generic 'capacity' to protect or realize human rights, but the exercise (or non-exercise)⁵⁰ of a function that, in turn, estab-

lishes a power relationship.⁵¹ When it exercises effective control over a territory, in addition to the duty to respect, the State holds extensive 'protect' and 'fulfil' obligations. When it detains an individual outside its own territory, the State bears a more limited catalogue of positive obligations towards the concerned individual.⁵² We argue that it is possible to look at the human rights responsibilities of corporations through the same paradigm.

'Function', in this model, is intrinsically linked to the notion of 'power', defined by Byers as follows:

Power is the ability of one actor to compel or significantly influence the behavior of another. It may be applied through the use or threat of force, through economic incentives or penalties, or through a variety of social pressures. It may be derived from a number of different sources, including military capabilities, wealth or moral authority. It may be augmented or constrained by concepts, values, institutions and rules.⁵³

Power, in this definition, is a matter of fact, not of law.⁵⁴ We would add to Byers' definition that power is not only the ability to compel or influence another's behaviour, but also to impact another's human rights. Power is also a 'relational concept':

It is above all a relational concept, in that the ability to compel or influence always depends on the relative abilities of the different actors concerned either to apply or resist pressure.⁵⁵

Power is not here conceived as an intrinsic, subjective characteristic of an actor, but as an objective and relational element. Both States and corporations exercise functions that, in turn, create a power relationship with other actors. These functions can take the shape of both actions and omissions and can amount to lawful or unlawful conduct. In the case of States, as in the example provided above, the power relationship could

⁴⁷ EUROPEAN COURT OF HUMAN RIGHTS. *Case of Al-Skeini and others v. the United Kingdom*. (App No 55721/07). ECtHR, 7 July 2011. p. 11.

⁴⁸ KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [s. l.], v. 9, n. 4, p. 521-556, 2009. p. 545-7.

⁴⁹ MACCHI, Chiara. With trade comes responsibility: the external reach of the EU's fundamental rights obligations. *Transnational Legal Theory*, [s. l.], v. 11, n. 4, p. 409-435, 2020.; MORENO-LAX, Violeta; COSTELLO, Cathryn. The extraterritorial application of the EU charter of fundamental rights: from territoriality to facticity, the effectiveness model. In: PEERS, Steve; HERVEY, Tamara; KENNER, Jeff; WARD, Angela. *Commentary on the EU Charter of Fundamental Rights*. Londres: Hart Publishing, 2014. p. 1657.

⁵⁰ In Judge Bonello's words, 'A "functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions', namely, the five ways in which states ensure the observance of human rights: 'firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. [...] (Al-Skeini, Concurring Opinion of Judge Bonello, para 10). Importantly, the notion of 'power' in this citation indicates

a *de facto* condition that exists independent of a lawful entitlement.

⁵¹ KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [s. l.], v. 9, n. 4, p. 521-556, 2009. p. 538.

⁵² KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [s. l.], v. 9, n. 4, p. 521-556, 2009. p. 548.

⁵³ BYERS, Michael. Custom, power, and the power of rules. *Michigan Journal of International Law*, [s. l.], v. 17, n. 1, p. 109-180, 1995. p. 113.

⁵⁴ BYERS, Michael. Custom, power, and the power of rules. *Michigan Journal of International Law*, [s. l.], v. 17, n. 1, p. 109-180, 1995. p. 121-22.

⁵⁵ BYERS, Michael. Custom, power, and the power of rules. *Michigan Journal of International Law*, [s. l.], v. 17, n. 1, p. 109-180, 1995. p. 113.

be created by the State's exercise or non-exercise of its passport-issuing function (lawful competence), but it could also be created by the exercise of a function amounting to an unlawful act under international law (e.g. the unlawful apprehension of an individual in the territory of another State).

To apply this model to the understanding of human rights responsibilities of corporations means considering the immense variety of rights-relevant functions (in the sense explained above) that the latter exercise. Transnational corporations, in particular, are global actors capable both of facilitating and of hindering the realization of human rights, based on their economic dimension, but also on other factors such as the sector and contexts in which they operate, their market share, the nature of their operations, their level of collaboration with public authorities, etc. Corporations can create *de facto* power relationships with certain individuals and communities through the exercise of their functions, not only when they cause a negative human rights or environmental impact, but also when their products, services and activities contribute to the realization of human rights. A company providing an essential service – e.g. the supply of staple food – in a country through its global supply chain, for instance, clearly affects a number of human rights in said country, contributing to the State's ability to ensure the right to food, the right to health and, for instance, to maintain public order amidst pandemic-induced panic shopping. In line with a functional paradigm, human rights responsibilities attach to all rights-impacting functions exercised by corporations. This reasoning does not rest on a 'can implies ought' principle, rejected by Ruggie as too broad.⁵⁶ Companies owe human rights responsibilities only to the individuals with whom they establish a *de facto* power relationship, and the corresponding positive obligations vary in each case based on legal and factual elements.

3.1 The scope of positive human rights responsibilities under the functional model

Under a functional understanding of corporate responsibility, the scope of a company's positive human rights responsibilities will be delimited by considerations

⁵⁶ RUGGIE, John R. Comments on thun group of banks: discussion paper on the implications of UN guiding principles 13 & 17 in a corporate and investment banking context. *Harvard Kennedy School Discussion Paper*, [s. l.], Feb. 2017. para 13.

of law and of fact. As concerns the relevant considerations of law, an upper limit to the positive human rights responsibilities of corporations will always be constituted by international law. Indeed, if we accept that international human rights law constitutes the normative foundation of the corporate responsibility to respect under the UNGPs, in spite of the current lack of a formal recognition of such international responsibility in positive (hard) law, then it follows that corporations cannot be required by international human rights norms to perform acts that would be unlawful under public international law if committed by a State. Another upper limit might be constituted by applicable domestic law, at least when not manifestly contravening international human rights law. As concerns the relevant factual considerations, the extent of a corporation's positive responsibilities will depend on a plethora of factors that are well exemplified by the human rights due diligence standard of conduct contained in the UNGPs, namely, the seriousness of the human rights impacts/risks at issue, the company's size and sector, the context and nature of operations, etc. Particularly important among these factors will be the level of control or influence that the company exercises over a territory or individuals.⁵⁷

Two observations are in order. Firstly, it is important to stress that a functionalist approach to corporate human rights responsibilities does not ground human rights 'jurisdiction' in a territorial factor: territory might come into the picture solely as one of the limiting factors to the corporation's positive responsibilities. Secondly, as specified above, a corporation's 'capacity' to determine human rights-relevant outcomes does not constitute the foundation for the company's responsibilities. However, such capacity could become relevant as one of the factors limiting the extent of its positive responsibilities.⁵⁸ In other words, a company cannot hold a positive responsibility to take actions that clearly exceed its capacity. For instance, a company might not have sufficient actual leverage to influence the human rights-conduct of a business partner, especially when

⁵⁷ ETO CONSORTIUM. *Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights*. 2011. Available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23. Access on: 16 Oct. 2024.

⁵⁸ KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [s. l.], v. 9, n. 4, p. 521-556, 2009. p. 546-547, 556.

such partner is a government with which it has a commercial relationship. Such factual lack of capacity constitutes an upper limit to its positive obligations – i.e. that corporations does not have a positive responsibility to bring the government’s violations to an end. In such circumstances, however, the company will still retain a due diligence responsibility to take action within the limits of its capacity, for instance, by teaming up with other corporations doing business with that same government in order to increase its leverage over it, or ending the business relationship when no other options are viable.⁵⁹

There are not many examples of companies exercising some degree of territorial control. Perhaps one such cases concerns United Fruit Company (now Chiquita) which was known to exercise a high level of control over portions of territory in several Latin American countries around its own plantations, building villages for its workers and providing services such as schools, aqueducts, electricity and even hospitals, to the extent that it was referred to as a parallel government.⁶⁰ The company had taken over the provision of services that normally pertain to the State, exercising extensive human rights-impacting functions in a portion of territory over which it exercised a high degree of authority (albeit not to the entire exclusion of the State’s own authority). It can be argued that the corresponding positive human rights responsibilities were consequently quite broad, and the company could be said to hold a responsibility towards the concerned individuals (e.g. Chiquita’s workers and their families) to ‘fulfil’ the relevant rights (e.g. the right to water). Similarly, a private company running prison facilities will have a responsibility (which does not displace the primary responsibility of the State) to fulfil the right to water, health or food of the inmates to the extent that the inmate’s access to such rights depends on the company, because of the factual power relationship it entertains with the concerned individuals.

⁵⁹ HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*. 2011. Commentary to Guiding Principle 19.

⁶⁰ BARTEL, Constantine; SOLDATI, Veronia. Embeddedness of Chiquita’s banana production in Panama: the potential to mitigate social and ecological problems. *African Technology Development Forum Journal*, [s. l.], v. 9, n. 1, p. 32-47, 2017. p. 33; BURGOS, Maria Jose. Banana road. *CBC News*, 2 Dec. 2018. Available at: <https://news-interactives.cbc.ca/longform/banana-republic>. Access on: 16 Oct. 2024.

According to a ‘gradual approach’ to human rights jurisdiction,⁶¹ positive obligations, albeit more limited, can also emerge in cases that do not involve such a high level of control or influence exercised by a company over territory or individuals. A corporation taking over the privatized water service in a country, for instance, has a negative responsibility not to limit access to it on a discriminatory basis, but it also has a positive responsibility to ensure that the water is “acceptable” and ‘safe’. A company that exercises a decisive influence over a business partner (e.g. a foreign supplier), might have a ‘duty to protect’ human rights from the harmful conduct of that partner by actively exercising its leverage over it.⁶² In line with what the UNGPs themselves posit, the higher that leverage, the wider the company’s duty to take steps. A big retailer selling essential goods through its stores arguably might have a responsibility, during a crisis such as the Covid-19 pandemic, not to unreasonably discontinue the distribution of those goods, in spite of the increased logistical hurdles.

3.2 Distinguishing the functional model from other approaches

The functional model for corporate responsibility that we propose should be distinguished from two other similar but distinct approaches: the capacity approach and the publicness approach as developed by Karp. In 2009, Meckled-Garcia explained that ‘the capacity approach holds that having the least burdensome capacity to protect or advance any human rights-relevant outcome is sufficient for an agent to have a moral obligation to protect or advance that outcome.’⁶³ Adapted to the business and human rights context, the capacity approach thus involves assigning responsibility to those corporations who have the capacity in a given context to respect, protect and even fulfil human rights. Karp developed and ultimately rejected this approach as

⁶¹ KING, Hugh. The extraterritorial human rights obligations of States. *Human Rights Law Review*, [s. l.], v. 9, n. 4, p. 521-556, 2009. p. 552.

⁶² MARES, Radu. “Respect” human rights: concept and convergence. In: BIRD, Robert C. *et al. Law, business and human rights: bridging the gap*. Cheltenham: Edward Elgar, 2014.; HUMAN RIGHTS COUNCIL. *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*. 2011. Guiding Principle 19.

⁶³ MECKLED-GARCIA, Saladin. Do transnational economic effects violate human rights? *Ethics and Global Politics*, [s. l.], v. 2, n. 3, p. 259-276, 2009. p. 268.

a way to conceptualize corporate human rights responsibility on two grounds. First, he argued that the capacity approach should be discarded because it does not assign a specific human rights responsibility on corporations but could instead be used to assign other forms of responsibility, particularly in tort and criminal law. Second, and more importantly for this article, he rejects the capacity approach on the grounds that this would create excessive agential costs for companies. Agential costs are defined as ‘costs to moral agents’ legitimate values, ends and projects’. Assigning responsibility based on capacity, or on determining which agent ‘can most effectively protect and provide for individuals’ human rights’, he argues, is not suitable because of the possibility of such excessive costs.⁶⁴ Beyond Karp’s compelling critique, we argue that the capacity approach leaves out a central element: power relations. A company providing an essential service – e.g. the supply of vaccines during a pandemic – exercises a function which, in turn, establishes a form of power over rights-holders. It should hold responsibility for human rights because of this power, which should also inform the contours of such responsibility. In our view, the capacity approach’s neutral foundation that ‘can implies ought’ is therefore misleading. In the proposed functional model to corporate responsibility, agential costs cannot be considered excessive because they depend on the intensity of the power relationship.

The functional model also needs to be distinguished from Karp’s central proposition, the publicness approach to responsibility for human rights. When a company provides collective goods such as health or security or when it exercises a public role, he argues, the company can be considered ‘relevantly public’, and as such be assigned responsibility for human rights despite being a private actor distinct from the State. Karp’s publicness approach overlaps with the functional model we are proposing in that it is role-based, rather than simply actor-based, and it connects to the idea that companies exercise some form of authority in some contexts. But Karp’s publicness approach is relatively narrow in that it rests on the idea that private actors ‘need to accept their public role and the responsibilities that go along with it, even if this acceptance is tacit’.⁶⁵ If they do not accept

this role, companies can abandon it, leaving individuals’ human rights to be violated ‘in the short term’, which would be acceptable under this approach pending ‘the establishment of robustly “public” institutions, which accept the responsibility to protect and provide for rights in the medium to long-term.’⁶⁶ This important caveat makes the publicness approach unsatisfactory from the perspective of international human rights law, which places the non-violation of rights-holders’ rights above other considerations.

4 Applying the functional model to concrete scenarios

To test what corporate responsibility under the functional model means in practice, we next turn to some examples based on business provision of essential resources along the interrelated metrics of affordability and/or guaranteed supply. This metric is relevant to all rights resources with a cost component, and is cited in relation to housing, healthcare, food, and water in the relevant General Comments.⁶⁷ This is also one of the hardest BHR-related problems, where States and businesses rely on free market arguments to justify non-intervention and profit-levels, despite ostensibly free markets being the creation of malleable legal constructs and despite the market often working to the detriment of access to rights.⁶⁸ It is also not a problem that BHR theory has seriously addressed, despite the integral role of markets in shaping, particularly, access to socio-economic rights.

First, some of the simpler cases where functional control is easy to define. Privatized water is a natural monopoly and private water suppliers should, under international human rights law, be under a legal obliga-

corporations in imperfect States. Cambridge: Cambridge University Press, 2014. p. 150.

⁶⁶ KARP, David Jason. *Responsibility for human rights: transnational corporations in imperfect States*. Cambridge: Cambridge University Press, 2014. p. 150.

⁶⁷ COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. *General comment n. 4: the right to adequate housing (Art. 11 (1) of the Covenant)*. 1991. para 8(c).

⁶⁸ BIRCHALL, David. Human rights and political economy: addressing the legal construction of poverty and rights deprivation. *Journal of Law and Political Economy*, [s. l.], v. 3, n. 2, p. 393-416, 2022. p. 408-410.

⁶⁴ KARP, David Jason. *Responsibility for human rights: transnational corporations in imperfect States*. Cambridge: Cambridge University Press, 2014. p. 108, 115.

⁶⁵ KARP, David Jason. *Responsibility for human rights: transnational*

tions to ensure affordable access to all.⁶⁹ This is because the private supplier has total functional control. Minimum wage is similar. The absolute functional control that an employer has over an employee's salary means that, to ensure a decent salary, the employer must be subject to direct regulation of wage levels. Private prisons also feature absolute functional control invoking absolute regulatory requirements. This absolute functional control entails that the corporate responsibility to respect has the same scope as State obligations in respect to the individuals falling within the company's functional 'jurisdiction'. Rights enjoyment will be reduced or removed if private water suppliers fail to supply water, employers fail to pay a decent wage, or if private prisons restrict access to any number of possible human rights. These businesses hold a responsibility to fulfil access to the right for those over whom they have functional control of access to the right on the grounds that anything less than this 'removes or reduces' access to the right. Therefore, where a business has functional control of access to an essential resource, that business should be regulated 'so as to ensure access'.⁷⁰

At the other extreme, producers of consumer food items generally have no cost regulation or supply guarantee responsibilities, because the market is so full of different producers that no single supplier has a functional control over access to food. If one drops out, there is still ample choice and supply. These businesses retain some degree of responsibility to the extent that, for instance, they should not imperil the right to health of consumers by marketing unsafe products, but their responsibility in terms of ensuring affordability and supply is very limited (with caveats possible for ensuring the affordability of healthy foods). A corporation's human rights responsibilities therefore align with its functional power over that human right within a given context.

4.1 Applying the functional model to 'hard' cases

In between the two extremes illustrated above are two hard cases, where varieties of oligopolistic control

create a confusion as to the bearer of functional control. First, private rental properties. Rent control by the State is advocated by the CESCR on the basis that private rental costs can restrict access to housing and the State has the ability to regulate these costs.⁷¹ Equally the ex-UNSR on the right to housing, Leilani Farha, has advocated greater business human rights responsibility from housing providers,⁷² while the current UNSR, Balakrishnan Rajagopal, has argued for 'accountability of public and private actors' arguing that 'the time is ripe for a re-evaluation of the role of public and private actors to make sure that housing remains affordable and accessible'.⁷³ Rental costs are complicated for at least four reasons. Firstly, individual landlords may be responding to, not setting, market prices; secondly, affordable privatized housing is more difficult to define and enact than a minimum wage; thirdly, market prices are the product of numerous factors; and fourthly, unlike free market consumer goods, a home is essential and subject to serious supply-side limits.⁷⁴

The functional approach clarifies responsibility by asking, 'who has functional control over housing prices?'. In an ideal free market, where no landlord monopolizes properties, landlords lack control over market prices, which are determined by factors like location, size, and condition. This creates a practical barrier to targeting landlords to price responsibly. While rent control is one potential solution, the State has broader tools, such as promoting social housing, adjusting tax incentives, and regulating investment properties. In this idealized scenario, the State shapes the market and should act as regulator, while landlords are only responsible towards their own tenants.⁷⁵

In practice markets are complicated, containing both small-scale landlords and, increasingly, large corporate landlords. Where large private equity investors purchase homes *en masse*, including entire apartment blocks, it becomes more reasonable that they themselves have func-

⁶⁹ OHCHR. *General Comment No. 15: The Right to Water* (Arts. 11 and 12 of the Covenant). 2003. para 27.

⁷⁰ OHCHR. *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*. 2017. para 18.

⁷¹ OHCHR. *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*. 2017. para 19.

⁷² UN GENERAL ASSEMBLY. *The financialization of housing and the right to adequate housing*. 2017. para 60.

⁷³ UN GENERAL ASSEMBLY. *Twenty years of promoting and protecting the right to adequate housing: taking stock and moving forward*. 2021. para 78.

⁷⁴ HEARNE, Rory. *Housing Shock*. Bristol: Bristol University Press, 2020.

⁷⁵ Generally, they enjoy freedom to raise rental costs assuming the individual will not be made homeless by the increase.

tional control.⁷⁶ Blackstone's purchase of Stuyvesant Town in New York, comprised of 11,000 apartments with expiring rent control agreements, is one example where a private company may have functional control.⁷⁷ Despite a trend towards large-scale corporate landlords, the rental housing market remains diversified enough that in most situations landlords do not control enough housing to hold functional control over pricing. This means that the regulatory State, not landlords, has functional control of pricing.

This is a vital insight of the functional approach, allowing responsibility for harms that occur through the 'free market' to be mapped. The free market often serves as a means to disavow responsibility, because it splits responsibility, and deniability, between State and business.⁷⁸ In the example here presented, by asking the question 'who controls the price?', one better knows whom to challenge. For housing, the State is in the best position to control prices, with numerous levers for doing so. This explains the CESCR's rent control argument and provides justification for it, coherent with applied human rights standards. It also invokes a significant challenge to governments that rely on the free market, suggesting that they are denying their own functional control, indeed their overt construction, of the market, to the detriment of access to housing and indeed causing human rights violations.

Global agribusiness provides a second hard case, made more difficult by the lack of State jurisdiction. Three companies control 75 per cent of the world's grain production.⁷⁹ Profit-motivated production changes can, and have, resulted in dramatic reductions in access to food in difficult to predict areas around the world.⁸⁰ These companies have demonstrable functional control over access to essential (irreplaceable, at least in

the relevant short-term) food. These companies produce food globally, meaning that they do not operate within the confines of a single jurisdiction. Oligopolistic agribusiness production appears to be the more natural realm of corporate responsibilities as it is not within the remit of individual State regulation but is sufficiently dominated by a small number of firms that do have functional control. To avoid causing an adverse human rights impact, these companies should manage supply so as to keep it stable and predictable and to ensure that no one's access to food is reduced through their actions.

The functional approach helps to answer difficult questions of who should bear responsibility, and whether responsibility is needed in a specific context. Private water and minimum wages we designate as 'dual' responsibility. This designation covers that the State can and should regulate the private supplier and the business obey the rules, but if the State fails to do so the business is also in a suitable position to take on the proactive responsibility. Rental prices we designate generally as a matter of State responsibility, on the grounds that the State has the macro-view necessary to make correct judgments, and insofar as no single landlord has any macro-effect on pricing. Global food prices we designate as a corporate responsibility (an international treaty could also do the job) on the grounds that no State has control, and that the oligopolistic nature of the market means that individual company actions make a difference and makes it easier for these companies to collaborate.

5 The functional model: role and limitations

Applying a functionalist reading to the responsibilities of corporations does not in any way displace or subordinate the human rights obligations of the State, whose role remains primary. We may rather speak of 'shared accountability',⁸¹ looking at the distinct but complementary responsibilities of subjects – States and corporations – that hold different status and roles under international law, but that are bound, at the normative level, by the same system of universal principles. In

⁷⁶ BIRCHALL, David; BERNAZ, Nadia. Business strategy as human rights risk: the case of Private Equity. *Human Rights Review*, [s. l.], v. 24, p. 1-23, Mar. 2023.

⁷⁷ BLACKSTONE GROUP. Reply to the Mandate Holders. *OTH 17/2019*. 2019. p. 3.

⁷⁸ BIRCHALL, David. Reconstructing State obligations to protect and fulfil socio-economic rights in an era of marketisation. *International and Comparative Law Quarterly*, [s. l.], v. 71, n. 1, p. 227-243, Jan. 2022.

⁷⁹ CLAPP, Jennifer. Concentration and crises: exploring the deep roots of vulnerability in the global industrial food system. *Journal of Peasant Studies*, [s. l.], v. 50, n. 1, p. 1-25, Oct. 2022. p. 14.

⁸⁰ DE SCHUTTER, Oliver. The green rush: the global race for farmland and the rights of land users. *Harvard International Law Journal*, [s. l.], v. 52, n. 2, p. 503-559, Jul. 2007.

⁸¹ NOLKAEMPER, Andre; JACOBS, Dov. Shared responsibility in international law: a conceptual framework. *Michigan Journal of International Law*, [s. l.], v. 34, n. 2, p. 359-438, 2013. p. 369.

fact, the functional model, by clarifying the normative underpinning and the scope of corporate responsibilities, also contributes to better defining the contours of the State duty to protect, and, in doing so, it could help respond to some challenges identified, particularly by the TWAIL and Global South literature, in the prevalent BHR paradigm.

Pahuja and Saunders note that the early discourse around the impacts of transnational corporations and foreign direct investment in the Global South, captured by States and organizations in the Global North after the 70s, gradually lost the political and radical connotation that had animated it in the years of the New International Economic Order, shifting towards an increasingly technical approach.⁸² The authors claim that this discursive shift, in which debates about regulation were ‘conducted among gatherings of experts and business leaders, and cloistered from political scrutiny’, led to an ‘internationalization of the protection of private property through an emerging regime of “international investment law”’, but failed to equally internationalize the regulation over corporate conduct, which remained confined to the domestic sphere.⁸³ Questions remain, even after the breakthrough represented by the UNGPs and subsequent developments, as to whether the BHR movement is able to engender transformative processes and stave off the risk of inadvertently legitimising the *status quo* by proposing legal and policy solutions that do not challenge the structural power asymmetries of the global economy.⁸⁴ A TWAIL critique to current le-

gislative initiatives around mandatory human rights and environmental due diligence, while recognizing them as important developments, indicates that they do not suffice to rebalance the disconnect between the rights that corporations enjoy under international law and the lack of recognition of corresponding international human rights obligations.⁸⁵ These laws, while referring to international standards and instruments, do not reconstruct the international human rights responsibility of corporations at the normative level, leaving once again the regulation over corporate conduct to the domestic sphere (or partially to the supranational sphere, as in the EU), and particularly to the legal systems of States in the Global North.⁸⁶ The transformative potential of these laws is further hindered by flaws in their engineering, which sometimes encourages a box-ticking style of compliance.⁸⁷

Admittedly, the functional model here presented for the interpretation of the corporate responsibility to respect under the UNGPs cannot on its own realize the needed transformation. The model, however, constitutes a step towards grounding this responsibility in international human rights law, rather than in the non-legal concept of ‘societal expectations’. By aligning corporate responsibilities with established human rights categories and linking them to the State’s duty to protect, this model suggests that international law could eventually confer both rights and duties on corporations, as it does, for instance, under international investment law.⁸⁸ It could be argued that without concrete legal me-

⁸² PAHUJA, Sundhya; SAUNDERS, Anna. Rival worlds and the place of the corporation in international law. In: VON BERNSTORFF, Jochen; DANN, Philipp. *The battle for international law: South-North perspectives on the decolonization era*. Oxford: Oxford University Press, 2019. p. 141, 172.

⁸³ PAHUJA, Sundhya; SAUNDERS, Anna. Rival worlds and the place of the corporation in international law. In: VON BERNSTORFF, Jochen; DANN, Philipp. *The battle for international law: South-North perspectives on the decolonization era*. Oxford: Oxford University Press, 2019. p. 174.

⁸⁴ BADER, Michael. Toward a strategic engagement with the question of the corporation. In: SAAGE-MAAß, Miriam; ZUMBANSEN, Peer; BADER, Michael; SHAHAB, Palvasha. *Transnational legal activism in global value chains: the Ali Enterprises factory fire and the struggle for justice*. New York: Springer, 2021.; DEVA, Surya. From business or human rights to business and human rights: what next? In: DEVA, Surya; BIRCHALL, David. *Research handbook on human rights and business*. Cheltenham: Elgar Publishing, 2020.; OMARI LICHUMA, Caroline. (Laws) made in the “First World”: a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains. *Heidelberg Journal of International Law*, [s. l.], v. 81, n. 2, p. 497-532, 2021. p. 513.

⁸⁵ OMARI LICHUMA, Caroline. (Laws) made in the “First World”: a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains. *Heidelberg Journal of International Law*, [s. l.], v. 81, n. 2, p. 497-532, 2021.; BOSE, Debadatta. Decentering narratives around business and human rights Instruments: an example of the french Devoir de Vigilance law. *Business and Human Rights Journal*, [s. l.], v. 8, n. 1, p. 18-42, Feb. 2023.

⁸⁶ OMARI LICHUMA, Caroline. (Laws) made in the “First World”: a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains. *Heidelberg Journal of International Law*, [s. l.], v. 81, n. 2, p. 497-532, 2021.

⁸⁷ DEVA, Surya. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, [s. l.], v. 36, n. 2, p. 389-414, Jun. 2023.; MAK, Chantal. Corporate sustainability due diligence: more than ticking the boxes? *Maastricht Journal of European and Comparative Law*, [s. l.], v. 29, n. 3, p. 301-303, 2022.

⁸⁸ GONZÁLEZ, Erika; VARGAS, Monica; HERNÁNDEZ ZUBIZARRETA, Juan. Business and human rights: the failure of self-regulation. *TNI*, Oct. 2016. Available at: <https://www.tni.org/en/article/business-and-human-rights-the-failure-of-self-regulation>. Access on: 21 Oct. 2024.

chanisms, the model remains largely symbolic. Indeed, no human rights treaties directly bind corporations, nor do customary law or any general principle of international law recognize corporations as bearers of human rights obligations, despite existing corporate responsibilities in areas like environmental law, anti-corruption, and humanitarian law.⁸⁹ Therefore, the interpretation of corporate human rights responsibilities according to the functional model might be seen as purely theoretical. However, we posit that the existence of responsibility should not be confused with the mode of implementing it.⁹⁰ The functional model lays the conceptual foundations for a *de lege ferenda* reasoning that might, on the one hand, prepare the ground for international law developments and on the other, independent of any positive law developments, supports a coherent interpretation of the corporate responsibility to respect under the UNGPs. In the medium to long term, a coherent unifying interpretation of corporate responsibility could be picked up by courts and policymakers, informing legislative processes at the international level or contributing to the emergence of a new customary law norm. In the short term, instead, a functionalist understanding of the corporate responsibility to respect and of its scope, including the positive responsibilities it implies, allows for a principled critique of relevant legislations, for instan-

ce, of emerging human rights and environmental due diligence laws.

Another objection that could be raised to the functional model is that it places excessively wide positive responsibilities on corporations. While agreeing with Ratner that corporations do not bear across-the-board human rights responsibilities tantamount to those of States, we also argue that boxing corporate human rights responsibilities, *a priori*, in a narrowly defined responsibility ‘to respect’ category would be an arbitrary choice disconnected from the reality of functions that corporations exercise.⁹¹ To recognize that corporate responsibilities can, in some circumstances, include positive ones, and even resemble ‘fulfil-like’ responsibilities, does not entail placing corporations on equal footing with States. In fact, such positive responsibilities are always limited by legal and factual considerations, such as the corporation’s lawful competence to act and its actual capacity to influence the enjoyment of human rights in the specific circumstances of a case. As this concept of responsibility arises from an existing (factual) power relationship, and entails positive responsibilities that are never broader than the company’s capacity, there is no disproportionate burden placed on companies, including smaller ones.

A specular objection could be that the functional model, by grounding corporate responsibility in international law and recognizing the theoretical possibility of a future recognition of direct human rights obligations, unduly empowers corporations, especially the largest ones, as subjects of the international community.⁹² However, this concern is misplaced. Transnational corporations already have disproportionate influence over policymaking, independent of any formal recognition in international law. Indeed, while the international business and human rights debate stagnated at the turn of the century due to irreconcilable differences as to the attribution of direct human rights obligations to corporations, powerful businesses strengthened their positioning in crucial international *fora* and their protection under international investment law.⁹³ It was, arguably,

⁸⁹ BLAIR, Cherie; VIDAK-GOJKOVIC, Ema. The medium is the message: establishing a system of business and human rights through contract law and arbitration. *Journal of International Arbitration*, [s. l.], v. 35, n. 4, p. 379-412, 2018. p. 380; LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [s. l.], v. 5, n. 1, p. 56-83, Jan. 2020.; BERNAZ, Nadia; PIETROPAOLI, Irene. Developing a business and human rights treaty: lessons from the deep seabed mining regime under the United Nations Convention on the Law of the Sea. *Business and Human Rights Journal*, [s. l.], v. 5, n. 2, p. 200-220, Jul. 2020. p. 211-213; DEVA, Surya. The human rights obligations of business: reimagining the treaty business. *Workshop on Human Rights and Transnational Corporations*, Geneva, Mar. 2014. Available at: https://media.business-humanrights.org/media/documents/files/media/documents/reimagine_int_law_for_bhr.pdf. Access on: 21 Oct. 2024.

⁹⁰ RATNER, Steven R. Corporations and human rights: a theory of legal responsibility. *Yale Law Journal*, [s. l.], v. 111, n. 3, p. 443-545, Dec. 2001. p. 481; CLAPHAM, Andrew. *Human rights obligations of non-state actors*. Oxford: Oxford University Press, 2006. LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [s. l.], v. 5, n. 1, p. 56-83, Jan. 2020. BILCHITZ, David. The Ruggie framework: an adequate rubric for corporate human rights obligations? *International Journal of Human Rights*, [s. l.], v. 7, n. 12, p. 199-229, Jun. 2010. p. 222; ROCHA, Armando. *Private actors as participants in international law: a critical analysis of membership under the Law of the Sea*. Londres: Bloomsbury, 2023. p. 34-36.

⁹¹ LOPEZ LATORRE, Andrés Felipe. In defence of direct obligations for businesses under international human rights law. *Business and Human Rights Journal*, [s. l.], v. 5, n. 1, p. 56-83, Jan. 2020. p. 80.

⁹² DURUIGBO, Emeka. Corporate accountability and liability for international human rights abuses: recent changes and recurring challenges. *Journal of Human Rights*, [s. l.], v. 6, n. 2, p. 222-261, 2008. p. 252.

⁹³ DRUTMAN, Lee. How corporate lobbyists conquered amer-

the *de facto* power exercised by corporations and its coincidence with the interests of some States that enabled their ascension as influential global actors. The adoption of legal frameworks (in the realms of lobbying or investment protection, for instance) that facilitated the consolidation of such ‘corporate capture’ was the result of existing power relationships. Arguably, such power relationships influenced international legal developments more than the other way around. Corporate influence in policymaking *fora* engendered the emergence of legal rights that contributed, in turn, to crystallizing such influence. At no stage in this process was there a formal recognition of an international legal personality of corporations nor of direct corporate human rights obligations.

In this scenario, some considerations are in order. Firstly, the functional model is not concerned with a formalistic top-down conferral of international legal personality to corporations, but rather aims at a human rights law-consistent interpretation of the corporate responsibility to respect under the UNGPs. It stems from the recognition that corporations *de facto* exercise functions that engender power relationships with individuals and communities and that, in turn, have a bearing on the enjoyment of human rights. In this model, responsibility attaches to functions and is commensurate to the lawful and factual capacity of a corporate actor to impact human rights. As a consequence, the model cannot confer to corporations a power that they do not already exercise. For the same reason, grounding corporate responsibility in international law does not automatically put corporations on equal footing with States and does not imply the attribution to them of state-like powers, such as the right to stipulate international treaties.⁹⁴ Peters et al, recalling the rights that corporations enjoy under international law, underline how it is instrumental ‘to make corporate legal personality become an issue only because now, rather than profiting from human rights, corporations are held accountable

to them’.⁹⁵ However, they also underscore ‘the difficulty of identifying and circumscribing a sphere of obligations of a concrete business actor which would be functionally equivalent to the sphere of jurisdiction of a State in which the human rights obligations apply.’⁹⁶ We agree that the concept of ‘sphere of influence’ is too broad and vague for this purpose, and we propose an alternative model based on the notion of ‘function’. Such model might contribute to a more coherent and granular interpretation of corporate human rights obligations that might, in time, be translated into positive law.

6 Conclusions

Historically, the debate around the human rights responsibilities of corporations under international law has run aground because of a lack of consensus around the attribution of international legal personality to corporations, the fear of overextending the responsibilities of corporations transferring to them part of the State’s own human rights obligations, or concerns about allowing corporations to achieve an international status that would allow them to ‘sit at the table’ and be allowed to shape relevant laws and policies. The need to avoid a polarizing debate around these contentious issues preempted a full recognition of international human rights law as the legal foundation for the corporate responsibility to respect, theorized in the UNGPs not as a legal concept, but as the result of evolving ‘societal expectations’. Attributing human rights responsibilities to corporations while refusing to interpret their content and scope through the categories of international law led to incoherence at the normative level within the UNGPs. It also risks giving rise to artificially narrow interpretations of the ‘do no harm’ responsibility of corporations, overlooking the role that corporations play in the realization of human rights and failing to provide

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⁹⁴ ROCHA, Armando. *Private actors as participants in international law: a critical analysis of membership under the Law of the Sea*. Londres: Bloomsbury, 2023. p. 23-24.

⁹⁵ PETERS, Anne; GLESS, Sabine; THOMALE, Chris; WELLER, Marc-Philippe. *Business and human rights: making the legally binding instrument work in public, private and criminal law*. [S. l.]: MPIL Research Paper Series, 2020. Available at: <https://gedip-egpil.eu/wp-content/uploads/2020/08/Business-and-Human-Rights-MPI-M-Ph.-Weller.pdf>. Access on: 21 Oct. 2024. p. 23.

⁹⁶ PETERS, Anne; GLESS, Sabine; THOMALE, Chris; WELLER, Marc-Philippe. *Business and human rights: making the legally binding instrument work in public, private and criminal law*. [S. l.]: MPIL Research Paper Series, 2020. Available at: <https://gedip-egpil.eu/wp-content/uploads/2020/08/Business-and-Human-Rights-MPI-M-Ph.-Weller.pdf>. Access on: 21 Oct. 2024. p. 24.

a legally-grounded paradigm for the definition of their negative and positive responsibilities under international law.

It is a matter of fact that corporate actors are already actively and deeply involved in the realization of human rights, and often essential to it. In addition, they are receiving increasing legitimization by the international community as subjects endowed with a share of responsibility for the achievement of global objectives with far-reaching human rights implications, such as the Sustainable Development Goals (SDGs), of which they are considered key enablers, or the Paris Agreement. To disregard this reality, dodging relevant questions around corporate responsibilities for the protection and fulfilment of human rights, leads to an internally inconsistent, and ultimately unsatisfactory, theoretical underpinning of corporate responsibility for human rights. In this paper, starting from concepts developed in scholarly debates around the human rights jurisdiction of States, we have proposed a functional approach to corporate responsibility that grounds the human rights 'jurisdiction' of corporations in their exercise of rights-relevant functions. By linking human rights responsibility to power, and in particular to the functions that generate such power, the functional model can make major inroads in understanding some of the most difficult human rights issues of our time. The model can help redesign the BHR agenda, for instance suggesting increased attention within BHR practice toward distribution. With the exception of wages, this area is largely excluded from BHR initiatives. The role of housing companies and State regulation thereof in distributing access to housing, for instance, is not covered in National Action Plans, whereas the leading benchmarking initiative, the CHRB, covers agribusiness but does not include distribution of food that these companies control.

Some multinationals today do control access to rights for some groups. They have voluntarily taken on this position, and with it the correlative responsibility. Where States are unwilling or unable to regulate these corporations, the responsibility to respect must be taken at face value. It encompasses all actions that risk 'removing or reducing' individuals' rights enjoyment. For those corporations that control access, this is a demanding responsibility in line with their authority. The model does not displace the State as primary bearer of human rights responsibility, but it does provide a co-

herent conceptual framework through which the existence and scope of corporate responsibility for human rights can be identified in concrete cases, particularly in cases where the respective responsibility of States and businesses are not immediately obvious. The model also allows for a principled critique of emerging due diligence legislations when the obligations they impose on businesses do not match the extent of corporate responsibility under international human rights law. For instance, due diligence legislations over-relying on narrowly-defined technical steps (e.g. contractual obligations) might not reflect the extent of such responsibility. More importantly, as commented by Deva, due diligence legislations are only one among many tools on the 'regulatory menu', and must not be the only item on it.⁹⁷ The principled interpretation of corporate responsibility provided by the functional model can help shape policies that reflect the reality of corporate power and the influence that businesses often have on access to essential resources.

We argue that the corporate responsibility for human rights is not only an issue for domestic legal systems (of Global North countries, in most cases), but must be brought back as an important item in the international law debate. The functional model allows our conceptualization of corporate human rights responsibility under the UNGPs to go beyond a formalistic subjects-objects dichotomy around the notion of international legal personality, a dichotomy that serves 'no functional purpose'.⁹⁸ We have argued in this paper that the corporate responsibility to respect is grounded in international law regardless of the current absence of its clear codification in positive law. The proposed interpretation of corporate responsibility provides a conceptual counterbalance to the extensive rights that multinational corporations already, unquestioningly enjoy under international law. By affirming that the normativity of international human rights law creates legal responsibility for businesses, the model does not bestow on corporations a power they do not currently enjoy. Quite on the contrary, it conceives responsibility as a necessary corollary of power, recognizing the rights-relevant functions that corporations already exer-

⁹⁷ DEVA, Surya. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, [s. l.], v. 36, n. 2, p. 389-414, Jun. 2023. p. 414.

⁹⁸ HIGGINS, Rosalyn. *Problems and process: international law and how we use it*. Oxford: Oxford University Press, 1994. p. 49.

cise all over the globe and affirming that such functions define the scope of corporate of negative and positive responsibilities.

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Shaping corporate responsibility in Latin America to address the challenges of climate change and the energy transition*

Moldando a responsabilidade corporativa na América Latina para enfrentar os desafios das mudanças climáticas e da transição energética

Daniel Iglesias Márquez**

Abstract

The climate emergency in the Americas requires urgent action by states and corporations to address the negative consequences of climate change on human rights. This article focuses on the corporate responsibility to respect human rights and the environment in the context of the climate emergency and the energy transition in Latin America through a critical and qualitative analysis of the implementation of the standards of the Inter-American Human Rights System. These seek to ensure, through state action, an enabling environment in which corporations take into account their climate impacts as part of their responsibility to respect human rights and, at the same time, prevent and remedy the adverse consequences of their energy transition commitments, plans, and projects on human rights and the environment.

Keywords: business; human rights; climate change; energy transition; climate litigation; climate due diligence.

Resumo

A emergência climática nas Américas exige ações urgentes dos estados e das empresas para enfrentar as consequências negativas das mudanças climáticas sobre os direitos humanos. Este artigo foca na responsabilidade corporativa de respeitar os direitos humanos e o meio ambiente no contexto da emergência climática e da transição energética na América Latina, por meio de uma análise crítica e qualitativa da implementação dos padrões do Sistema Interamericano de Direitos Humanos. Esses padrões buscam garantir, por meio da ação estatal, um ambiente em que as empresas considerem seus impactos climáticos, prevenindo e remediando as consequências adversas de seus compromissos de transição energética sobre os direitos humanos e o meio ambiente.

Palavras-chave: empresas; direitos humanos; mudança climática; transição energética; litígios climáticos; diligência climática.

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1 Introduction

Latin America as a region is highly exposed and vulnerable to climate change. Its negative consequences are amplified by inequality, poverty, population growth, and high population density, as well as changes in land use, particularly deforestation, land degradation, and national and local economies' high dependence on natural resources for the production of goods.¹ This highlights the need for urgent mitigation and adaptation measures to address the climate emergency. These measures should focus on protecting human rights and the environment, seeking to implement responses to climate change and its effects that are environmentally and socially just and equitable.

The urgent need to address the climate emergency is not only incumbent on states but also on other actors that have historically contributed and continue to contribute to climate change, such as corporations. These actors affect the global climate system through greenhouse gas emissions generated by their activities, business relationships, products, and services. Advances in climate science have been able to quantify the historical contribution of different corporate actors to the climate crisis, as well as to associate these emissions to specific extreme weather events that have direct effects on the enjoyment of human rights. Thus, it has been possible to establish a link between companies' activities and the increase in global atmospheric CO₂, surface temperature, sea level, and ocean acidification.² Scientific evidence has shown that 90 fossil fuel and cement companies, known as «Carbon Majors», have been responsible for 63% of cumulative global emissions between 1751 and 2010.³ Several of the *Carbon Majors*, such as *Pemex*, *Petroleos de Venezuela*, *Petrobras*, *Cemex*, and *PetroEcuador*, are based in Latin American countries. Others, such as BP,

Shell, Total and RWE and Repsol, are based in the Global North but have operations in the region.

Although international climate change laws do not impose direct obligations on companies, Decision 1/CP.21 accompanying the adoption of the Paris Agreement encourages the private sector to increase its efforts and support measures to reduce emissions, increase resilience, and reduce vulnerability to the adverse effects of climate change. Though still in a limited way, more and more companies in the region have established commitments, plans, and targets for net zero emissions or policies and actions. These will contribute to the transformation of the energy sector through the implementation of renewable energy projects or the extraction of «transition minerals» as a key strategy to address climate change.⁴ However, many of these climate and energy transition commitments, policies, and actions towards a decarbonized and resilient economy have mainly followed wealth accumulation patterns, reproducing the negative impacts of traditional fossil fuel extractivist models on human rights and the environment.

In short, it is not only historical and current corporate emissions that have a negative and disproportionate impact on nature and the enjoyment of human rights, but also corporate energy transition projects that aim to address climate change. This research addresses how Latin American states, in compliance with their obligations under the Inter-American Human Rights System (IAHRS), must ensure that companies take into account their climate impacts as part of their responsibility to respect human rights. It also analyzes how states should ensure that corporate climate actions, commitments, and energy transition projects are fair, inclusive, and based on human rights and environmental protection. This work aims to explore the Inter-American Standards on Business and Human Rights through a deductive analysis, reviewing their implementation by IAHRS states to create an enabling environment in which companies can fulfill their responsibility to respect human rights and protect the environment in the context of the climate emergency and energy transition in Latin America.

Therefore, the hypothesis of this research is that Latin American states, through the implementation

¹ CASTELLANOS, Edwin *et al.* (ed.). *Climate Change 2022: impacts, adaptation and vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge/New York: Cambridge University Press, 2022. p. 1689-1816.

² FRUMHOFF, Peter C.; HEEDE, Richard; ORESKES, Naomi. The climate responsibilities of industrial carbon producers. *Climatic Change*, v. 132, p. 157-171, 2015.; MARJANAC, Sophie; PATTON, Lindene. Extreme weather event attribution science and climate change litigation: an essential step in the causal chain? *Journal of Energy and Natural Resources Law*, v. 36, n. 3, p. 265-298, 2018.

³ HEEDE, Richard. Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers: 1854–2010. *Climatic Change*, v. 122, p. 229-241, 2014.

⁴ UNITED NATIONS. *Theme Report on Energy Transition*. Towards the Achievement of SDG 7 and Net-Zero Emissions. New York: Department of Economic and Social Affairs, United Nations, 2021.

of Inter-American standards, can establish an effective normative framework that ensures companies take into account the climate impacts of their activities, and that their actions related to the energy transition are fair, inclusive, and environmentally respectful. This would contribute to addressing the climate emergency and safeguarding human rights in the region.

To this end, this research first explores climate change and corporate responsibility as issues that are part of the regional agenda established by the Organization of American States (OAS). Second, it examines the IA-HRS approach to climate change and the complex relationship between business and human rights. Third, it analyzes and discusses the implementation of Inter-American Standards on Business and Human Rights in the context of the climate emergency and the energy transition in Latin America. Finally, final considerations and conclusions are provided on the issues addressed in this research.

2 Climate change, human rights, and corporate responsibility on the regional agenda

Climate change and the corporate responsibility to respect human rights and protect the environment form part of the Latin American regional agenda. However, they have not always been addressed in a coordinated manner, but rather in a fragmented way without considering how they are interrelated. In this sense, the OAS, as a political forum that brings together most of the countries in the Latin American region, has played an important role in advancing cooperation and policies on climate change.⁵ Since the late 1990s, the OAS General Assembly has adopted several resolutions calling on the organization's member states to implement actions and coordinate efforts to address the impacts of climate change in the region.

In 1999, the OAS General Assembly adopted Resolution AG/RES. 1674 (XXIX-O/99) on climate change in the Americas, which recognized, on the one hand, that climate change is a common concern for humanity

⁵ OAS. *Climate Change: a comparative overview of the rights based approach in the Americas*. Washington D.C.: Department of Sustainable Development of the General Secretariat of the Organization of American States, 2016.

and, on the other hand, the urgent need for all OAS member states to start planning for adaptation to climate change and to adopt measures to mitigate the possible adverse effects of climate change in the Americas.⁶ This was also addressed in Resolution AG/RES. 1736 (XXX/O/00), on the socioeconomic and environmental effects of climate change in the countries of the Hemisphere, which instructed the General Secretariat to mobilize resources to assist member states in their efforts to adapt to climate change.⁷ Resolution AG/RES. 1864 (XXXII-O/02) urged member states to develop strategies to mitigate and adapt to climate change through development policies and planning initiatives.⁸

The OAS General Assembly has considered the impacts of climate change as a threat that jeopardizes the necessary conditions for the enjoyment of human rights in the region. In this sense, Resolution AG/RES. 2349 (XXXVII-O/07), on water, health and human rights, encouraged actions to address the effects of climate variability and change on water resources, drinking water supply, and sanitation, with special emphasis on the prevention of risks associated with environmental management, as well as the degradation of watersheds and wetlands.⁹ Even more relevant is Resolution AG/RES. 2429 (XXXVIII-O/08), which explicitly recognized the relationship between climate change and human rights, expressing concern about the effects of this anthropocentric phenomenon on the full enjoyment of human rights and urging states to increase their resilience to climate change.¹⁰

Thus, Resolution AG/RES. 2588 (XL-O/10), on climate change in the countries of the Hemisphere, recognized that climate change not only degrades the quality of life and the environment of present generations, but also of future generations, and therefore recommended increasing efforts to mitigate greenhouse gas (GHG) emissions.¹¹ In this regard, Resolution AG/

⁶ ASAMBLEA GENERAL DE LA OEA. *Los cambios climáticos en las Américas*. AG/RES. 1674 (XXIX-O/99). 1999.

⁷ ASAMBLEA GENERAL DE LA OEA. *Los efectos socioeconómicos y ambientales del cambio climático en los países del Hemisferio*. AG/RES. 1736 (XXX-O/00). 2000.

⁸ ASAMBLEA GENERAL DE LA OEA. *Los efectos socioeconómicos y ambientales del cambio climático en los países del Hemisferio*. AG/RES. 1864 (XXXII-O/02). 2002.

⁹ ASAMBLEA GENERAL DE LA OEA. *El agua, la salud y los derechos humanos*. AG/RES. 2349 (XXXVII-O/07). 2007.

¹⁰ ASAMBLEA GENERAL DE LA OEA. *Derechos humanos y cambio climático en las Américas*. AG/RES. 2429 (XXXVIII-O/08). 2008.

¹¹ ASAMBLEA GENERAL DE LA OEA. *El cambio climático en*

RES. 2649 (XLI-O/11) emphasized that OAS member states face significant risks caused by the adverse effects of climate change and, therefore, share the responsibility to find equitable and effective solutions under the principle of common but differentiated responsibilities and their respective capabilities. The Assembly resolved that states should work to strengthen climate resilience and promote capacity building and information exchange related to this global crisis.¹²

More recently, in Resolution AG/RES. 3001 (LIII-O/23) «Toward Improved Climate Financing», the OAS General Assembly recognizes that Latin American countries are continually and increasingly affected by extreme weather events. It is also deeply concerned by the conclusions of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), which clearly states that «the scope and magnitude of the impacts of climate change are greater than those estimated in previous assessments» and that ecosystems and human systems are being greatly affected, especially in the regions of Central and South America. Therefore, the General Assembly has encouraged OAS member states and permanent observers to scale up the provision and mobilization of climate finance in compliance with the commitments of the Paris Agreement.¹³

In October 2023, within the framework of the OAS, the member states adopted the Nassau Declaration (CIDI/RIMDS-IV/DEC. 1/23) and the Inter-American Climate Change Action Plan 2023-2030 (CIDI/RIMDS-IV/doc. 7/23 rev.2), which contain a set of commitments and strategic guidelines that seek to promote actions to develop innovative solutions to climate change. The Declaration recognizes the need to make concerted efforts for climate action in the Americas, in coordination with the private sector, among others. Thus, the OAS has proposed strengthening the implementation of climate mitigation actions by reducing, sequestering, and eliminating GHG emissions through fair energy transitions towards clean, renewable, affordable, reliable, sustainable, and modern energy technologies, moving away from emission-intensive energy sources. It also promotes the protection of human rights defenders, particularly indigenous peoples and lo-

cal communities. The Inter-American Plan of Action, which serves to implement the Nassau Declaration, contains a series of actions to accelerate transitions to clean, sustainable, renewable, and equitable energy in Latin America.

While the Nassau Declaration emphasizes collaboration with the private sector for climate action, previous General Assembly resolutions do not mention the role of the private sector, including business, in combating climate change, nor do they address the extent to which states should involve companies in climate action to address the negative impacts of GHG emissions. In this regard, while several companies in the region are committed to the fight against climate change, empirical evidence shows that climate action is not yet an integral part of the business strategy of Latin American companies. Although many companies state their commitment to contribute to Goal 13 of the Sustainable Development Goals (SDGs), few actually have an emissions reduction target, plan, or commitment to reach carbon neutrality by 2050. They also rarely report annually on their emissions and their contribution to the SDGs.¹⁴

In relation to the corporate responsibility to respect human rights and the environment, since 2001 the OAS has also served as a multi-stakeholder forum to discuss the impact of business on human rights and the environment, as well as to promote the implementation of corporate social responsibility guidelines, tools, and practices.¹⁵ The General Assembly has also adopted several resolutions calling on states to address the environmental impacts of business activities. For example, Resolutions AG/RES. 2483 (XXXIX-O/09) and AG/RES. 2687 (XLI-O/11) encouraged OAS member states that actively exploit their natural resources to promote best practices in environmental protection among companies in the natural resource extraction and manufacturing sectors. Resolution AG/RES. 2554 (XL-

los países del Hemisferio. AG/RES. 2588 (XL-O/10). 2010.

¹² ASAMBLEA GENERAL DE LA OEA. *El cambio climático en los países del Hemisferio*. AG/RES. 2649 (XLI-O/11). 2011.

¹³ ASAMBLEA GENERAL DE LA OEA. *Hacia un mejor financiamiento climático*. AG/RES. 3001 (LIII-O/23). 2023.

¹⁴ LIBÉLULA. *Reporte de acción climática empresarial de Latinoamérica 2022*. Available at: <https://nexosmasuno.com/wp-content/uploads/2023/03/Reporte-de-Accion-Climatica-Empresarial-de-Latinoamerica-2022.pdf>. Access on: 4 Oct. 2024.

¹⁵ See: ASAMBLEA GENERAL DE LA OEA. *Promoción de la Responsabilidad Social de las Empresas en el Hemisferio*. AG/RES 2.123 (XXXV-O/05). 2005.; ASAMBLEA GENERAL DE LA OEA. *Promoción de la Responsabilidad Social de las Empresas en el Hemisferio*. AG/RES 2.194 (XXXVI-O/06). 2006.; ASAMBLEA GENERAL DE LA OEA. *Promoción de la Responsabilidad Social de las Empresas en el Hemisferio*. AG/RES 2.336 (XXXVII-O/07). 2007.; ASAMBLEA GENERAL DE LA OEA. *Promoción de la Responsabilidad Social de las Empresas en el Hemisferio*. AG/RES 2.483 (XXXIX-O/09). 2009.

O/10), on promoting corporate social responsibility in the Hemisphere, called on member states to support initiatives to strengthen their capacity to manage and develop natural resources in an environmentally sustainable and socially responsible manner.

None of the OAS General Assembly resolutions on corporate responsibility referred to climate change explicitly. However, at its fifty-first session in 2021, the General Assembly approved Resolution AG/RES. 2969 (LI-O/21), known as the «Inter-American Business Charter», which seeks to strengthen OAS instruments bolstering the role of the private sector in the integral development of the Southern Hemisphere. Paragraph 30 of Chapter VII of this Resolution, on fostering sustainable development and building resilience, asserts that member states should promote the adoption of strategies and policies for the incorporation and disclosure of climate and environmental risks in investment decisions consistent with the goals of the Paris Agreement and contribute to the implementation of nationally determined contributions (NDCs).¹⁶

3 The intersection between climate change, business, and human rights: an inter-American perspective

A greater understanding of the complex relationship between climate change, business, and human rights has been reached in the IAHR. The General Assembly has requested the Inter-American Commission on Human Rights (IACHR, an advisory body to the OAS), on the one hand, to contribute to efforts to determine whether there is a link between the adverse effects of climate change and the full enjoyment of human rights (AG/RES. 2429 (XXXVIII-O/08) and, on the other hand, to conduct a study on inter-American business and human rights standards (AG/RES. 2887 (XLVI-O/16)).

Regarding climate change, the IACHR published Resolution 3/2021 «Climate emergency: scope of inter-American human rights obligations», which is part of the mandate received by the OAS General Assembly to determine the possible existence of a link between the

adverse effects of climate change and the full enjoyment of human rights.

With a view to the future advisory opinion on climate emergency and human rights requested by Colombia and Chile from the Inter-American Court of Human Rights (IACHR Court) in 2023, Resolution 3/2021 is a first step that clarifies and systematizes the human rights obligations of IAHR states in the context of the climate crisis. One of the central themes of Resolution 3/2021 is corporate responsibility to respect human rights and remedy possible environmental and climate violations (paragraphs 42 to 47), since it recognizes that a significant part of global GHG emissions are caused by the activities, products, and services of companies. As such, Resolution 3/2021 reaffirms the obligation of IAHR states to prevent and remedy human rights impacts associated with business activities in light of the climate crisis.

IAHR bodies have recognized that climate change is a business and human rights issue.¹⁷ Therefore, they have encouraged states to implement business and human rights policy and regulatory frameworks that include climate change as a key issue. In early 2020, the IACHR and its Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDES-CA) published the report «Business and Human Rights: Inter-American Standards», also requested by the OAS General Assembly in 2016 in its Resolution AG/RES. 2887 (XLVI-O/16). The report establishes limits, guidelines, targets, and creation standards that outline the minimum actions that both states and companies ought to take to respect and guarantee human rights in the context of business activities, in compliance with the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and inter-American case law. The Inter-American Standards on Business and Human Rights have quickly become prominent in the IAHR, as they have been used to determine state responsibility in cases like *Buzos Miskitos (Lemoth Morris et al.) v. Honduras*, *Vera Rojas et al. v. Chile* and *La Oroya v. Peru*.

¹⁶ ASAMBLEA GENERAL DE LA OEA. *Carta Empresarial Interamericana*. AG/RES. 2969 (LI-O/21). 2021.

¹⁷ IACHR. *Climate Emergency: Scope of Inter-American Obligations Regarding Human Rights*, Resolution 3/2021. 2021.; IACHR COURT. *Environment and Human Rights (State Obligations Regarding the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity - Interpretation and Scope of Articles 4.1 and 5.1 in Relation to Articles 1.1 and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, Series A No. 23, 2017.

The report «Business and Human Rights: Inter-American Standards» by the IACHR and its REDESCA identifies twelve fundamental inter-American criteria in business and human rights. These criteria—including the right to a healthy environment—should be applied when developing legal frameworks, strategies, and mechanisms in this area. The IACHR and its REDESCA emphasize that only states must take into account and respect the right to a healthy environment, the sustainable use and conservation of ecosystems, and biological diversity when exercising their regulatory, oversight, and judicial functions. This implies that states must implement strategies and policies based on human rights and with a gender perspective to reduce GHG emissions and the effects of climate change, including companies' legal responsibilities and due protection of environmental defenders.¹⁸ The IAHRs also recognizes the obligation of states to use all means at their disposal to prevent activities under their jurisdiction, including extractive activities or renewable energy projects, from causing significant damage to the environment.¹⁹

Climate change and environmental degradation are also considered as one of the six top priority contexts in the area of business and human rights. The IACHR and its REDESCA have expressed concern that a significant portion of global emissions are caused by corporate activities, products, and services. In this regard, they recognize that extractive or mining activities and deforestation in the region are the main causes of the climate crisis and its effects on the rights of present and future generations, especially vulnerable persons. This context raises the need for concrete mitigation actions by both states and companies and, in turn, climate action must be consistent with the human rights framework.²⁰

Under the Inter-American Standards on Business and Human Rights, states must ensure that both public and private entities reduce GHG emissions and are accountable for any harm they may cause to the climate. Likewise, under Article 26 of the American Convention on Human Rights, which establishes an obligation to

cooperate for the realization of economic, social, and cultural rights, states must coordinate efforts to develop strategies against climate change. This cooperation involves governments sharing expertise and technology to reduce GHG emissions, as well as establishing responses to determine the role of business in the fight against climate change.

4 Inter-American business and human rights standards in the context of the climate emergency and energy transition

In light of the above, the implementation of inter-American business and human rights standards is vital in the context of the climate emergency and the energy transition in the Americas. These standards must guide state action and intervention to ensure companies operating in the region identify and report climate risks in their decisions, meeting the goals of the Paris Agreement and respecting the rights recognized in the IAHRs. They must encourage states to ensure corporate accountability in respecting human rights and redressing negative impacts in the context of the climate emergency. From a climate justice perspective, the Inter-American Standards on Business and Human Rights contain guidance and recommendations for states to adopt actions and measures aimed at achieving a fairer, more inclusive, and equitable distribution of the burdens and benefits of business-driven measures to address climate change.

4.1 Policy coherence as a catalyst for the climate dimension of the business and human rights agenda

Most Latin American states have adopted climate policy and legislative frameworks to comply with their climate commitments. Similarly, business and human rights have gradually become a matter of interest for the region's states, and policies and legislative proposals are being adopted to ensure respect for human rights in business activities. However, in practice, government departments, agencies, and other state institutions in charge of climate policy and regulating business activities have shown a lack of coordination and collaboration.

¹⁸ IACHR. *Business and Human Rights Report: Inter-American Standards*. Washington, D.C.: IACHR, 2019. par. 19.

¹⁹ IACHR COURT. *Environment and Human Rights (State Obligations Regarding the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity - Interpretation and Scope of Articles 4.1 and 5.1 in Relation to Articles 1.1 and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17, Series A No. 23, 2017.

²⁰ IACHR. *Business and Human Rights Report: Inter-American Standards*. Washington, D.C.: IACHR, 2019.

In this regard, the UN Working Group on Business and Human Rights has expressed that «[h]uman rights and climate change are governed in many States by separate sets of laws, rules and institutions».²¹ This creates a lack of coherence and common objectives between climate change policies and laws and business and human rights developments. Even if the actions, policies, climate programs, and energy transition projects of states—and companies—reflect the urgency of the climate emergency, they may not necessarily take into account the adverse effects on human rights.

Resolution 3/2021 establishes that states:

should adopt and implement policies aimed at reducing greenhouse gas emissions that reflect the highest possible ambition, foster resilience to climate change and ensure that public and private investments are consistent with low-carbon and climate-resilient development.²²

In this regard, the Inter-American Standards on Business and Human Rights suggest that:

all public policies and normative frameworks implemented for mitigation, adaptation, and resilience to climate change, as well as facing significant environmental damages, must be carried out with a rights-based approach, and include the impacts and infringements produced by businesses, including financing and investment agents.²³

In terms of policy coherence, the United Nations Guiding Principles on Business and Human Rights, endorsed by the governments of the region, calls for states to ensure that government departments, agencies, and other state institutions that shape business practices are aware of and observe the state's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training, and support (Guiding Principle 8).

The Guiding Principles therefore suggest a greater involvement of all departments, agencies, and authorities responsible for attracting foreign investment and encouraging business development in promoting respect for human rights, as these institutions have little or no knowledge of or uptake of human rights considera-

tions. In its visits to Latin American states, the Working Group has identified the need for greater coherence in the government ministry and department policies, particularly the policies of institutions dealing with human rights issues and those that shape business practices.

The region is also facing the challenge that the departments, agencies, and authorities in charge of climate change policies must align corporate responsibility policies and include them in their mandates to respect human rights. National Action Plans (NAPs) are an ideal way for governments to achieve or enhance coherence and coordination in climate and business and human rights policies. According to the Working Group, NAPs are a useful policy tool to foster «greater coordination and coherence within Government on the range of public policy areas that relate to business and human rights».²⁴ Climate change should be included in the various public policy areas on business and human rights. In this regard, Resolution 3/2021 states that in national action plans on business and human rights:

States should take into consideration the role of business and its contribution to the increase of GHGs, leading to the aggravation of the climate crisis and the concomitant limitation to the effective enjoyment of human rights. Such plans should expressly state that the duty of companies to respect human rights includes the adoption of human rights and environmental policies.²⁵

The Latin American NAPs adopted so far refer to climate change expressly, such as Colombia's second NAP,²⁶ or lay out some policy coherence measures related to climate change, such as the first NAPs of Chile and Peru.²⁷ In Colombia, the fight against climate change is considered as part of the state's commitment to

²⁴ WORKING GROUP ON BUSINESS AND HUMAN RIGHTS. *Guidance on National Action Plans on Business and Human Rights*. Geneva: Human Rights Council, 2016.

²⁵ IACHR. *Climate Emergency: Scope of Inter-American Obligations Regarding Human Rights*, Resolution 3/2021. 2021. par. 43.

²⁶ COLOMBIA. *National Action Plan on Business and Human Rights 2020/2022: Together We Make It Possible Resilience and Solidarity*. 2020. Available at: <https://derechoshumanos.gov.co/Areas-Trabajo/Empresas-DDHH/Paginas/300121-Descripcion-PNA-Empresas-DDHH.aspx>. Access on: 4 Oct. 2024.

²⁷ CHILE. *First National Action Plan on Human Rights and Business of Chile*. 2017. Available at: https://www.subrei.gob.cl/ejes-de-trabajo/comercio_y_asuntos_laborales/planes-de-acci%C3%B3n. Access on: 4 Oct. 2024; PERU. *National Action Plan on Business and Human Rights 2021-2025*. 2021. Ministry of Justice and Human Rights. Available at: <https://observatorioderechoshumanos.minjus.gob.pe/plan-nacional-de-accion-sobre-empresas-y-derechos-humanos/>. Access on: 4 Oct. 2024.

²¹ UNITED NATIONS GENERAL ASSEMBLY. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: extractive sector, just transition, and human rights*. A/78/155, 2023.

²² IACHR. *Climate Emergency: Scope of Inter-American Obligations Regarding Human Rights*, Resolution 3/2021. 2021. par. 1.

²³ IACHR. *Business and Human Rights Report: Inter-American Standards*. Washington, D.C.: IACHR, 2019. par. 246.

clean and sustainable growth, which stems from the economic and social reactivation roadmap derived from the COVID-19 pandemic.²⁸ However, no specific policy or legislative action or measure has been adopted for the prevention and redress of human rights impacts associated with GHG emissions from business activities. Although references to climate change are limited in Chile's second NAP, it lays out measures such as the implementation of a national just transition strategy and the improvement of human rights risk prevention in territories with substantial development of renewable energy projects.²⁹

Meanwhile, in Peru's NAP, one of the actions of Objective 3 of Strategic Guideline No. 2, on the design of public protection policies to prevent human rights violations in the business environment, expressly provides for incorporating the approach of the Guiding Principles and responsible business conduct in actions related to climate change, biological diversity, and environmental land use planning in the next National Environmental Action Plan and in the National Environmental Policy. The purpose of this is to associate climate change issues with business and human rights expressly. In this way, these public policies will encourage companies to take into account the issues arising from climate change, threats to biodiversity and environmental land management in their due diligence processes throughout the supply chain.³⁰

NAPs are therefore public policy tools that help ensure that state entities and sub-state agencies have relevant knowledge about the human rights obligations and responsibilities of states and companies in the context of the climate emergency. Following the Inter-American Standards on Business and Human Rights, future NAPs in the region could be more closely related to nationally determined contributions and contemplate

training related to human rights standards and their relationship to the goals of the Paris Agreement.

4.2 Corporate due diligence in the climate emergency and energy transition

Although renewable energy projects in Latin America can contribute positively to achieving the goals of the Paris Agreement, empirical evidence has shown that some of these projects generate adverse impacts on human rights and the environment. In the region, several hydro-power, wind, and solar projects have been associated with cases of human rights abuses.³¹ Latin America is not only the region with the highest percentage of renewable energy participation but also with the highest number of complaints in this sector. The development of renewable energies in the region is replicating the negative impacts that have characterized the extractivist model.

New renewable energy technologies and infrastructure require the supply of key raw materials such as cobalt, copper, lithium, manganese, nickel, and zinc. The exploration and extraction of strategic minerals for the energy transition is often carried out by transnational mining companies, whose operations are also associated with negative impacts on people and the environment.³²

²⁸ COLOMBIA. *National Action Plan on Business and Human Rights 2020/2022: Together We Make It Possible Resilience and Solidarity*. 2020. Available at: <https://derechoshumanos.gov.co/Areas-Trabajo/Empresas-DDHH/Paginas/300121-Descripcion-PNA-EmpresasyDDHH.aspx>. Access on: 4 Oct. 2024.

²⁹ CHILE. *Second National Action Plan on Human Rights and Business of Chile*. 2022. Available at: https://www.subrei.gob.cl/ejes-de-trabajo/comercio_y_asuntos_laborales/planes-de-acci%C3%B3n. Access on: 4 Oct. 2024.

³⁰ PERU. *National Action Plan on Business and Human Rights 2021-2025*. 2021. Ministry of Justice and Human Rights. Available at: <https://observatoriorederechoshumanos.minjus.gob.pe/plan-nacional-de-accion-sobre-empresas-y-derechos-humanos/>. Access on: 4 Oct. 2024.

³¹ UNITED NATIONS GENERAL ASSEMBLY. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: extractive sector, just transition, and human rights*. A/78/155, 2023. In Yucatan, Mexico, for example, communities and civil society have denounced the negative impacts of the development of solar energy projects such as the lack of free, prior and informed consultation, deforestation and land grabbing. See: HUDLET VÁZQUEZ, Karen; HODGKINS, Chelsea. *(In)justicia energética en América Latina*. Center for Information on Business and Human Rights, 2021. In La Guajira, Colombia, wind energy projects are mainly located in collective territory of the Wayuu indigenous people, exacerbating the situation of vulnerability of the communities. It is alleged that these projects have been implemented without respecting the rights to collective property, consultation and free, prior and informed consent of indigenous peoples. See: GONZÁLEZ POSSO, Camilo; BARNEY, Joanna. *El viento del Este llega con revoluciones*. Multinacionales y transición con energía eólica en territorio Wayúu. Bogotá: Indepaz, 2019.

³² In Ecuador, the Mirador copper mining project, owned by the Chinese company ECSA, has been linked to forced relocations, community divisions and harassment. See: CICDHA. *Human Rights and Chinese Business Activities in Latin America: Cases from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, and Venezuela*. 2022. Available at: <https://www.business-humanrights.org/en/latest-news/global-sociedad-civil-latinoamericana-recomiendan-informe-sombra-ante-el-epu-que-china-elabore-plan-nacional-sobre-empresas-y-derechos-humanos/>. Access on: 4 Oct. 2024. In Peru, the Falchani and Macusani lithium and uranium mining projects planned in Puno are owned by the Canadian company Ameri-

Therefore, an enabling framework for the respect of human rights and the environment is urgently needed in the context of the energy transition. In this regard, Resolution 3/2021 states that companies should: implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impact on human rights.³³

The implementation of due diligence processes is still limited in business practice. According to the *2020 Corporate Human Rights Benchmark*, 46.2% of 229 companies assessed from five different sectors scored zero points for due diligence.³⁴ This is because, in the absence of a legally binding requirement, only a minority of well-intentioned companies or those facing consumer scrutiny choose to improve their due diligence processes. Thus, the Inter-American Standards on Business and Human Rights call for states to adopt legislation imposing binding provisions on corporate human rights due diligence. This legislation should include minimum operational guidelines on how companies should conduct human rights impact assessments throughout their global supply chain and corporate structure. The adoption of these laws is therefore part of the IAHRs states' obligation to protect human rights in mining activities for energy transition purposes.

In the context of the energy transition, human rights due diligence laws not only create a regulatory framework for companies in the energy sector to prevent and account for the negative impacts of their renewable energy projects, but should also address the social and environmental impacts of strategic minerals extraction, such as pollution, overuse of water resources, loss of biodiversity, workplace safety issues, land rights abuses, and lack of consultation with indigenous communities.

can Lithium through two subsidiaries: Plateau Energy and Macusani Yellowcake S.A.C. Both open-pit mining projects could generate significant environmental and health impacts. These include impacts on the biodiversity of the high Andean ecoregion and local water sources, as well as on human health. See: DHUMA; EARTH-RIGHTS INTERNATIONAL. *El rostro del litio y uranio en Puno: La cultura, salud, derechos de las comunidades y medio ambiente en riesgo*. Lima, Puno: DHUMA; EarthRights International, 2022.

³³ IACHR. *Business and Human Rights Report: Inter-American Standards*. Washington D.C.: IACHR, 2019. par. 46.

³⁴ WORLD BENCHMARKING ALLIANCE. *Corporate Human Rights Benchmark 2022: Insights Report*. 2022. Available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf. Access on: 4 Oct. 2024.

Through these laws, participation and consideration of stakeholder and rights-holder interests can also be ensured when implementing renewable energy and strategic mineral extraction projects.³⁵ This is therefore a useful tool for Latin American states to put human rights at the center of the energy transition and distribute the burdens and benefits of this process in a fair, inclusive, and equitable manner when regulating business activity.

In countries like Germany, France, Norway, and the Netherlands, mandatory due diligence laws have been adopted, and similar proposals exist in other European countries.³⁶ In May 2024, the Corporate Sustainability Due Diligence Directive was adopted, marking a milestone in the field of business and human rights, as it represents the first binding regional legislation on the subject.³⁷ One of the positive aspects of the Directive is its explicit references to climate change, making it a crucial legislative tool to ensure the business transition toward a decarbonized economy.

Article 22 of the Directive stipulates that Member States must ensure that companies adopt and implement a transition plan for climate change mitigation, aiming to ensure, through their best possible efforts, that the company's business model and strategy are compatible with the transition to a sustainable economy and the limitation of global warming to 1.5°C, in line with the Paris Agreement. This plan must include specific climate-related targets with defined deadlines for 2030 and five-year intervals up to 2050, an explanation and quantification of the investments and financing supporting the implementation of the transition plan, and a description of the role of administrative, management, and supervisory bodies concerning the plan. While this provision promotes corporate climate action, it should be noted that the mitigation plan is not part of the due diligence obligations that companies must fulfill, nor

³⁵ IGLESIAS MÁRQUEZ, Daniel. *La participación significativa de las partes interesadas en los procesos de debida diligencia en Derechos Humanos*. Guía práctica. Madrid: OXFAM, 2023.

³⁶ IGLESIAS MÁRQUEZ, Daniel; DEL VALLE CALZADA, Estrella; MARULLO, María Chiara. *Hacia la diligencia debida obligatoria en derechos humanos: Propuestas regulatorias y lecciones aprendidas*. Coruña: Colex, 2024; DEVA, Surya. Mandatory human rights due diligence laws in Europe: A mirage for rightsholders? *Leiden Journal of International Law*, Leiden, v. 36, n. 2, p. 389-414, 2023.

³⁷ BUENO, Nicolás; BERNAZ, Nadia; HOLLY, Gabrielle; MARTIN-ORTEGA, Olga. The EU Directive on Corporate Sustainability Due Diligence (CSDDD): the final political compromise. *Business and Human Rights Journal*, p. 1-7, 2024.

does it generate any liability for failure to create or implement it.

To date, due diligence laws are yet to be adopted in Latin America. Mexico and Peru have proposals from political parties and civil society, respectively.³⁸ In Mexico, the political party Movimiento de Regeneración Nacional (MORENA) proposed a bill for the General Law of Corporate Responsibility and Corporate Due Diligence in 2020.³⁹ In Peru, civil society published a Peruvian bill to regulate business activity and due diligence in human rights and environment in 2020.⁴⁰ Neither of these proposals have begun the legislative process in their respective countries.

The Mexican initiative aims to require micro, small, medium, and large enterprises to institutionalize a due diligence process to prevent, mitigate, identify, account for, and have processes in place to redress human rights violations or impacts. This initiative places special emphasis on mining and energy companies, among others, which will be subject to the highest standard of due diligence. The Peruvian bill, while not containing a particular approach like the Mexican initiative, covers both national companies and companies with foreign capital, private or public, regardless of factors such as size, location, structure, sector of activity, or owners, whose activities or operations are carried out and have an impact on the national territory of Peru. These companies must, among other things, prepare a Business Plan for human rights and environmental protection and a Corporate Policy Report. Both proposals, therefore, would lay down an enabling regulatory framework for renewable energy and strategic mineral extraction projects to be carried out respecting human rights and the environment.

³⁸ GUAMÁN, Adoración; TOLE MARTÍNEZ, Julián. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022.

³⁹ See: MARTÍNEZ CÁZARES, Germán. *Proyecto de decreto por el que se crea la Ley General de Responsabilidad Empresarial y Debida Diligencia Corporativa*. 2023. Available at: https://www.senado.gob.mx/65/gaceta_del_senado/documento/112449. Access on: 4 Oct. 2024.

⁴⁰ See: BILL regulating business activity and human rights and environmental due diligence. Available at: <https://derechosnemergencia.dhperu.org/wp-content/uploads/2022/11/PROYECTO-LEY-DEBIDA-DILIGENCIA.pdf>. Access on: 4 Oct. 2024.

4.3 Corporate climate litigation in Latin America

Since the adoption of the Paris Agreement, climate litigation has increased exponentially around the world.⁴¹ Latin America is no exception, as countries such as Brazil and Mexico are among the jurisdictions, apart from the United States, with the highest number of cumulative climate litigation cases.⁴² More than 80 cases are documented in the region involving material issues of climate change science, policy, and law, without counting cases in which climate change is a peripheral issue.⁴³ In this context of growing climate litigation in the region, IACHR Resolution 3/2021 declares:

States should adopt immediate measures to guarantee access to justice in environmental and climate matters of a judicial or administrative nature in accordance with the guarantees of due process, eliminate all barriers to its exercise and ensure free technical and legal assistance.⁴⁴

At the same time, it is a priority to strengthen the capacities of all judicial operators, justice assistants, the Public Prosecutor's Office, and control bodies to prevent, investigate, and punish situations of threats or violations of human rights related to climate change.

Today, climate litigation is pushing states to drive legislative and policy changes in adaptation and mitigation efforts and positively influence future climate negotiations. It is also increasingly focusing on companies as a strategy to make them bear the cost of damages and adaptation measures for their contributions to climate change, strengthen their climate commitments and policies in line with the goals of the Paris Agreement, or be held accountable for circulating misleading information about their climate action.⁴⁵

⁴¹ See: MOREIRA, Danielle de Andrade; GARRIDO, Carolina de Figueiredo; NEVES, Maria Eduarda Segovia Barbosa. Litigância climática e licenciamento ambiental: consideração da variável climática à luz dos tratados internacionais sobre o clima. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 61-79, 2022.

⁴² UNEP. *Global Climate Litigation Report: 2023 Status Review*. Nairobi: UNEP, 2023.

⁴³ SETZER, Joana; HIGHAM, Catherine. *Global trends in climate change litigation: 2023 snapshot*. Londres: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023.

⁴⁴ IACHR. *Business and Human Rights Report: Inter-American Standards*. Washington, D.C.: IACHR, 2019. par. 36.

⁴⁵ IGLESIAS MÁRQUEZ, Daniel. La responsabilidad de las empresas de respetar los derechos humanos en el contexto de la crisis climática. *Revista de Direito Internacional*, Brasília, v. 16, n. 3, p. 50-74, 2019.

In the Latin American region, several precedents have emerged in litigation against companies where climate change is used as the main argument or as a peripheral argument. For example, in Brazil, the case of São Paulo's Public Ministry against airlines in which a public civil action was brought to claim compensation for damages caused mainly by GHG emissions resulting from airline activities at the region's international airport. The airlines were requested to implement reforestation measures for the absorption of GHGs,⁴⁶ but the case was dismissed by the court.

Another category of climate litigation is just transition cases, where questions are raised about the fairness and equity of measures taken by states and companies in implementing their actions towards energy transition.⁴⁷ Considering the high number of transition and strategic mineral extraction projects in Latin America, this type of litigation has been on the rise in the region since 2016.⁴⁸

For example, the construction of large-scale wind farms by the French energy company EDF on the lands of the Zapotec indigenous people of Unión Hidalgo in Oaxaca, Mexico, has given rise to various intertwined actions, given that these projects do not benefit these communities and affect their individual and collective rights, particularly the right to free, prior, and informed consultation. In 2018, the project was suspended and a consultation procedure was ordered to be carried out

⁴⁶ See: Public Ministry of the State of São Paulo v. United Airlines and Others (Airline Companies Case). Available at: <https://climatecasechart.com/non-us-case/public-ministry-of-the-state-of-sao-paulo-v-klm/>. In a similar vein, the Brazilian Attorney General's Office filed a public civil action against Siderúrgica São Luiz Ltda. for climate damage allegedly caused by the continued use of illegally sourced coal in its units in the State of Minas Gerais. The case sought measures to compensate for GHG emissions and compensation for damages caused by the illegal activity. See, Federal Environmental Agency (IBAMA) v. Siderúrgica São Luiz Ltd. and Martins. Available at <https://climatecasechart.com/non-us-case/federal-environmental-agency-ibama-v-siderurgica-sao-luiz-ltda-and-martins/>.

⁴⁷ SAVARESI, Annalisa; SETZER, Joana. *A first global mapping of rights-based climate litigation reveals a need to explore just transition cases in more depth*. 2022. Available at: <https://www.lse.ac.uk/granthaminstitute/news/a-first-global-mapping-of-rights-based-climate-litigation-reveals-a-need-to-explore-just-transition-cases-in-more-depth/>. Access on: 4 Oct. 2024.

⁴⁸ SETZER, Joana; HIGHAM, Catherine. *Global trends in climate change litigation*. 2023 snapshot. Londres: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023.

meeting the highest standards to guarantee the rights of indigenous peoples in terms of free, prior, and informed consent.⁴⁹ Although the authorities attempted a consultation process, the organizations, as well as some special UN procedures,⁵⁰ have raised serious doubts about the neutrality, legitimacy, and appropriateness of such process, mired by confrontation and the insecurity of the people opposing the project. This case has been brought before French civil courts and the National Contact Point of the Organization for Economic Cooperation and Development (OECD), in both cases for the lack of an adequate due diligence process.⁵¹

Climate litigation therefore has the transformative potential to ensure that companies consider and address their climate impacts and even greater climate ambition through a variety of avenues.⁵² It can also reinforce and redress corporate climate policies and actions by putting human rights at the center in a manner that is fair, equitable, and inclusive for people in vulnerable situations. Despite the transformative potential of climate litigation to influence the corporate behavior and action regarding the climate and their energy transition policy, the various practical and procedural hurdles should not be overlooked.

Existing legal and policy frameworks on climate change and energy transition do not provide effective access to justice and redress.⁵³ In the Latin American region, some practical obstacles to climate litigation include *locus standi* requirements that make it very difficult for civil society organizations to bring actions on behalf

⁴⁹ See, *amparos* 376/2018, 377/2018 and 554/2018 issued by the First District Court in Federal Matters in the State of Oaxaca, Mexico.

⁵⁰ See, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico, A/HRC/39/17/Add.2.; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Mexico, A/HRC/35/32/Add.2.

⁵¹ BAILEY, Chloé; LAVITE, Cannelle; ALIBERT, Clara; TORRES, Guillermo; BADER, Michael. *De los derechos a la realidad: garantizar una aplicación de la ley francesa del deber de vigilancia centrada en las personas*. Lecciones aprendidas del caso Unión Hidalgo vs. EDF. Berlin: European Center for Constitutional and Human Rights, 2023.

⁵² See: PIRES, Julia Stefanello; PAMPLONA, Danielle Anne. *Perspectivas da litigância climática em face de empresas: o caso Milieudefensie et al. v. Royal Dutch Shell*. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 145-163, 2022.

⁵³ UNITED NATIONS GENERAL ASSEMBLY. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: extractive sector, just transition, and human rights*. A/78/155, 2023.

of people affected by climate change impacts or by an energy transition project, the absence of independent public actors to defend environmental climate issues through litigation, language restrictions for affected non-dominant communities, evidentiary obstacles (burden of proof), ignorance of climate issues by judicial actors, and ineffective mechanisms to enforce and monitor compliance with judgments. In addition, there are—sometimes multiple—legal and practical barriers in cases related to companies. According to the IACHR,⁵⁴ in many cases involving companies, «access to justice is not guaranteed, so people and communities in these contexts often have a low probability of obtaining effective remedy.» Among other reasons, this is due to the lack of political will to address cases involving large companies, coupled with the power of corporate influence or «corporate capture» or corruption. In many cases, the costs of accessing redress mechanisms can be high, and although free legal advice is available for some processes, it is not available beyond family or criminal matters, which do not necessarily cover business and human rights issues.

The implementation of the Inter-American Standards on Business and Human Rights could support climate litigation against companies, as well as eliminate or reduce the obstacles identified in this type of litigation in Latin America. Likewise, these Standards consider it a priority for states to guarantee access to justice and redress for climate-related damage. In this regard, states must establish accessible, affordable, timely, and effective mechanisms to challenge actions or omissions related to climate change and the energy transition that affect human rights in order to seek redress for damage arising from climate risks and corporate policies. In relation to the burden of proof, under the Inter-American Standards, states should evaluate the procedural rules applicable to evidence and the evidentiary stage where evidentiary obstacles are found, in order to balance the asymmetries and thus facilitate access to justice and adequate remedies. To this end, dynamic procedural burdens would allow the reversal of the burden of proof when key information in the case cannot be obtained without the company's cooperation or when it provides elusive or ambiguous answers to the accusations made against it. Likewise, in litigation against companies, plaintiffs should be offered legal aid and other finan-

⁵⁴ IACHR. *Business and Human Rights Report*: Inter-American Standards. Washington D.C.: IACHR, 2019. par. 131.

cing systems, allowing class actions and public-interest litigation. In turn, access to information must be ensured through mandatory disclosure legislation and procedural rules for obtaining evidence held by companies, including the reversal of the burden of proof where the company has knowledge or control of all or part of the information relevant to resolving a claim.⁵⁵

5 Conclusions

The fight against climate change and the negative impacts of the energy transition on people and the Earth system requires a multi-stakeholder and multi-level response. This article reaffirms that the responsibility of business to respect human rights includes a climate dimension. The fight against climate change in the Americas requires, on the one hand, greater climate ambition on the part of companies to prevent both the erosion of human rights and the risks associated with their climate impacts and, on the other hand, business responses to climate change mitigation and adaptation to be equitable, fair, inclusive, and based on human rights and environmental protection.

Climate change and the corporate responsibility to respect human rights and the environment have led to the creation of regional agendas on these key issues in the Americas. However, these agendas have developed in parallel with some sporadic convergences. In this regard, the IAHRs, under the mandate of the OAS General Assembly, has contributed with significant advances to the interplay between business, human rights, and climate change with a regional perspective. In this sense, the analysis in this article sets out a proposal based on inter-American standards for a framework that would enable state action so that companies can fulfill their responsibility to respect human rights and protect the environment in the context of the climate emergency and the energy transition in the Americas.

In relation to the IAHRs obligations, state intervention is essential to ensure that companies in the region increase their climate ambition and to prevent and redress not only the climate impacts of business activities that affect human rights but also to address the negative consequences of corporate responses to climate chan-

⁵⁵ IACHR. *Business and Human Rights Report*: Inter-American Standards. Washington D.C.: IACHR, 2019. par. 131.

ge, especially in energy transition actions and projects, which are reproducing the negative effects of extractivist models.

The enabling environment proposed in this article is based on greater coherence between the business and human rights agenda and the climate change agenda. In this sense, NAPs can help integrate the two areas. These are policy tools that states in the region have committed to develop and have the potential to include expectations for companies to respect human rights in the context of climate change and to put human rights at the center of energy transition actions and projects. In this sense, the energy transition in the Americas must involve not only emissions reductions, but must also be fair and respectful of human rights.

Within this context, states in the region must implement a smart combination of voluntary and mandatory measures to ensure that companies respect human rights taking the climate emergency into account. In this regard, due diligence laws should urge companies to consider the climate impacts associated with their business activities. Potential laws in the region should explicitly include the climate impacts and responsibilities of companies, or extend general due diligence obligations to cover GHG emissions as well. This is not only because of the implications of climate change for the region but also because it is a mandate established in the Inter-American Standards, which refer to climate change as a fundamental issue that is inextricably linked to business and human rights. Likewise, human rights and environmental due diligence is a fundamental piece of the puzzle to better integrate human rights considerations in renewable energy and strategic mineral extraction projects for the energy transition.

Finally, access to justice is key in the context of the climate emergency and energy transition in the Americas. Climate litigation has proven to be a strategy with significant potential to redirect companies' climate ambition, as well as to address the negative impacts of renewable energy and mineral extraction projects. However, to ensure that climate litigation has a positive impact and influence on companies operating in the region, state intervention in reducing and eliminating procedural and practical obstacles in these types of cases is a challenge yet to be overcome.

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Abstract

In the last decade, sanctions targeting companies have become a frequent reality, though their legality remains contested due to potential conflicts with state human rights obligations, rule of law, and international norms. Despite advancements in the business and human rights framework, sanctions receive limited focus and are often only considered as amplifying corporate risk or justifying withdrawal from certain business relations. However, these sanctions raise vital questions, including whether corporate responsibility to respect human rights extends to using leverage to mitigate risks even when the company is not directly implicated. This article examines these dilemmas through Ukraine's case, assessing how human rights sanctions against corporations intersect with the business and human rights principles, highlighting the need for sanctions to meet both substantive and procedural rule of law requirements.

Keywords: sanctions; business and human rights; corporate responsibility to respect human rights; rule of law; solidarity.

Resumo

Na última década, as sanções direcionadas a empresas tornaram-se uma realidade frequente, embora sua legalidade ainda seja contestada devido a possíveis conflitos com as obrigações estatais de direitos humanos, o Estado de Direito e as normas internacionais. Apesar dos avanços no marco de empresas e direitos humanos, as sanções recebem pouca atenção e, frequentemente, são tratadas apenas como fatores que ampliam riscos corporativos ou justificam a retirada de determinadas relações comerciais. No entanto, essas sanções levantam questões cruciais, incluindo se a responsabilidade corporativa de respeitar os direitos humanos se estende ao uso de influência para mitigar riscos, mesmo quando a empresa não está diretamente envolvida. Este artigo examina esses dilemas a partir do caso da Ucrânia, avaliando como as sanções de direitos humanos contra empresas se cruzam com os princípios de empresas e direitos humanos, destacando a necessidade de que

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tais sanções atendam tanto aos requisitos substantivos quanto processuais do Estado de Direito.

Palavras-chave: sanções; empresas e direitos humanos; responsabilidade corporativa de respeitar os direitos humanos; Estado de Direito; solidariedade

1 Introduction

In the past decade, sanctions against companies, intended as a means of influencing behavior rather than as a measure of legal liability and punishment, have become almost a daily reality. Nevertheless, their legality remains contested in academic and geopolitical discussions, primarily due to concerns about their compliance with the state’s human rights obligations, the requirements of the rule of law, and the principles of international law. Recent events – including Russia’s war against Ukraine, mass violations of Uyghurs’ rights in China, the brutal suppression of political protests, and the repression of political opposition in Belarus, along with the military coup in Myanmar, have prompted new waves of sanctions from numerous countries, including the US, EU, Canada, Australia, Great Britain, Japan, and other countries. In Ukraine, the Law “On Sanctions” was adopted in 2014, following the annexation of Crimea by Russia and the occupation of the Eastern part of Ukraine. It has been actively applied since February 24, 2022, in response to Russia’s full-scale invasion of Ukraine. Currently, Ukraine leads in the number of sanctions applied to companies, with 4,882 companies listed¹).

The business and human rights literature (hereafter referred to as BHR) gives very limited attention to sanctions, merely pointing out that the application of sanctions is one of the factors that should be taken into consideration when assessing the overall environment of a company (or its supply chains) and significantly increases the risks of the company’s involvement in negative impacts on human rights. Relevant BHR policy papers and guides emphasize that “the imposition of

sanctions may be a useful indicator, but not a substitute, for a business to exercise heightened human rights due diligence”². At the same time, the “due diligence framework of responsible business conduct standards can help enhance sanctions compliance when it is a legal obligation by improving visibility over complex business relationships that increase the risk of sanctions evasion.”³

Sanctions literature rarely includes a BHR perspective. In practice, states that apply sanctions often refer to the fact that sanctions are a tool to influence the behavior of companies in situations where the company itself is beyond the jurisdiction of the state. Without knowing it, the states are in search of a solution to one of the main challenges of the BHR framework: what appropriate means could be used by states to protect its population against human rights abuses by business enterprises out of state’s jurisdiction?

This article explores the dilemmas associated with applying human rights sanctions against companies through a BHR lens, underscoring the need for sanctions that align with substantive and procedural rule of law standards. In particular, it argues that sanctions must be proportionate to a company’s involvement in an adverse impact on human rights – the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship, and should be proportional to the kind of such involvement.

The second section of this article offers a brief history of the application of economic sanctions against states and outlines key concerns related to their implementation. We review the relevant academic literature, policy papers, reports from human rights organizations, and documents prepared by UN agencies and institutions. Section three is devoted to human rights sanctions against companies and overviews existing practices of their application with indication the rule of law

¹ REGISTER of sanctions of legal entities: complete list, War and sanctions. *Sanctions.nazk.gov.ua*, [2023]. Available at: https://sanctions.nazk.gov.ua/en/sanction-company/?country=ua&date_from=10-15-2008&date_to=09-23-2023#filters. In comparison, the EU applied sanctions to just over 500 companies, UK – around 230 companies, USA – 1700, Canada – 480, Switzerland – 650, Australia – 170, Japan – 400.

² UNITED NATIONS DEVELOPMENT PROGRAMME. Heightened Human Rights Due Diligence for business in conflict-affected contexts: a guide. *UNDP*, 16 June 2022. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

³ OECD Responsible business conduct implications of Russia’s invasion of Ukraine. *OECD*, 2023. Available at: <https://www.oecd-ilibrary.org/docserver/t222a4d1-en.pdf?expires=1692376231&id=id&accname=guest&checksum=23FF17867BC70CE088890FF70EBDA70F>.

concerns. Section four discovers the business and human rights concept which is important to be applied for rethinking human rights sanctions regimes against companies. The state duty to protect, as described in the UN Guiding Principles on Business and Human Rights, is taken for building argumentation of lawfulness of human rights sanctions against companies. The fifth section discovers five main dilemmas of applying human rights sanctions against companies by Ukraine: 1) The criteria of effectiveness of sanctions against Russian companies; 2) Payment of taxes to the budget of the Russian Federation as a reason of sanctions application; 3) The issue of essentiality of services and goods that are supplied by companies operating in Russia to justify the impossibility of applying sanctions against them; 4) (Not)use of leverage by companies beyond of involvement in human rights violations; 5) Western manufacturers' supplies of components for weapons to Russia. This section is based on the analysis of legislation and its interpretation by the National Security and Defense Council of Ukraine (the body that makes decisions on the application of sanctions, which are put into effect by the Decree of the President of Ukraine) that was discovered by the sub-structured interview with its representatives. In the conclusions, we apply business and human rights framework for rethinking the human rights sanctions against corporations for ensuring sanctions compliance with the rule of law.

2 Autonomous economic sanctions: brief history and current concerns

2.1 History of economic sanctions application

The history of economic sanctions' application by states and quasi-state entities dates back at least to ancient Greece. These early attempts at deploying economic coercion typically occurred in conjunction with the use of military force. Researchers provide various examples, such as in 492 BC when the Greek city-state of Aegina took non-military coercive action against Athens by seizing an Athenian ship and holding its passengers hostage. Throughout history, states have

employed different grounds to impose economic sanctions.⁴

The term "sanctions" is not, strictly speaking, a term of art in public international law.⁵ There is roughly general consensus that sanctions are measures that one party (the sender) takes to influence the actions of another (the target).⁶

Despite some differences in approaches, supporters of sanctions primarily emphasize that these measures are not punitive; rather, they are imposed to bring about a change in policy or activity by the target party (or parties) responsible for the behavior in question. This behavior may include not respecting international law or human rights, or pursuing policies or actions that do not conform to the rule of law or democratic principles.⁷

In the 20th century, economic sanctions became a popular tool in international relations. During World War I, the Allied and Associated Powers, led by Britain and France, initiated an unprecedented economic war against the German, Austro-Hungarian, and Ottoman empires.⁸ The Trading with the Enemy Act of 1917 was the first law to use political causes (armed conflict) to restrict economic relations with foreign countries.

President Wilson truly believed that economic pressure was a viable alternative to the use of force. As a prophet of economic coercion, Wilson assumed that:

⁴ The practice of justifying economic restrictions on the grounds of human rights violations dates back to the protection of religious minorities in medieval times. Indeed, Kern Alexander provides an example of trade restrictions imposed by Protestant Swiss cantons, led by Zurich, on Catholic cantons for violating their treaty obligation to tolerate their Protestant minorities. See ALEXANDER, Kern. *Economic Sanctions: law and public policy*. [S. l.: s. n.], 2007.

⁵ CRAWFORD, J. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A retrospect. *The American Journal of International Law*, v. 96, n. 4, p. 874-890, Oct. 2002. p. 875.; UNITED NATIONS. *Report of the International Law Commission on the Work of its Fifty-third Session*. 2001. 2 Yearbook of the UN International Law Commission, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (part 2) (Commentary to the Articles on State Responsibility). p. 128.;

ZOLLER, E. *Peacetime Unilateral Remedies: An Analysis of Countermeasures*. [S. l.: s. n.], 1984. Available at: <https://brill.com/peacetime-unilateral-remedies-analysis-countermeasures>. p. xv-xvii.

⁶ EATON, J.; ENGERS, M. P. *Sanctions*. NBER Working Paper, n. w3399, 1990.

⁷ COUNCIL OF THE EUROPEAN UNION. General Secretariat of the Council. Sanctions Guidelines. *Council of the European Union*, Brussels, 4 May 2018. Available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>.

⁸ MULDER, N. *The economic weapon*. London: Yale University Press, 2022. p. 78.

“the boycott is what is substituted for war.”⁹ Later, the drafted Covenant of the League of Nations stipulated that if any state violates the peace, other states should either provide military and naval force or, as an alternative, impose financial and economic restrictions.¹⁰

The effectiveness of economic warfare during World War I encouraged statesmen to put significant faith in such measures as potential mechanisms for enforcing the rules of a new world order. In his book *After the Great War: Economic Warfare and the Promise of Peace in Paris 1919*, Phillip Dehne argues that the most significant success of the Paris Peace Conference concerned economic warfare,¹¹ “with the hope that the threat of facing universal economic sanctions would lead countries to reconsider before launching the war.”¹² What made interwar sanctions a truly new institution was this coercive exclusion could take place *in peacetime*.¹³ But with the outbreak of World War II, states started to employ various economic measures to undermine the economic strength of the belligerents as well.¹⁴

One of the key results of the World War II was establishing of the United Nations in an attempt to maintain international peace and security and to achieve cooperation among nations on economic, social, and humanitarian problems. Under Article 41 of the UN Charter, sanctions measures encompass a broad range of enforcement options that do not involve the use of armed force:

the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means

⁹ comp HAMILTON, F. *Woodrow Wilson's Case for the League of Nations*. 2. ed. New Jersey: Princeton University Press, 1923. p. 72.

¹⁰ MILLER, D. H.; BUTLER, N. M. *The Drafting of the Covenant*. New York: G. P. Putnam's Sons, 1928. p. 6.

¹¹ DEHNE, P. A. *After the Great War: Economic Warfare and the Promise of Peace in Paris 1919*. [S. l.]: Bloomsbury Academic, 2019. p. 5.

¹² DEHNE, P. A. *After the Great War: Economic Warfare and the Promise of Peace in Paris 1919*. [S. l.]: Bloomsbury Academic, 2019. p. 6.

¹³ MULDER, N. *The economic weapon*. [S. l.]: Yale University Press, 2022. p. 49.

¹⁴ BOGDANOVA, I. *Unilateral sanctions in international law and the enforcement of human rights: The Impact of the Principle of Common Concern of Humankind*. [S. l.]: Brill/Nijhoff, 2022. p. 32.

of communication, and the severance of diplomatic relations.¹⁵

Since 1966, the Security Council has established 31 sanctions regimes.¹⁶ Security Council sanctions have taken a number of different forms (from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions), in pursuit of a variety of goals (support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation).¹⁷

The post-WWII word shows that sanctions may be imposed by states either in implementation of measures to implement United Nations Security Council resolutions or on an autonomous basis, i.e. on the own initiative of a state or a group of states.

2.2 Debate on the lawfulness of autonomous economic sanctions

The emergence of such a tool as the UN Security Council sanctions has intensified the debate over whether states can impose autonomous (unilateral) economic sanctions. These are restrictive economic measures imposed by an individual state against another state and/or its government officials, bodies, legal entities, and foreign nationals. They are implemented in pursuit of political objectives without any prior authorization from an international or regional organization.¹⁸

Starting from the 1970s, the United States framed sanctions as a part of a broader effort to promote human rights abroad.¹⁹ At the same period of time, the EU has imposed unilateral sanctions (restrictive measures) against a number of third States due to the serious human rights violations.²⁰

¹⁵ UNITED NATIONS. Security Council. *Sanctions*. UN. Available at: <https://www.un.org/securitycouncil/sanctions/information>.

¹⁶ UNITED NATIONS. Security Council. *Sanctions*. UN. Available at: <https://www.un.org/securitycouncil/sanctions/information>.

¹⁷ UNITED NATIONS. Security Council. *Sanctions*. UN. Available at: <https://www.un.org/securitycouncil/sanctions/information>.

¹⁸ BOGDANOVA, I. *Unilateral sanctions in international law and the enforcement of human rights: The Impact of the Principle of Common Concern of Humankind*. [S. l.]: Brill/Nijhoff, 2022. p. 5.

¹⁹ MARTIN, L. L. *Coercive cooperation: Explaining Multilateral Economic Sanctions*. [S. l.]: Princeton University Press, 1994. p. 101-102.

²⁰ SUMMARIES of EU Legislation: Restrictive measures against serious human rights violations and abuses. *EUR-LEX*. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/restrictive-measures-against-serious-human-rights-violations-and-abuses.html>.

As opponents of unilateral economic sanctions argue, at first glance, such sanctions might appear to challenge the principles of state sovereignty and the rule of law. Consequently, unilateral sanctions could be seen as a challenge to the existing international legal order anchored in the UN Charter. According to the Charter, sanctions should be imposed by the UN Security Council (UNSC) following a determination that there is a threat to or a breach of international peace and security. In contrast to the multilateral process of UNSC action, unilateral sanctions involve only one state making the determination that there has been a violation of international law or a breach of an international obligation.²¹ These sanctions are imposed by a State through application of its national legislation, which are *prima facie* extraterritorial in nature and against the established principles of jurisdiction under international law. The doctrine concerning extraterritorial application of national legislation, though not well settled, endorses the basic principle of international law that all national legislations are territorial in character.²²

The European Union, the United States, Canada, Australia and a number of other states have traditionally been among the staunchest supporters of unilateral human rights sanctions, while some countries lodge formal protests to such coercive measures on behalf of the international community.²³ The issue of human rights sanctions application should be considered through the lenses that

the relationship between human rights and state sovereignty should and can be complementary. State sovereignty and independence should serve not as a hurdle to, but as a guarantee for the realization of the fundamental human rights of the state's nationals. If gross human rights violations are not solved by a state itself, it is no longer solely the problem of the state concerned. Fundamental human rights have acquired a status of universality and the international community should accept this.²⁴

This universality of fundamental human rights implies several key principles that should guide the international community:

First, references to the principle of respect for state sovereignty cannot be used by states to justify their immunity from interference by other states when such interference is aimed at preventing or stopping gross fundamental human rights violations or concomitant threats to the national security of another state. *Second*, the introduction of the UN Security Council sanctions is designed to significantly increase the impact on the state that poses a threat to peace and security, and coordinated actions of the world community can ensure greater effectiveness of such a measure. However, this does not exclude the possibility (and necessity) of applying this measure autonomously. Especially obvious is the need to apply autonomous sanctions in a situation where a threat to peace and security comes from a state that is a permanent member of the UN Security Council and has the right to veto. *Third*, the question of the lawfulness of autonomous economic sanctions should not be raised when sanctions are imposed by the state in self-defense (as in the case of Ukraine) in response to an internationally wrongful act directed against its state sovereignty, national security and threatening human rights in its territory. The state is obliged to take all possible measures to protect human rights. Furthermore, referring to the previous paragraph, human rights “are matters of international concern that justify intervention by the international community”,²⁵ and case of Ukraine is a vivid example of what “if gross human rights violations are not solved by a state itself, it is no longer solely the problem of the state concerned”.²⁶

In this sense, the international community should show solidarity and take measures in its power to help protect human rights on the territory of Ukraine from the threat posed by the Russian full-scaled invasion (“responsibility to protect” (R2P): in his 2012 report on the R2P, the UN Secretary-General recognised the importance of sanctions as part of a “timely and decisive response” to atrocity crimes).²⁷ In 2022, Justices

²¹ MAROSSA, A. Z.; BASSETT, M. R. *Economic Sanctions under International Law*. [S. l.]: T.M.C. Asser Press eBooks, 2015. p. XV.

²² MOHAMAD, R. *Unilateral Sanctions in International Law: A quest for Legality*. [S. l.]: T.M.C. Asser Press eBooks, 2015. p. 41.

²³ BOGDANOVA, I. *Unilateral sanctions in international law and the enforcement of human rights: The Impact of the Principle of Common Concern of Humankind*. [S. l.]: Brill/Nijhoff, 2022. p. 61.

²⁴ WALLING, C. B. Human Rights Norms, State Sovereignty, and Humanitarian Intervention. *Human Rights Quarterly*, v. 37, n. 2, 2015. p. 384.

²⁵ CLEVELAND, S. Human Rights Sanctions and International Trade: A Theory of Compatibility. *Journal of International Economic Law*, v. 5, iss. 1, p. 133–189, 2002. p. 133.

²⁶ WALLING, C. B. Human Rights Norms, State Sovereignty, and Humanitarian Intervention. *Human Rights Quarterly*, v. 37, n. 2, 2015. p. 385.

²⁷ HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Spe-

Richard Humphreys and Lauma Paeglkalna published a paper outlining an escalating series of “non-warfighting measures” that could be pursued by States in relation to Ukraine.²⁸ That paper proposed a five-part typology of options that speaks to the question of what States might do both to honour their R2P in Ukraine, and to fulfil their obligation to cooperate to end serious breaches of peremptory norms, in particular economic sanctions.²⁹

2.3 Humanitarian consequences and human rights impact of economic sanctions

The key concern raised regarding economic sanctions, including UN Security Council sanctions, is that they often have adverse humanitarian consequences. Instead of impacting the target regime, economic sanctions often affect the population at large, particularly the most vulnerable in the targeted society. Considerable attention has been devoted to assessing the humanitarian and human rights effects of sanctions and exploring ways to make them more humane and better targeted.³⁰

According to the OHCHR, unilateral coercive measures can impact the full enjoyment of human rights set forth in the Universal Declaration of Human Rights, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and necessary social services.³¹ Since 1996, the UN General Assembly has regularly adopted resolutions entitled “Human rights and unilateral coercive measures” that condemn the use of

unilateral sanctions and underline their incompatibility with the states’ human rights obligations.

In September 2021, during the 48th regular session of the Human Rights Council, a biennial panel discussion on unilateral coercive measures and human rights was conducted with the participation of the President of the Human Rights Council and the United Nations High Commissioner for Human Rights. Prior to this, decisions by several United Nations organs and human rights treaty bodies, along with studies by United Nations agencies, had outlined legal limitations on the imposition of unilateral coercive measures concerning rights essential for dignity and survival. Additionally, numerous declarations and resolutions have emphasized the need for special measures to alleviate the negative impact of such measures on the human rights of women, children, and other vulnerable groups.³²

However, characterizing the statements of the United Nations High Commissioner for Human Rights or UN agencies as being against the imposition of unilateral sanctions and denying their lawfulness may be considered manipulative. These institutions call for the consideration of the human rights impact of sanctions and the avoidance of adverse human rights consequences to prevent people from being deprived of their basic means of survival.³³ The Committee on Economic, Social and Cultural Rights has concluded that human rights should be fully taken into account when designing sanctions regimes.³⁴ Effective monitoring should be undertaken throughout the period that sanctions are in force, and the external entity imposing sanctions has an obligation to take steps, both individually and through international assistance, to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.³⁵ The Special Rapporteur on the

cial Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>. p. 9.

²⁸ HUMPHREYS, R.; PAEGLKALNA, L. Combat Without Warfighting: Non-Belligerent actors and the Russian invasion of Ukraine. *Social Science Research Network*, 28 Mar. 2022.

²⁹ BARBER, R. What does the “Responsibility to Protect” require of states in Ukraine? *Journal of International Peacekeeping*, v. 25, n. 2, 2022. p. 158.

³⁰ SIMONEN, K. Economic sanctions leading to human rights violations: Constructing legal argument. In: MAROSS, Ali; BASSETT, Marisa (ed.). *Economic Sanctions and International Law*. Unilateralism, Multilateralism, Legitimacy and Consequences. T.M.C. [J. I]: Asser Press eBooks, 2015. p. 180;

OHCHR. *Sub-Comm’n Res. 2000/1: Human Rights and Humanitarian Consequences of Sanctions, Including Embargoes*. UN Doc. E/CN.4/Sub.2/RES/2000/1.

³¹ OHCHR. *OHCHR and unilateral coercive measures*. Available at: <https://www.ohchr.org/en/unilateral-coercive-measures>.

³² OHCHR. *High Commissioner calls for critical re-evaluation of the human rights impact of unilateral sanctions*. Available at: <https://www.ohchr.org/en/2021/09/high-commissioner-calls-critical-re-evaluation-human-rights-impact-unilateral-sanctions>.

³³ OHCHR. *High Commissioner calls for critical re-evaluation of the human rights impact of unilateral sanctions*. Available at: <https://www.ohchr.org/en/2021/09/high-commissioner-calls-critical-re-evaluation-human-rights-impact-unilateral-sanctions>.

³⁴ CESCR. *General Comment 8: The Relationship between Economic Sanction and Respect for Economic, Social, and Cultural Rights*, para 7, U.N. Doc. E/C.12/1997/8 (12 December 1997).

³⁵ OHCHR. A/HRC/19/33: Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such

negative impact of unilateral coercive measures on the enjoyment of human rights has repeatedly highlighted the importance of a systematic monitoring and assessment of the human rights impact of unilateral sanctions and the clear identification of the targets of such measures.³⁶ On the initiative of the Special Rapporteur, a tool to better identify the effects that unilateral sanctions have on human rights was developed.³⁷ It consists of a non-exhaustive set of questions and indicators that can be readily used, by governments, international and regional organisations, civil society, academia and others who observe or have information about situations in which sanctions are harming human rights. This tool proposes the list of human rights and assess if sanctions impact their availability: right to health (physical & mental), right to food, water & sanitation, education, cultural rights, employment and social protection, services and infrastructure, humanitarian assistance. And if there is an impact, the items concerned and the populations most affected should be indicated.³⁸

To conclude, human rights law does prohibit comprehensive economic sanctions regimes that rise to the level of causing starvation among the population. Star-

vation in this context is not defined narrowly as directly causing widespread death from lack of food and water, but rather is the process of creating conditions of severe malnutrition, limited access to water and to basic sanitation, and denial of basic medicines.³⁹ This is consistent with the fact that even in famine most fatalities are not caused by caloric deprivation itself, but rather by the spread of disease made possible by the conditions of malnutrition, lack of sanitation, and shortage of clean water. International law “does impose a limit . . . in the extreme circumstances where unilateral sanctions rise to the level of depriving a people of its own means of subsistence or threatens the starvation of the state.”⁴⁰ However, if the sanctions do not reach such a degree of negative impact on human rights, they can be considered lawful from the point of view of international human rights law.

3 Human rights sanctions against companies

Researchers on the sanctions application history identify various stages in the development of this instrument. A distinctive feature of the current stage, many call the intensification of the application of sanctions against non-state actors.⁴¹ Until 2012, sanctions were not systematically imposed on human rights violators and were applied to countries rather than individuals.⁴²

Sanctions against non-state actors, in particular companies, are called “smart” or “targeted” sanctions – sanctions directed against individuals, groups or entities,⁴³ and unlike comprehensive sanctions imposed

measures. *OHCHR*, 2012. Available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc1933-thematic-study-office-united-nations-high-commissioner-human>.

³⁶ OHCHR. Call for input: Draft Monitoring & Impact Assessment Tool. *OHCHR*, 2023. Available at: <https://www.ohchr.org/en/calls-for-input/2023/call-input-draft-monitoring-impact-assessment-tool>.

³⁷ OHCHR. Call for input: Draft Monitoring & Impact Assessment Tool. *OHCHR*, 2023. Available at: <https://www.ohchr.org/en/calls-for-input/2023/call-input-draft-monitoring-impact-assessment-tool>.

³⁸ In this context, a six-pronged test to evaluate sanctions was proposed: (i) Are the sanctions imposed for valid reasons (legitimate aim)? (ii) Do the sanctions target the relevant parties? (iii) Do the sanctions target the relevant goods or objects? Sanctions should not interfere with the free flow of humanitarian goods and they should not target goods required to ensure the basic subsistence of the civilian population, nor essential medical provisions or educational materials of any kind. (iv) Are the sanctions reasonably time-limited? (v) Are the sanctions effective? (vi) Are the sanctions free from protests arising from violations of the “principles of humanity and the dictates of the public conscience”? BOSSUYT, M. J. The adverse consequences of economic sanctions on the enjoyment of human rights: Working paper. *United Nations Digital Library System*, 2000. Available at: <https://digitallibrary.un.org/record/419880>.

Some of the components of the proposed test are questionable (in particular, effectiveness of sanctions and their freedom from protests). At the same time, this test overlooks procedural dimension of the lawfulness of sanctions, pays limited attention to the impacts of sanctions on human rights and does not consider different forms of involvement of the relevant parties to the wrongdoing actions.

³⁹ CONLEY, B.; DE WAAL, A. The purposes of starvation. *Journal of International Criminal Justice*, v. 17, n. 4, p. 700-701, 2019.; DANNENBAUM, T. Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on blockade. *SSRN*, 2021. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784220.

⁴⁰ JIB/JAB: The Laws of War Podcast. Episode 25: Aslı Bâli on Economic Sanctions and the Laws of War. *JIB/JAB*, 15 July 2021. Podcast. Available at: <https://jibjabpodcast.com/episode-25-aslibali-on-economic-sanctions-and-the-laws-of-war/>.

⁴¹ MARTIN, C. Economic Sanctions under International Law: A guide for Canadian policy. *Social Science Research Network*, 2021.

⁴² ROBERTSON, G. Bad people: and how to be rid of them. *Random House Australia*, 2021. p. 22.

⁴³ GALTUNG, J. On the Effects of International Economic Sanctions, With Examples from the Case of Rhodesia. *World Politics*, v. 19, n. 3, 1967. p. 378.

against states, such sanctions are considered to pose a significantly lower risk of negative impact on human rights for local people⁴⁴ (although such risks are also present and should be assessed). However such sanctions are restrictions on human rights imposed on a specific person, and therefore must comply with the “classic test” of the lawfulness of human rights restrictions: the legitimate aim of the restriction, the imposition of a restriction in the order prescribed by law, the proportionality of the restriction.

In 2012, the United States enacted the Sergei Magnitsky Rule of Law Accountability Act of 2012. In 2016, Congress enacted the Global Magnitsky Human Rights Accountability Act. This act entitles the US president to impose sanctions against any foreign national if there is credible evidence that this person committed or is complicit in gross violations of internationally recognised human rights and against any foreign government official responsible for acts of significant corruption. As of December 10, 2022, the United States has designated a total of 450 foreign persons (individuals and entities) pursuant to this sanctions program, which targets those connected to serious human rights abuse, corrupt actors, and their enablers.⁴⁵

A number of other states followed this example and imposed similar human rights sanctions. In December 2020, the European Union established a framework to impose sanctions (restrictive measures) against individuals, legal persons, entities or bodies responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred (the EU Global Human Rights Sanctions Regime). It applies to acts such as genocide, crimes against humanity and other serious human rights violations or abuses. Other human rights violations or abuses can also fall under the scope of this sanctions regime, if they are widespread, systematic or otherwise of serious concern as regards the objectives of the EU common foreign and security policy.⁴⁶ As the official website em-

phasizes, the EU restrictive measures are not punitive although they are called “sanctions”. They are intended to bring a change in bad or harmful policies or activities by targeting the non-EU countries, including organisations and individuals.⁴⁷

The coalition of countries supporting Ukraine (G7, EU countries and some of Ukraine’s neighbours) is working to support Ukraine across a number of areas, including sanctions and economic measures. Russia’s full-scale invasion of Ukraine has led to several waves of sanctions packages and the creation of a “sanctions coalition” of countries that are trying to harmonize sanctions among themselves. But before moving on to consider what dilemmas Ukraine faces in applying sanctions against companies (other countries of the coalition face similar dilemmas), let’s consider a more general question – the application of any type of sanctions must comply with a number of substantive and procedural requirements, as sanctions applied in such a way that they undermine the rule of law weaken the credibility and legitimacy of the sanctions instrument.

The substantive rule of law requirements for the imposition of sanctions are following:

3.1 A legitimate aim of imposing sanctions and justification in the decision

States have a fairly wide margin of appreciation and the decision to apply sanctions is considered a political decision. But in any case, it is necessary to single out a general legitimate goal (that is, for what purpose sanctions are applied in general) and a specific one (for what purpose sanctions are applied to a specific individual or legal entity). In particular, a general goal will not be considered legitimate if the application of sanctions is aimed at obtaining an economic advantage of one state over another, or if sanctions serve the purpose of punishment (since there is an institution of legal liability). The EU calls such objectives to adopt sanctions: safeguarding EU’s values, fundamental interests, and security; preserving peace; consolidating and supporting democracy, the rule of law, human rights and the principles of international law; and preventing conflicts

⁴⁴ DREZNER, D. W. Sanctions sometimes smart: targeted sanctions in theory and practice. *International Studies Review*, v. 13, n. 1, 2011. p. 105.

⁴⁵ 2022 Global MagnitSky Human Rights Accountability Act Annual Report. *Federal Register*, 31 Mar. 2023. Available at: <https://www.federalregister.gov/documents/2023/03/31/2023-06749/2022-global-magnitsky-human-rights-accountability-act-annual-report>.

⁴⁶ EU SANCTIONS MAP. *Lists of persons, entities and items*. Available at: <https://www.sanctionsmap.eu/#/main/details/50/lists?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D>.

⁴⁷ COUNCIL OF THE EUROPEAN UNION. General Secretariat of the Council. Sanctions Guidelines. *Council of the European Union*, Brussels, 4 May 2018. Available at: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INTE/en/pdf>.

and strengthening international security. The specific purpose of sanctions is to change the behavior of the person or entity to whom such sanctions are applied.

In addition, the justification for the legitimacy of the purpose of applying sanctions should include an explanation of the impossibility of applying other measures (in particular, bringing to legal liability persons who create or are in some way involved in creating a threat to national security, democracy, the rule of law, human rights).

The most common situation is when the application of sanctions is justified by the presence of sanctioned persons beyond the jurisdiction of the state (in particular, officials in Ukraine explain the spread of sanctions on certain individuals and companies by the impossibility of applying the usual legal mechanisms because these individuals and companies are beyond the sphere of effective control of Ukraine, in particular in the temporarily occupied territory).⁴⁸

In addition, the principle of solidarity also says that if a state cannot independently ensure the protection of human rights on its territory because of the actions of another state other states should also use all possible measures to change the behavior of actors who are involved in the negative impact on human rights. International solidarity is not limited to international assistance and cooperation, aid, charity or humanitarian assistance. International solidarity should be understood as a broader concept that includes sustainability in international relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens, refraining from doing harm or posing obstacles to the greater wellbeing of others.⁴⁹

3.2 Human rights impact assessment and elimination of risks of leveling access to basic human rights (the basic subsistence) for the local population or groups

This requirement is a direct manifestation of the humanitarian consequences of economic sanctions, which were disclosed above. There is increasingly widespread recognition that economic sanctions must, at a minimum, be subject to *ex ante* human rights impact assessments, as well as human rights and humanitarian waivers and exceptions built into the legal framework of the regime. For instance, it is now widely accepted that comprehensive trade sanctions regimes ought to have humanitarian exceptions, permitting the export/import of basic food, medicine, and other goods deemed essential for the health and welfare of the population in the target state. Such exceptions were developed in response to a growing body of analysis that documented the serious and extensive humanitarian consequences of comprehensive sanctions regimes, such as those imposed on Iraq. The existing legal regulation of the application of sanctions, including the sanctions regime in Ukraine, does not include human rights assessment of the sanctions.

3.3 Balancing a legitimate aim (public interest) with the individual rights of a concrete person to whom sanctions are applied

This requirement is reflected in the practice of the ECtHR. The ECtHR considered only three cases on the application of sanctions, all of which were adopted in compliance with the resolutions of the UN Security Council: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*,⁵⁰ *Nada v. Switzerland*, and *Al-Dulimi and Montana Management Inc. v. Switzerland*.⁵¹ In all three cases, the ECtHR concluded that the interference with human rights was provided for by law and pursued a legitimate

⁴⁸ According to the interview with the National defense and security council of Ukraine.

⁴⁹ OHCHR. Independent Expert on human rights and international solidarity. *OHCHR*. Available at: <https://www.ohchr.org/en/special-procedures/ie-international-solidarity#:~:text=International%20solidarity%20is%20the%20expression,rights%20to%20achieve%20common%20goals>.

⁵⁰ EUROPEAN COURT OF HUMAN RIGHTS. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Judgment 30/06/2005. Information Note on the Court's case-law No. 76. *ECHR*, June 2005. Available at: <https://hudoc.echr.coe.int/fre?i=002-3835>.

⁵¹ EUROPEAN COURT OF HUMAN RIGHTS. *Al-Dulimi and Montana Management Inc. v. Switzerland* - 5809/08, Judgment 26/11/2013. Information Note on the Court's case-law 168. *ECHR*, Nov. 2013. Available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-9241&filename=002-9241.pdf&TID=thkbhnlzk>.

aim, which are two prerequisites for compliance with the provisions of the Convention. Although the three cases concerned different rights under the Convention, the ECtHR followed the same approach in determining whether there was a violation of the interference with those rights; whether reasonable links of proportionality were ensured between the measures applied and the objective sought to be achieved.

Therefore, in each case it is important to consider whether a fair balance was observed between the requirements to ensure the general interests and the interests of the plaintiff. In clarifying this, the ECtHR also recognized that the States concerned enjoyed a discretion as to the means to be used and as to whether the consequences were justified by the general interest in order to achieve the desired goal.

3.4 Proportionality and efficiency

Traditionally, when it comes to any restrictions on human rights, there is a requirement to observe proportionality between the legitimate aim and the ways in which it is achieved. An important feature of the application of sanctions is their focus on changing the behavior of the person to whom they are applied. In this regard, proportionality should take into account the form of involvement of a non-state actor in illegal actions in connection with which the state applies sanctions. There is a gap in application of human rights sanctions against companies as the form of their involvement in illegal actions is not taken into consideration.

The effectiveness of sanctions must also be considered in terms of their purpose to change the behaviour of addressee of sanctions. This provides reasonable argumentation for some derogations from guarantees that are traditionally applied in a situation of application of human rights restrictions. One such derogation may be a failure to notify the person / entity that sanctions are being considered to be applied and not give the opportunity to be heard at that stage. Such a derogation is explained by the fact that otherwise the effectiveness of the sanction will be completely leveled, and the legitimate aim of changing the behavior of a person or entity will not be achieved. However, in order to maintain proportionality, this derogation must be compensated by procedural safeguards,⁵² in particular, by ensuring

the possibility of delisting a company without going to court (by providing the necessary explanations and evidence of non-involvement in the wrongdoing action or evidence of a change in behavior to the authority that adopted the decision to impose sanctions), as well as establishing judicial control over the application of sanctions.

3.5 The procedural rule of law requirements to the sanction regimes" application

The substantive rule of law requirements should be supplemented with procedural requirements:

- 1) the procedure for the application of sanctions provided for by law;
- 2) the due process, taking into account the criteria of effectiveness, in particular the existence of effective judicial control over the application of sanctions as an important component of ensuring a fair balance of interests; the right to be heard;
- 3) the possibility of de-listing without application of the judicial procedure.⁵³

the European Convention on human rights. *USAID Activity Office. Office of Democracy and Governance, 2023.*

⁵³ Bardo Fassbender revealed the following problems: Designated individuals were not informed before being listed and, consequently, were deprived of the right to challenge their listing; Listed individuals were deprived of the right to request de-listing directly from the sanctions committee; Listed individuals were not granted a hearing after a de-listing request was filed; The absence of legal rules that would oblige the sanctions committee to approve a de-listing request if specific conditions were met. FASSBENDER, B. Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure That Fair and Clear Procedures Are Made Available to Individuals and Entities. *Study Commissioned by the United Nations Office of Legal Affairs, 2006.*

For example, the EU constantly monitors situations in connection with which restrictive measures have been introduced. Decisions of the EU Council on the introduction of restrictive measures are valid for 12 months. Depending on the development of the situation, the EU Council may decide to prolong these measures, expand them, adjust, suspend or cancel them. In the case that a decision is made to cancel the sanctions, or there is no prolongation, all restrictive measures cease to be in force. In turn, the regulations adopted by the Council have no time limit. Thus, the restrictive measures of the EU are a fairly flexible mechanism for responding to undesirable actions of third countries, as well as individuals and legal entities whose actions threaten the interests of the Union and its member states. EUROPEAN UNION COMMITTEE. *The legality of EU sanctions. 11th Report of Session 2016-17, HL Paper 102. 2017.*

⁵² MCBRIDE, J. Seizure of Assets under the law on sanctions and

4 Business and human rights concept to enhance compliance of sanctions against companies with the rule of law requirements

In recent years, the development of BHR instruments and academic literature, following the mandate of John Ruggie as UN Secretary-General Special Representative on business and human rights, provides a new lens through which to examine the business impact on human rights.

In 2011, the UN Guiding Principles on business and human rights (UNGPs) establish the state duty to protect human rights (Pillar I), the business responsibility to respect human rights (Pillar II) and that victims should have access to remedy when harm is done (Pillar III). The UNGPs are recognized as the authoritative business and human rights (BHR) common framework providing clear principles for states and businesses to prevent and address business-related human rights abuse.

According to this concept, “the corporate responsibility to respect is the basic expectation society has of business,” “the baseline expectation for all companies in all situations.”⁵⁴ The corporate responsibility to respect means, in particular, that businesses should avoid and address “human rights risks” – potential or actual adverse impacts on human rights that a business may cause or contribute to through its own activities, or to which it may be directly linked through its operations, products, or services via its business relationships.⁵⁵ Human rights risks are most commonly identified via an iterative, ongoing *process* known as human rights due diligence (HRDD), which includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.⁵⁶

⁵⁴ HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

⁵⁵ GUIDING principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. *OHCHR*, 01 Jan. 2012. Available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

⁵⁶ MCCORQUODALE, Robert; NOLAN, Justine. The Ef-

As it was mentioned in the previous section, the application of human rights sanctions against companies should be proportional. For this, it is necessary to apply the UNGPs “involvement framework”⁵⁷, the typology used in Guiding Principle 13 – “causation”, “contribution” and “direct linkage”.

Guiding Principle 13 states that the corporate responsibility to respect human rights requires all business enterprises to: a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. This involvement framework helps business enterprises to understand the various ways in which they may become involved in adverse human rights impacts (within the meaning of the UNGPs) and the actions they are expected to take in response.⁵⁸ Contribution must be *substantial*, meaning that this does not include minor or trivial contributions.⁵⁹

The justification for the imposition of sanctions against corporate actors must include an explanation of the entity’s involvement in the acts for which the sanctions are applied. The absence or insufficiency of such justification may subsequently lead to that the application of sanctions is recognized by the court as unlawful. Hence, in the CJEU case law on sanctions against Russians and Ukrainians,⁶⁰ it was indicated the

effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses. *Netherlands International Law Review*, Dordrecht, v. 68, iss. 3, p. 455-478, Dec. 2021. DOI: 10.1007/s40802-021-00201-x.

⁵⁷ OHCHR. The Corporate Responsibility to Respect Human Rights: An Interpretive Guide. *OHCHR*, 2012. Available at: <https://www.ohchr.org/en/publications/special-issue-publications/corporate-responsibility-respect-human-rights-interpretive>;

OHCHR. Financial sector: OHCHR and business and human rights. *OHCHR*. Available at: <https://www.ohchr.org/en/business-and-human-rights/financial-sector>.

⁵⁸ OHCHR. Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting. *OHCHR*, 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf>.

⁵⁹ OECD-FAO Business Handbook on Deforestation and Due diligence in Agricultural Supply Chains. *OECD iLibrary*, 2023. Available at: https://www.oecd-ilibrary.org/finance-and-investment/oecd-fao-business-handbook-on-deforestation-and-due-diligence-in-agricultural-supply-chains_c0d4bca7-en;jsessionid=ih9RBcalKD6MottMaimYH48L7HgMi-61s5SyKNZ.ip-10-240-5-106.

⁶⁰ CHALLET, C. Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the Euro-

lack of compliance with the obligation to state reasons was sanctioned regarding the measures imposed on Russian persons or entities which, by their conduct, were responsible for actions or policies undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.⁶¹ Thus, the non-use of the UNGPs “involvement framework” by the state authorized to justify sanctions against a particular company significantly weakens their legitimacy and validity.

In the situation of the conflict, the UNGPs’ “involvement framework” is complemented by the concept of hHRDD. In 2022, “with powerful influence in mind UNDP and the UN Working Group on Business and Human Rights developed the practical roadmap for action: Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide”.⁶² It notes that “Heightened human rights due diligence means identifying potential and actual impacts on people (human rights) as well as on the context (conflict),”⁶³ therefore hHRDD is about identifying and assessing not only companies’ actual or potential adverse impacts on human rights, but also their actual or potential adverse impacts on conflict⁶⁴. As summary of the Guide notes, “The Guide recognizes that businesses invariably impact the dynamics of a conflict and that they therefore need to adopt conflict-sensitive practices to account for, and mitigate, these impacts.”

The concept of hHRDD is built around the thesis of “contributing to or exacerbating conflict and nega-

tively impacting human rights in conflict-affected areas by business”.⁶⁵ This aspect should also be taken into consideration for assessment involvement of company in the negative impact on human rights as a reason of applying sanctions against this company.

The UNGPs framework gives also an additional justification for the legitimate aim of the imposing sanctions by the state can serve as a reference to Principle 1 UN Guiding Principles on Business and Human Rights on State’s Duty to protect:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.⁶⁶

This implies that the state uses all possible measures to ensure the protection of human rights. One of the most difficult challenges to the concept of business and human rights is the question of how a state can ensure the protection of human rights for people in the territory of the state from violations by businesses that are not under the effective control of this state. The situation of war exacerbates this problem, as business becomes involved in human rights violations committed by one state on the territory of another state.

5 Sanctions dilemmas in legal regulation of their application in Ukraine

5.1 Dilemma 1: Ineffectiveness of sanctions

There is a big difference between impact of the sanctions on behavior of local and trans- or multinational businesses. This difference is caused by the more general difference between local and multinational companies.⁶⁷ As Tara Van Ho noted, the former are dependent

pean Union. *European Legal Studies*, 2020. Available at: http://aei.pitt.edu/103422/1/researchpaper_4_2020_celia_challet.pdf. p. 7.

⁶¹ CHALLET, C. Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union. *European Legal Studies*, 2020. Available at: http://aei.pitt.edu/103422/1/researchpaper_4_2020_celia_challet.pdf. p. 8.

⁶² UNITED NATIONS DEVELOPMENT PROGRAMME. Heightened Human Rights Due Diligence for business in conflict-affected contexts: a guide. UNDP, 16 June 2022. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

⁶³ UNITED NATIONS DEVELOPMENT PROGRAMME. *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*. New York: UNDP, 2022. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf.

⁶⁴ UNITED NATIONS DEVELOPMENT PROGRAMME. *Heightened Human Rights Due Diligence for business in conflict-affected contexts: A Guide*. New York: UNDP, 2022. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2022-06/UNDP_Heightened_Human_Rights_Due_Diligence_for_Business_in_Conflict-Affected_Context.pdf. p. 13.

⁶⁵ ČERNIČ, Jernej Letnar; GERRITSE, Eva. Opinion: Responsible Business Conduct in Times of War. *E-International Relations*, 22 Oct. 2022. Available at: <https://www.e-ir.info/2022/10/22/opinion-responsible-business-conduct-in-times-of-war/>.

⁶⁶ Referência

⁶⁷ VAN HO, T. Business and human rights in transitional justice: challenges for complex environments. In: DEVA, S.; BIRCHALL, D. *Research Handbook on Human Rights and Business*. [S. l.]: Edward Elgar Publishing eBooks, 2020.

on operating within a state and may have no choice but to do what the government tells them. They have low power and independence. The latter generally *can* leave the state, even if doing so is financially uncomfortable. They enjoy power and independence over their own involvement in the abuses.⁶⁸

Institutional theory proposes the explanations⁶⁹ and provides a framework for understanding the societal process that shapes how organizations are formed, operate, and react to the external environment.⁷⁰ Firms may be considered a product of their institutional environment as organizations seek legitimacy and gather the resources needed to implement their strategy. Firms also develop organizational capabilities that are reflective of the prevailing external institutions.⁷¹ In an economy such as Russia, with weak institutional structures, corruption, and lower levels of property rights protection and rule of law, Russian firms have developed organizational capabilities and resources to operate in a politicized external environment. Targeted economic sanctions work when the sanctioned targets seek international legitimacy and need access to international markets to maintain and grow their businesses.⁷² Moreover, given the nature of politically connected firms, sanctions may further drive these firms into the arms of their home governments. As a result of foreign sanctions, Russian firms faced a highly uncertain environment and needed to satisfy the often-conflicting demands of their home institutional environment and the pressures from the external (foreign) environment. The home-host institutional conflict presented a unique situation for Russian firms to deploy a range of strategies that varied from partnering with the home governments, attempting to avoid the impact of sanctions, adapting through reor-

ganizing global supply and distribution chains, and restructuring subsidiaries.⁷³

Nevertheless, it is essential to reconsider the objectives of sanctions within the framework of corporate responsibility to respect human rights, which encompasses not only a company's direct actions but also its supply chains. Imposing sanctions on Russian firms typically does not alter their conduct, but it should influence the behavior of those companies whose supply chains are intertwined with sanctioned entities. This expanded perspective broadens our interpretation of the legitimate purpose of applying sanctions: not only to induce changes in the sanctioned company itself but also to impact the conduct of its supply chains.

In this sense, the concept of social expectations, which underlies the concept of corporate responsibility to respect human rights, also requires rethinking, as it turns out to be distorted in non-democratic societies.⁷⁴ According to the classical business and human rights concept, "the corporate responsibility to respect is the basic expectation society has of business", "the baseline expectation for all companies in all situations".⁷⁵ The corporate responsibility to respect means, in particular, that businesses should avoid and address "human rights risks" – potential or actual adverse impacts on human rights that a business may cause or contribute to through its own activities, or to which it may be directly linked through its operations, products, or services via its business relationships.⁷⁶ One of the goals of sanctions is to signal to the public that certain behavior of a company is unacceptable in a situation where the company operates under the jurisdiction of a state that does not fulfill its human rights obligations.

⁶⁸ VAN HO, T. Not all parties are equal: understanding the responsibility for reparations in conflict-affected areas. *Business & Human Rights Resource Centre*, 20 Feb. 2023. Available at: <https://www.business-humanrights.org/en/blog/not-all-parties-are-equal-understanding-the-responsibility-for-reparations-in-conflict-affected-areas/>.

⁶⁹ OLIVER, C. Strategic Responses to Institutional Processes. *Academy of Management Review*, v. 16, n. 1, p. 145-179, 1991. p. 146.

⁷⁰ SCOTT, W. R. The Adolescence of Institutional Theory. *Administrative Science Quarterly*, v. 32, n. 4, p. 493-511, Dec. 1987. p. 496.

⁷¹ SAKA-HELMHOUT, A.; GEPPERT, M. Different Forms of Agency and Institutional Influences within Multinational Enterprises. *Management International Review*, v. 51, p. 567-592, 2011. p. 568.

⁷² DREZNER, D. W. Sanctions sometimes smart: targeted sanctions in theory and practice. *International Studies Review*, v. 13, n. 1, 2011. p. 99.

⁷³ GAUR, A.; SETTLES, A.; VÄÄTÄNEN, J. Do Economic Sanctions Work? Evidence from the Russia-Ukraine Conflict. *Journal of Management Studies*, v. 60, iss. 6, p. 1391-1414, Sep. 2023. p. 1398.

⁷⁴ It is also shown in the series of the podcasts. Rule of Law and Corporate Actors. 2023. Available at: <https://ruleoflawbiz.org/category/podcasts>.

⁷⁵ GUIDING principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. *OHCHR*, 01 Jan. 2012. Available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

⁷⁶ GUIDING principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. *OHCHR*, 01 Jan. 2012. Available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

5.2 Dilemma 2: Payment of taxes to the budget of the aggressor state

There is a pressure on the companies continue to pay taxes in Russia that they are indirectly financing the war and the severe breaches of international human rights and humanitarian law that we see in Ukraine today.⁷⁷ The report from B4Ukraine and the Kyiv School of Economics (KSE) takes a closer look at multinational revenues and taxes in Russia in 2022. The report finds: in 2022, global corporations made over \$213.9 billion in revenues through their local Russian businesses. Collectively, companies headquartered in the EU member states earned \$75.2 billion in 2022 and paid \$594 million in profit tax.⁷⁸

The National Agency on Corruption Prevention and the Ministry of Foreign Affairs of Ukraine are developing the list of the international war sponsors. This list includes companies which pay taxes in Russian Federation. As the site is emphasizing, the list designation is reputational only. Ukraine does not control the enforcement: it is the global community who acts as the judge, jury, and executioner.⁷⁹

In the context of formulating the UN Guiding Principles on Business and Human Rights (UNGPs), Professor John G. Ruggie noted that the “mere presence in a country, *paying taxes*, or silence in the face of abuses is unlikely to amount to the practical assistance required for legal liability”.⁸⁰ The paper published by the OHCHR in August 2023 also notes that, as a general rule, the payment of taxes in situations of armed conflict or authoritarian regimes does not on its own make a business “involved with” the violations of

a government regime, even an illegitimate one (apart from exceptional circumstances where a business is a very significant tax contributor to a government that is involved in gross violations of human rights).⁸¹ Guiding Principle 23 reminds businesses that they should comply with all applicable laws, including in challenging circumstances (indeed, this is often an important line of defence against arbitrary government action). Further, taxes are necessary to fund public services that fulfil human rights, such as health and education.⁸²

At the same time, situations are possible when the government does not fulfill its obligations to provide the local population with public services necessary for the realization of human rights. Myanmar can be cited as an example. Many experts called on companies operating in Myanmar to stop paying taxes to the budget of Myanmar’s military.⁸³ However, this is not the only criterion that must be taken into account, and the assessment of the company’s conduct must be individual. So when H&M announced its withdrawal from Myanmar, Vicky Bowman, director of the Myanmar Centre for Responsible Business and former British ambassador to Myanmar, regret H&M’s announcement, as it will have a negative impact on thousands of women workers in Myanmar.⁸⁴

The situation with Russia is distinct in that the withdrawal of companies making substantial contributions to the Russian budget doesn’t inherently jeopardize the population’s access to essential public services

⁷⁷ REPORT: The Business of Staying: a closer look at multinational revenues and taxes in Russia in 2022. *Business & Human Rights Resource Centre*, 4 July 2023. Available at: <https://www.business-humanrights.org/en/latest-news/report-the-business-of-staying-a-closer-look-at-multinational-revenues-and-taxes-in-russia-in-2022>.

⁷⁸ B4UKRAINE; KSE INSTITUTE. The Business of Staying: a closer look at multinational revenues and taxes in Russia in 2022. *B4Ukraine.org*, 2022. Available at: <https://b4ukraine.org/pdf/BusinessOfStaying.pdf>.

⁷⁹ FREQUENTLY asked questions. Available at: <https://sanctions.nazk.gov.ua/en/faq>.

⁸⁰ HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

⁸¹ OHCHR. Business and Human Rights in Challenging Contexts Considerations for Remaining and Exiting. *OHCHR*, 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/bhr-in-challenging-contexts.pdf>.

⁸² HUMAN RIGHTS COUNCIL. Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Human Rights.org*, 7 Apr. 2008. Available at: <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

⁸³ O’SULLIVAN, Diarmid; MATHIASON, Nick. How we helped reveal Heineken and Carlsberg tax payments to Myanmar military junta. *Finance Uncovered*, 20 Apr. 2023. Available at: <https://www.financeuncovered.org/stories/how-we-helped-reveal-heineken-and-carlsberg-tax-payments-to-myanmar-military-junta>.; MYANMAR: Urgent action needed to block foreign revenue. *Human Rights Watch*, 25 Jan. 2022. Available at: <https://www.hrw.org/news/2022/01/25/myanmar-urgent-action-needed-block-foreign-revenue>.

⁸⁴ REID, Helen. Exclusive-H&M says it will ‘phase out’ sourcing from Myanmar. *Reuters*, 17 Aug. 2023. Available at: <https://jp.reuters.com/article/global-fashion-myanmar-hm-idAFL1N39Y14B>.

that safeguard basic human rights (as discussed in dilemma 3). However, the significant financial contributions of certain companies could be viewed as leverage. In our perspective, the imposition of sanctions against such companies might be justifiable. However, the payment of taxes to the budget of the Russian Federation cannot be the only and automatic criterion for the application of sanctions. From the perspective of a corporate responsibility to respect human rights, the company should answer the question of what actions it has taken to use its leverage to stop or minimize risks to human rights. When a company operates in a situation of conflict and/or a non-democratic political regime, the understanding of leverage is broadened and applied not only to the direct business relationships of the company, but also to its impact on the overall human rights situation in the country. In this regard, companies with leverage (paying significant taxes, having large sales markets and a wide client base in the country, etc.) are obliged to answer the question of what measures they have taken in connection with gross violations of international human rights law and international humanitarian law by the host country in addition to the heightened human rights due diligence.⁸⁵

5.3 Dilemma 3: The essentiality of services and goods that are supplied by companies operating in aggressor state

Access to essential services and goods – including safe drinking water, adequate food, housing, healthcare and medicine, electricity and gas supply, rail and urban transport, public utilities, banking services, sanitation, and access to internet and communication services – is a key condition to satisfy basic needs for leading a life with human dignity⁸⁶ and well-being.⁸⁷ Recognized

⁸⁵ UNITED NATIONS DEVELOPMENT PROGRAMME. Heightened Human Rights Due Diligence for business in conflict-affected contexts: a guide. *UNDP*, 16 June 2022. Available at: <https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide>.

⁸⁶ THE SPHERE PROJECT. *Humanitarian Charter and Minimum Standards in Disaster Response*. Geneva: The Sphere Project, 2004.

⁸⁷ BROOK, P. J.; SMITH, S. M. *Contracting for Public Services: Output-based Aid and Its Applications*. Washington, DC: World Bank, 2001. Available at: <http://hdl.handle.net/10986/13978>;

UNITED NATIONS. *UN Habitat: International Guidelines on Access to Basic Services for All*. UN Doc HSP/GC/22/2/Add. 2009.; OLIVER, D.; PROSSER, T.; RAWLINGS, R. *The regulatory state: Constitutional Implications*. Oxford: Oxford University, 2010. p. 158.;

human rights standards call for ensuring the minimum necessary access to these essential services.

“Essentiality” is context specific. No fixed definition of essential goods/services exists in the strict sense. A frequently used term that can be interpreted more narrowly is the term “basic goods / services”, defined as goods/services in the social domain that should be available and reasonably accessible to everyone in need for them.

B4Ukraine notes that “companies exploiting the “essentiality” justification are some of the biggest revenue generators in Russia meaning that the continued provision of non-essential food and hygiene products significantly contributes to the war in Ukraine.”⁸⁸ B4Ukraine emphasizes that

the burden should be on each company to justify why the good/service is essential to the market, why no alternative products are available or no other local actor(s) can supply the good/service, and how the company will mitigate its proximity to human rights harms.⁸⁹

However, it does not sufficiently take into account the context. Companies, assessing their impact on human rights in a targeted state, should assess not just the nature of their products (food, medicine, etc.), but their role in the implementation of a specific human right and provide evidence that the enjoyment of a fundamental human right would be threatened if it were withdrawn from the market.

5.4 Dilemma 4: (Not)use of leverage beyond of involvement in human rights violations

The business and human rights concept requires companies to ensure corporate responsibility to respect human rights, but “this does not mean that companies must categorically stay away from authoritarian states”,⁹⁰ because “international companies that respect human rights in words and deeds can be a force for good”.⁹¹ The

ČERNIČ, J. L. *Corporate accountability under socio-economic rights*. Oxon: New York: Routledge, 2019. p. 111.

⁸⁸ ESSENTIAL Goods & Services. *B4Ukraine*. Available at: <https://b4ukraine.org/what-we-do/essential-goods-services>.

⁸⁹ ESSENTIAL Goods & Services. *B4Ukraine*. Available at: <https://b4ukraine.org/what-we-do/essential-goods-services>.

⁹⁰ EKELOVE-SLYDAL, G. M.; DALE, I. *Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity*. [S. l.]: Norwegian Helsinki Committee, 2022. p. 7.

⁹¹ EKELOVE-SLYDAL, G. M.; DALE, I. *Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity*. [S. l.]: Norwegian Helsinki Committee, 2022. p. 7.

Norwegian Helsinki Committee notes that international companies should step up their support for human rights within their spheres of influence and publicly state their values and principles. Companies struggling to be faithful to their values due to government pressure and persecution need to be supported by democratic states, which, i.e., should introduce targeted sanctions against corrupt and brutal political leaders and their enablers who trample on human rights. In designing sanctions, the role of international companies should be considered.⁹² This thought was supported also by Ekaterina Deikalo: a company, sticking to human rights values, using the leverage of partnership, etc., can indeed sometimes be the only “hope” and instrument for the people trying to protect themselves.⁹³

There are many examples when companies were called to use their power (leverage) to impact to the human rights environment positively. In 2019, major Dutch institutional investors appealed to Shell to bring pressure on Brunei Darussalam over a proposed law mandating the death penalty for homosexuality. Leading investment banks such as JP Morgan also boycotted hotels owned by the Sultan of Brunei;⁹⁴ the legislation was eventually abandoned. But supporting civic freedoms does not always have to mean stark choices or overt public messaging. In some cases, investors and companies can exert influence discreetly.

As Tara van Ho mentioned, the business’s power to stop (or minimize) the harm should be taken into consideration. Power can manifest in three different ways: power directly over the circumstances; power in a relationship with another actor; and power over the environmental or social conditions that lead to harm.⁹⁵

As always in business and human rights, context matters. Companies do not have the same leverage over a government that tolerates gross human rights violations and, accordingly, there cannot be a universal call to stop business or leave the country. As we have already indicated, companies with leverage (large taxpayers, companies with a large customer base, etc.) must demonstrate how they used their leverage in order to minimize the negative impact on human rights, or, if that’s not possible – exit.

5.5 Dilemma 5: Western manufacturers’ supplies of components for weapons to Russia

Following the February 2022 invasion of Ukraine, the US, the UK and the EU passed a range of sweeping sanctions on Russia. These included targeted financial and sectoral sanctions, in addition to the extension of wide-ranging export controls designed to curtail the country’s access to military technology and critical components. A variety of other countries and jurisdictions, including Japan, South Korea, Taiwan, Canada, Australia and Switzerland, committed to implementing similar export controls. While prior to the invasion many of the US manufactured components found in Russia’s weapons systems were cleared for export to Russia under the Export Administration Regulation (EAR99) (Byrne, Somerville, Byrne, Watling, Reynolds & Baker),⁹⁶ the US exporters of these products still had a due-diligence obligation to make sure they were not destined for a prohibited end user, or to be applied in a prohibited end use.

However, in the summer of 2023, RUSI identified 450 unique components primarily sourced from Western manufacturers, of which at least 318 came from US-based companies, 34 from Japan companies, 30 – Taiwan, 18 – Switzerland, 14 – Netherlands, 10 – Germany, 6 – China, 6 – Republic of Korea, 5 – United Kingdom, 2 – Austria.⁹⁷

[I]: Norwegian Helsinki Committee, 2022. p. 8.

⁹² EKELØVE-SLYDAL, G. M.; DALE, I. *Doing Business in Authoritarian States: Tackling Dilemmas While Preserving Integrity*. [S. l.]: Norwegian Helsinki Committee, 2022. p. 13.

⁹³ DEIKALO, E. BHR agenda and authoritarian regimes: The case of political and human rights crisis in Belarus since 2020. *Business and Human Rights Journal*, 2023. p. 4.

⁹⁴ VANDELDELDE, M.; MORRIS, S. JPMorgan bans staff from Brunei-owned hotels over gay law. *Financial Times*, 2019. Available at: <https://www.ft.com/content/b0365536-69ca-11e9-80c7-60ee-53e6681d>.

⁹⁵ VAN HO, T. Not all parties are equal: understanding the responsibility for reparations in conflict-affected areas. *Business & Human Rights Resource Centre*, 20 Feb. 2023. Available at: <https://www.business-humanrights.org/en/blog/not-all-parties-are-equal-understanding-the-responsibility-for-reparations-in-conflict-affected-areas>.

⁹⁶ BYRNE, J.; SOMERVILLE, G.; WATLING, J.; REYNOLDS, N.; BAKER, J. Silicon Lifeline: Western Electronics at the Heart of Russia’s War Machine. *RUSI*, 2022. Available at: https://static.rusi.org/RUSI-Silicon-Lifeline-final-updated-web_1.pdf.

⁹⁷ BYRNE, J.; SOMERVILLE, G.; WATLING, J.; REYNOLDS, N.; BAKER, J. Silicon Lifeline: Western Electronics at the Heart of Russia’s War Machine. *RUSI*, 2022. Available at: https://static.rusi.org/RUSI-Silicon-Lifeline-final-updated-web_1.pdf.

Components that have been identified by the Ukrainian authorities in Russian missiles are linked to many of the same companies whose components have appeared in other intercepted weapons on Ukrainian territory since April 2022: US Analog Devices, US Texas Instruments, US Microchip Technology, US Intel corporation, US AMD, German Infineon Technologies, Korean Samsung, Switzerland STMicroelectronics, US Vicor, USA XILINX, USA ZILOG, US Maxim Integrated, and USA Cypress Semiconductor. These components are not from old stocks. In December 2022, Conflict Armament Research analyzed the remnants of two Russian Kh-101 missiles in Kyiv and concluded with near certainty that these missiles had been manufactured within the previous two months (i.e., before November 2022).⁹⁸ As experts in sanctions regimes issues note,

the export control regime is not as effective as needed. Too many components from Western producers are finding their way to Russia, even if we recognize that some circumvention of export controls is unavoidable as entities in third countries may be outside the direct reach of the sanctions coalition.⁹⁹

As a response to this threat, they propose

that companies and other legal entities operating in sanctions coalition countries be obligated to disclose information on their business ties with Russia and Belarus. At a minimum, the proposed disclosure requirements should obligate EU, U.S., Canadian, Korean, Japanese, UK, and Ukrainian companies that have business ties with Russia to disclose the existence of such ties, the identity of their Russian counterparts, and the nature of the relationship. These disclosures will increase awareness of these businesses' dealings, investors, creditors, clients, and other stakeholders of such relationships.¹⁰⁰

It shows the lack of awareness on the UNGPs framework among those who are developing sanctions” regimes and lack of capacities to implement UNGPs for ensuring responsible business conduct in supply chains of components that could be used for the Russian military aggression. Above mentioned risks could be significantly minimized by implementing a heightened HRDD approach: As the risk of gross human rights abuses is heightened in conflict-affected contexts, businesses should carry out heightened human rights due diligence: to identify and assess not only their actual or potential adverse impacts on human rights, but also their actual or potential adverse impacts on conflict.¹⁰¹ Moreover, the expectation that the company know own supply chains (suppliers in different tiers of its supply chains), makes them transparent and takes steps to ensure that suppliers in different tiers of supply chains respect human rights and are not involved in human rights violations and violations of the IHL – such expectations are already meaningful part of the UNGPs agenda. It should be also noted that disclosing information on business ties is very limited and non-holistic approach that is not able to ensure responsible business conduct as it does not cover policy commitments, due diligence, and remedy.

The using of tools heightened HRDD and tracking supply chains would identify risks at much earlier stages. Due diligence framework of the RBC standards can help enhance sanctions compliance where it is a legal obligation by improving visibility over complex business relationships that heighten the risk of sanctions evasion – including in the context of export restrictions on certain dual use technologies to Russia. For companies and policy makers, this makes a compelling case for enhanced due diligence based on the RBC standards, including in relation to down-stream impacts and business relationships. Where relevant, the RBC due diligence can help improve companies’ understanding of how their supply chains and business relationships potentially intersect with exposed entities or sectors, while ensuring that related issues and relevant RBC risks are

⁹⁸ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #12: Strengthening Sanctions to Stop Western Technology from Helping Russia’s Military Industrial Complex. *Stanford University*, 3 July 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-07/sanctions_working_group_-_russian_import_of_critical_components-7-9-2023_final.pdf.

⁹⁹ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #11: Action Plan 2.0: Strengthening Sanctions against the Russian Federation. *Stanford University*, 24 Apr. 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf.

¹⁰⁰ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #11: Action Plan 2.0: Strengthening Sanctions against the Russian Federation. *Stanford University*, 24 Apr. 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf. p. 10.

¹⁰¹ THE INTERNATIONAL WORKING GROUP ON RUSSIAN SANCTIONS. Working Group Paper #11: Action Plan 2.0: Strengthening Sanctions against the Russian Federation. *Stanford University*, 24 Apr. 2023. Available at: https://fsi9-prod.s3.us-west-1.amazonaws.com/s3fs-public/2023-04/russia_sanctions_working_paper_11_action_plan_2.0_v2.pdf. p. 11.

identified and addressed, whether operating in or from a sanctioning jurisdiction or not¹⁰².

6 Conclusions

The development of the business and human rights framework has given very limited attention to sanctions against companies. In fact, sanctions are seen only as a factor that significantly increases the risk for a company to be involved in negative impacts on human rights, or as an indicator of the need to withdraw from business relations. At the same time, the debate around the applied sanctions raises issues of high relevance to the business and human rights concept. One such question is whether the corporate responsibility to respect human rights encompasses the company's obligation to use its power (leverage) to minimize or eliminate human rights risks in a situation where the company itself is not involved in negative impact ("causation," "contribution" and "direct linkage"). In other words, there is a situation where the company has the ability to influence beyond of its business relationship. Leverage can be the company's role in the country's economy, influence on the investment image, influence on public opinion, etc. (public power linkage). Thus, the concept of corporate responsibility to respect human rights should be much more related to the company's power (leverage) and, accordingly, expanded beyond its understanding only within the framework of a situation where "the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship."¹⁰³ Most often, companies encounter this situation in non-democratic political regimes.

And in this sense, the answer depends on what we consider as the underlying idea of the concept of business and human rights. It seems to us that the main idea is that any actor endowed with a certain amount of public power (the power to influence the behavior

of other participants in social relations) is the bearer of human rights obligations.

The theory and practice of applying sanctions against companies completely overlooks the business and human rights concept. The BHR concept has significant potential to ensure that sanctions comply with the requirements of the rule of law, maintain their legitimacy and increase their effectiveness. We have identified key positions in which the concept of sanctions should be rethought through the lens of the concept of business and human rights. The principle of proportionality is traditionally at the basis of the rule of law, and the purpose of application of human rights sanctions against companies should be based on understanding of human rights adverse impact by business and corporate responsibility to respect human rights.

First, companies should be sanctioned on the basis of their alleged involvement in human rights violations: "causation," "contribution", "direct linkage" and, as we mentioned earlier, "public power linkage". The sanction itself should be proportionate to the perceived degree of involvement of the company in the violation.

Second, the purpose of imposing sanctions against companies may not be to change the behavior of the company itself, but to change the behavior of companies that are part of its supply chains. This, in turn, brings the issue of hHRDD and supply chain tracing to the fore in order to ensure the effectiveness of sanctions. Companies that fail to exercise hHRDD and end up in the supply chain of sanctioning companies should be held accountable.

Third, the application of sanctions should include a human rights impact assessment. One of the components of such an assessment should be depriving or significantly complicating the access of the population (or groups) to basic services and goods that ensure the realization of fundamental human rights. It also means that a sufficient reason for not withdrawing from a business relationship that adversely affects human rights cannot be based on the essentiality of the provided goods and services, unless such withdrawal will deprive the local people (or some groups, especially vulnerable) of a fundamental human right or significantly limit them.

¹⁰² OECD Responsible business conduct implications of Russia's invasion of Ukraine. *OECD*, 2023. Available at: <https://www.oecd-ilibrary.org/docserver/f222a4d1-en.pdf?expires=1692376231&id=id&accname=guest&checksum=23FF17867BC70CE088890FF70EBDA70F>.

¹⁰³ Referência.

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human rights due diligence**

Juan Camilo García Vargas

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La dimensión normativa de la debida diligencia en derechos humanos*

The normative dimension of human rights due diligence

Juan Camilo García Vargas**

Dilia Paola Gómez Patiño***

Resumen

Las empresas voluntaria o inadvertidamente pueden generar riesgos o vulneraciones a los derechos humanos a lo largo de su cadena de valor y suministro, con ocasión de sus actividades comerciales. Por tanto, hay un esfuerzo regulatorio global para implementar medidas y mecanismos que prevengan o mitiguen estos riesgos mediante la debida diligencia en derechos humanos (DDHH). El objetivo de este artículo es analizar la dimensión normativa de la debida diligencia en derechos humanos por lo que se describe en qué consiste y dónde se origina el concepto y la práctica de los DDHH como una forma de gestionar la globalización de los riesgos en derechos humanos derivados de la actividad empresarial. Asimismo, se analizan los instrumentos voluntarios, las leyes de DDHH y las propuestas de instrumentos jurídicos en el contexto europeo y latinoamericano relacionados con este campo, desembocando en el estado actual del proceso normativo en el contexto colombiano. En efecto, en esto radica el principal valor del documento: entender la debida diligencia en DDHH como un concepto en evolución y su aplicación en el ámbito empresarial, especialmente en el contexto de la globalización. Simultáneamente, en de la constante evolución deriva la principal limitación; toda vez que, en el momento de escribir este artículo, no existen leyes específicas en América Latina; asimismo, la efectividad de las directrices existentes puede variar dependiendo de los contextos de aplicación. El documento desarrolla los siguientes acápites: (i) La globalización y las empresas; (ii) Las empresas y los derechos humanos; (iii) DDHH en el campo empresarial; (iv) Instrumentos no vinculantes en materia de DDHH; (v) Leyes de DDHH y otros instrumentos; (vi) Contexto latinoamericano; (vii) Contexto colombiano; (viii) Conclusiones. El artículo en su conjunto permite tener un panorama general de la debida diligencia empresarial en derechos humanos, así como destacar su rol estratégico en desarrollo de operaciones responsables.

Palabras clave: empresa; derechos humanos; leyes debida diligencia; gestión de riesgos en actividades comerciales; gobernanza corporativa.

Abstract

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El presente artículo es resultado de investigación del proyecto INVDER 3958 de 2024, financiado por la Vicerrectoría de Investigaciones de la Universidad Militar Nueva Granada.

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Companies may voluntarily or inadvertently generate risks or violations to human rights throughout their value and supply chain, on the occasion of their business activities. Therefore, there is a global regulatory effort to implement measures and mechanisms to prevent or mitigate these risks through human rights due diligence (HRDDD). The purpose of this article is to analyze the regulatory dimension of human rights due diligence and so describe what it consists of and where the concept and practice of HRDD originates as a way of managing the globalization of human rights risks arising from business activity from voluntary, non-binding instruments, HRDD laws and proposals for legal instruments in the European and Latin American context. This leads to the current state of the normative process in the Colombian context. Indeed, therein lies the primary value of the document: to understand due diligence in HRDD as an evolving concept and its application in the business sphere, especially in the context of globalization. Simultaneously, the main limitation derives from this constant evolution; since, at the time of writing this article, there are no specific laws in Latin America; likewise, the effectiveness of existing guidelines may vary depending on the application context. The article has the following structure: (i) Globalization and Business; (ii) Business and Human Rights; (iii) HRDD in the field of Business and Human Rights; (iv) Non-binding instruments in the field of HRDD; (v) Laws of Human Rights and other instruments; (vi) Latin American Context; (vii) Colombian Context; (viii) Conclusions. The article as a whole provides a general overview of corporate human rights due diligence, as well as highlighting its strategic role in the development of responsible operations.

Keywords: business; human rights; due diligence laws; risk management in business activities; corporate governance.

1 Introducción

El objetivo de este artículo es analizar la dimensión normativa de la debida diligencia en derechos humanos (en adelante DDDH). Para ello se describe en qué consiste y dónde se origina el concepto y la práctica como una forma de gestionar riesgos en derechos humanos. Se parte de la forma en que se construye el concepto, para luego analizar cómo ha sido abordado desde los instrumentos no vinculantes. Se consideran, además, las

leyes de DDDH y las propuestas de instrumentos jurídicos en el contexto europeo y latinoamericano. Finalmente, el recorrido propuesto desemboca en el estado actual del proceso normativo en el contexto colombiano.

Con tal objeto el documento se organiza de la siguiente manera: 1. La Globalización y las Empresas; 2. Las empresas y los derechos humanos; 3. DDDH en el campo de empresa y derechos humanos; 4. Instrumentos no vinculantes en materia de DDDH; 5. Leyes de DDDH y otros instrumentos; 6. Contexto latinoamericano; 7. Contexto Colombiano; y, 8. Conclusiones.

El análisis se efectúa siguiendo la metodología utilizada en la elaboración del estado del arte de una materia específica. Guevara Patiño¹ desarrolla tres aproximaciones conceptuales sobre el estado del arte, nos centraremos en dos de ellas. La primera es la investigación documental y la segunda una revisión de propuestas investigativas. Ambas perspectivas teóricas están apuntaladas por la concepción de que la técnica investigativa del estado del arte es un diálogo de saberes sobre el objeto de estudio. En el caso particular de este estudio, dicho objeto es la DDDH. Esta metodología permite sopesar, en el marco de la presente investigación, los argumentos de diversos autores para lograr una lectura crítica sobre el estado actual de la discusión.

En tal sentido, el concepto operacional sobre el cual se desarrollará la discusión es el de Debida diligencia en derechos humanos (DDDH), que se entiende como el proceso mediante el cual las empresas identifican, previenen, mitigan y rinden cuentas sobre cómo abordan sus impactos en los derechos humanos sobre sus diferentes grupos de interés. En consecuencia, otro concepto operacional asociado será el de Leyes de debida diligencia en derechos humanos: refieren a las regulaciones que establecen obligaciones específicas para las empresas en relación con la debida diligencia en derechos humanos, incluyendo la identificación y mitigación de riesgos en sus operaciones, grupos de interés, cadenas de valor y cadenas de suministro.

Este estudio se centra en el análisis de la dimensión normativa de la debida diligencia en derechos humanos,

¹ GUEVARA PATIÑO, R. El estado del arte en la investigación: ¿análisis de los conocimientos acumulados o indagación por nuevos sentidos? *Folios*, n. 44, p. 165-179, 2016. Disponible en: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0123-48702016000200011&lng=en&tlng=es. Acceso en: 15 jun. 2023.

examinando tanto instrumentos internacionales como leyes nacionales, con un enfoque particular en el contexto europeo, latinoamericano y colombiano. Se excluye el análisis detallado de casos específicos de implementación de la debida diligencia en empresas concretas.

La mencionada delimitación nos remite a la siguiente pregunta problema: ¿Cómo se ha desarrollado y materializado la debida diligencia en derechos humanos en el ámbito normativo, y cuáles son los desafíos y perspectivas para su efectiva implementación en un contexto de globalización?

Al respecto la tesis propuesta es que la debida diligencia en derechos humanos ha evolucionado desde ser una expectativa voluntaria a una obligación legal en varias jurisdicciones, impulsada por la necesidad de proteger los derechos humanos en el contexto de la globalización, determinado por las operaciones empresariales transnacionales. En Colombia, aunque no se cuenta con una ley específica, la jurisprudencia y los planes de acción nacionales reflejan un avance hacia la adopción de este estándar, aunque persisten desafíos significativos para su plena implementación y efectividad, asociada también a la persistencia del conflicto armado.

2 La globalización y las empresas

El proceso de globalización ha removido barreras para el intercambio de bienes, servicios y el movimiento de capitales, de igual forma la deslocalización de la producción y el libre comercio ha dado lugar a mercados globales. Es precisamente esa dimensión económica de la globalización la que ha permitido el desarrollo de las empresas en actores relevantes para el orden económico y político mundial².

Este proceso ha aumentado el poder político y económico de las empresas en el orden nacional e internacional, convirtiéndolas en entidades capaces de tener distintos tipos de incidencias o efectos, tanto positivos como negativos, en las sociedades contemporáneas. A primera vista, las empresas multinacionales pueden tomar ventaja o sacar provecho de la fuente de mano de obra barata, los beneficios fiscales, la debilidad del Es-

tado de acogida en materia laboral, social y ambiental para maximizar sus ganancias al disminuir los costos operacionales³.

Además, como lo observa Nolan

Las corporaciones a menudo operan en países que no tienen la capacidad o la voluntad de proteger los derechos de quienes están dentro de su jurisdicción; como resultado, sus actividades son difíciles de monitorear y regular, y las injusticias suelen quedar sin reparación.⁴

Por tanto, estos potenciales impactos no deseados han hecho necesaria la regulación de la actividad empresarial y las externalidades negativas asociadas a la misma en el marco de la globalización⁵. El carácter transnacional de las actividades empresariales es un reto para el Estado nación en materia regulatoria, como lo expone Clavero: “Las actividades de las empresas transnacionales desbordan las capacidades regulatorias de los Estados”⁶.

A partir del proceso de globalización, que incluye por supuesto a las empresas, también se globalizan los riesgos del desarrollo científico, tecnológico, industrial y de la actividad económica de la sociedad contemporánea, emergiendo así una sociedad global del riesgo⁷. Este último concepto fue elaborado por el sociólogo alemán, Ulrich Beck (1944- 2015), quien trabajó la noción del riesgo como marco explicativo y categoría de análisis de los procesos sociales que configuran la sociedad contemporánea. La Figura 1 engloba los resultados del paralelo conceptual adelantado por Lanoszka⁸, en

³ LAW, J. (ed.). *A dictionary of business and management*. 6. ed. Oxford: Oxford University Press, 2016.; STATI, D. *The Routledge dictionary of business management*. London: Taylor & Francis e-Library, 2004.

⁴ NOLAN, J. Hardening soft law: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights? *Revista de Direito Internacional*, Brasília, v. 15, n. 2, p. 64-83, 2018. Disponible en: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/5355/3966>. p. 66.

⁵ IGLESIAS MÁRQUEZ, D. Las obligaciones de las empresas en virtud del derecho internacional: retos y oportunidades en materia de empresas y derechos humanos. In: ABELLO-GALVIS, R.; ARÉVALO-RAMÍREZ, W. (ed.). *Derechos humanos, empresas y Sistema Interamericano de Derechos Humanos: reflexiones y diálogos*. Bogotá: Editorial Universidad del Rosario, 2019. p. 67-102.

⁶ CLAVERO, B. *Derecho global: por una historia verosímil de los derechos humanos*. Madrid: Editorial Trotta, 2014.

⁷ Beck acuñó el término sociedad del riesgo en 1986, el concepto se desarrolló en el libro que lleva un título homónimo, *Risk Society: Hacia una nueva modernidad* (Beck, 1992). Un desarrollo posterior del tema se trató en el volumen *World Risk Society* (Beck, 1999).

⁸ LANOSZKA, A. *Corporate governance and economic development: identifying critical institutional reform*. New York: Routledge, Taylor & Francis Group, 2023.

² TORRES REINA, D. Globalización, empresas multinacionales e historia. *Pensamiento & Gestión*, n. 30, p. 165-185, 2011. Disponible en: <https://www.redalyc.org/articulo.oa?id=64620756009>. Acceso en: 31 mayo 2023.

que se condensa la realidad de los avances del ejercicio analítico frente al quehacer corporativo y la práctica de los derechos humanos.

Figura 1 - Comparativo del barrido conceptual Empresa & Derechos Humanos



Fonte: Elaboración propia con base en Lanoska (2023).

Así, el ejercicio comparativo que Lanoska⁹ adelanta frente a la línea teórica, argumental, experiencial y comparativa de los estudiosos en el tema corporativo y su relación con los derechos humanos, redondea lo expuesto por teóricos y académicos bajo la suficiencia de sus aproximaciones iniciada de modo más compacto desde la década de los noventa en que el riesgo resulta ser un vector angular sobre el cual observar tanto los vacíos como las consistencias de las prácticas corporativas respecto a los derechos humanos.

Por ejemplo, en su teoría, Beck sostiene que “el riesgo puede definirse como una forma sistemática de enfrentarse a peligros e inseguridades inducidos e introducidos por la propia modernización”¹⁰. En la sociedad del riesgo la garantía de protección que brindan los Estados a sus asociados se pone en entredicho. Las amenazas sobrepasan ampliamente las fronteras del Estado-nación. También, los marcos políticos, jurídicos, científicos y económicos del Estado-nación parecen ser insuficientes, o no aptos para conjurar el riesgo¹¹.

A través de estos postulados se observa que los riesgos creados por las actividades de las empresas para los derechos humanos no solo se han globalizado, sino que son la consecuencia misma del desarrollo económico,

industrial y científico que ha hecho posible la emergencia de las empresas y la sociedad contemporánea. Al igual que la globalización y las empresas multinacionales, las ideas de evaluación del riesgo y su gestión, como la Debida Diligencia en Derechos Humanos, se desarrollaron con la modernidad¹².

3 Las empresas y los derechos humanos

Las actividades de las empresas transnacionales o nacionales pueden afectar potencialmente derechos humanos internacionalmente reconocidos. Los derechos humanos son atributos que se predicen del ser humano, siendo inherentes y consustanciales al mismo, sin distinciones. Se caracterizan por ser universales, indivisibles, interdependientes, interrelacionados, inalienables y exigibles. Asimismo, son normas de carácter positivo presentes en el ordenamiento jurídico nacional e internacional. Son derechos subjetivos que los Estados tienen la obligación de proteger, por esta misma razón son exigibles y justiciables¹³.

Los derechos humanos se fundamentan en normas contenidas en convenios y pactos internacionales a partir de los cuales se originan las obligaciones de los Estados. De este modo, los derechos humanos hacen parte del derecho internacional y, a la vez, en el orden nacional se expresan en la Constitución y las leyes. Los Estados, en virtud de las obligaciones que adquieren al firmar o ratificar instrumentos internacionales de derechos humanos, son responsables de implementar las medidas pertinentes para su salvaguarda en el ordenamiento constitucional, normativo y administrativo interno. Todo esto para hacer respetar y garantizar el ejercicio de esos derechos, como también investigar y sancionar a quienes los vulneran.

La Figura 2 relaciona la ruta jurídica que los estudios normativos siguen para dilucidar sobre qué lineamientos regular las prácticas empresariales respecto a la gestión en derechos humanos.

⁹ LANOSZKA, A. *Corporate governance and economic development: identifying critical institutional reform*. New York: Routledge, Taylor & Francis Group, 2023.

¹⁰ BECK, U. *Risk society: towards a new modernity*. London: Sage, 1992. p. 21

¹¹ BECK, U. Risk society and the provident state. In: LASH, S.; SZERSZYNSKI, B.; WYNNE, B. (ed.). *Risk, environment and modernity: towards a new ecology*. London: Sage, 1996. p. 27-43.

¹² SCOTT, J. *A dictionary of sociology*. Oxford: Oxford University Press, 2015.

¹³ GALVIS ORTIZ, L. *Comprensión de los derechos humanos: una visión para el siglo XXI*. Bogotá: Ediciones Aurora, 2008.

Figura 2 - Ejes de estudio normativo para la diligencia en DD.HH



Fonte: Elaboración propia con base en Cantú Rivera (2017).

Como se observa, dichos derechos se salvaguardan mediante normas positivas que buscan proteger las libertades inmanentes al ser humano, es decir, sus derechos civiles, políticos, económicos, sociales y culturales. Por otro lado, con el objeto de hacer efectiva esa protección existen normas procesales e instancias judiciales ante las cuales acudir para exigir su respeto.

En ese mismo orden de ideas, las empresas también deben velar porque sus actividades no pongan en riesgo o vulneren directa o indirectamente los derechos humanos. Con este objetivo se ha introducido el concepto y la práctica de la Debida Diligencia en Derechos Humanos en el campo de las Empresas y los Derechos Humanos.

No obstante, cuando Bilchitz¹⁴ enfatiza en la importancia que tiene para el escenario empresarial la fundamentación que Ruggie¹⁵ elabora respecto a establecer un amplio margen de obligaciones desde lo corporativo y pese a los vacíos de su propuesta en cuanto a la estructuración dimensional de lo organizacional frente a los derechos humanos, sí reúne la virtud de identificar las capacidades de los actores que intervienen en esta dinámica. En esa medida, desarrolla principios orientativos conducentes a maximizar tareas e interactuar desempeños que es en suma el fin último sobre el cual ponderar las buenas prácticas alrededor de los derechos humanos.

¹⁴ BILCHITZ, D. El marco Ruggie: ¿una propuesta adecuada para las obligaciones de derechos humanos de las empresas? *JUR: Revista Internacional de Derechos Humanos*, v. 7, n. 12, p. 209-241, jun. 2010.

¹⁵ John Ruggie profesor de la Universidad de Harvard cuyo marco de responsabilidades en derechos humanos publicado en 2007, constituye una base para las empresas que contemplan estructurar los fundamentos de buenas prácticas en esta materia.

4 DDDH en el campo de empresa y derechos humanos

Para efectos del análisis que se propone en el presente estado del arte, la debida diligencia en el campo de Empresa y Derechos Humanos debe ser abordada desde múltiples aristas. En primer lugar, desde la perspectiva general, esto es, como estándar de conducta y cuidado razonable para evitar daños. En segundo lugar, a partir del dialogo entre las formas en que se entiende el concepto y la práctica de la debida diligencia desde el derecho internacional público y la gobernanza corporativa.

4.1 La debida diligencia como estándar de conducta para las empresas

El concepto de debida diligencia tiene su origen en la noción de diligencia del *bonus pater familias* en el Derecho Romano, fundado en la prudencia con la que este debe manejar negocios, intereses y bienes tanto propios como ajenos¹⁶. Desde esa perspectiva, se le concibe como un estándar de conducta y cuidado razonable orientado a no producir daño a otros. Lo contrario a la diligencia es entonces la negligencia.

La debida diligencia se ha nutrido también de la figura de la persona razonable o «reasonable man» propia del derecho anglosajón. Thomas Kurian define la diligencia como “el grado de cuidado que una persona de prudencia y razón ordinarias (un hombre razonable) ejercería en determinadas circunstancias”¹⁷.

El daño que se busca evitar emana de un riesgo que es contenido con la conducta diligente y el cuidado razonable desplegado por el agente. De acuerdo con Peters et al: “La diligencia es un calificativo del comportamiento [...] Así pues, la diligencia debida no es una obligación autónoma, sino una modalidad unida a un deber de diligencia para con alguien o algo más (incluido el deber de prevenir y mitigar el daño)”¹⁸.

¹⁶ MÁRQUEZ CARRASCO, C. Instrumentos sobre la debida diligencia en materia de derechos humanos: orígenes, evolución y perspectivas de futuro. *Cuadernos de Derecho Transnacional*, v. 14, n. 2, p. 605-642, 2022. Disponible en: <https://doi.org/10.20318/cdt.2022.7198>.

¹⁷ KURIAN, G. *The AMA dictionary of business and management*. New York: AMACOM, 2013. p. 197.

¹⁸ PETERS, A.; KRIEGER, H.; KREUZER, L. Due diligence in the international legal order: dissecting the leitmotif of current ac-

En el contexto empresarial, la debida diligencia tradicionalmente implica una investigación precontractual que realiza una empresa sobre datos y hechos legales, financieros y operacionales de otra. Todos ellos previos al establecimiento de relaciones comerciales de distintos tipos entre dichas empresas para evitar riesgos reputacionales, legales y financieros¹⁹.

Guamán y Tole ponen de presente que el concepto esta orientado a “dotar a las corporaciones de las herramientas y procesos necesarios para evaluar los riesgos [...] con el objetivo evidente de aumentar los beneficios corporativos”²⁰. Luego, desde la práctica empresarial, la debida diligencia se entiende como un proceso de análisis y gestión de riesgos basado en un estándar de conducta y cuidado razonable.

4.2 La debida diligencia en el derecho internacional público

La debida diligencia también hace ingreso al derecho internacional de la mano del derecho romano. Ello sucede con la noción de diligencia encarnada en la figura del *bonus pater familias*. En la legislación de derecho internacional público, de acuerdo con Björnstjern: “el término ‘debida diligencia’ se utiliza para describir el nivel de conducta necesario para cumplir con un deber de protección”²¹.

Los derechos humanos son derechos positivos, por tanto, son exigibles y justiciables. Dan origen a un deber de protección por parte del Estado emanado de los derechos sustantivos contenidos en los instrumentos y tratados de derechos humanos suscritos por ellos. Todo esto en sinergia con las cláusulas de protección general incluidas en los mismos. Los Estados tienen el deber de proteger y salvaguardar los derechos humanos de cualquier vulneración, inicialmente sin importar quién sea

el infractor. Asimismo, los Estados tienen el deber de investigar y juzgar a los responsables y reparar los daños causados, en caso de ocurrir la violación.

En virtud de los tratados internacionales de derechos humanos se le exige a los Estados parte que garanticen el ejercicio de estos derechos. La doctrina clasifica las obligaciones de los Estados parte en tres niveles. Estos tres niveles, según Lambooy, corresponden a:

las obligaciones de respetar, proteger y hacer efectivos los derechos humanos. Estas obligaciones implican que los propios Estados deben abstenerse de violar estos derechos, pero también implican obligaciones positivas, es decir, que los Estados tomen medidas para garantizar que los derechos no se violarán y se cumplirán²².

El deber de debida diligencia dentro del derecho internacional público le impone al Estado la necesidad de adecuar su comportamiento y arquitectura institucional para acatar las normas en materia de derechos humanos. Esto quiere decir hacer las reformas necesarias en el orden legislativo, administrativo y judicial para cumplir con estas normas, asegurando también que sean respetadas en su jurisdicción tanto por sus agentes como por actores no estatales²³.

En el derecho internacional público la debida diligencia no busca evitar totalmente el daño, dependiendo las circunstancias, lo que se busca es que el Estado haga todo lo que sea posible para evitar su ocurrencia o minimizar sus efectos. Por tanto, Peters *et al.* explica que “la debida diligencia se ha establecido como una obligación de hacer todo lo posible en contraste con las obligaciones orientadas a los resultados y en contraste con la responsabilidad objetiva”²⁴.

La evaluación o análisis de la de debida diligencia en Derechos Humanos para determinar la posible responsabilidad del Estado debe tener presente, según el

countability debates. In: PETERS, A.; KRIEGER, H.; KREUZER, L. (ed.). *Due diligence in the international legal order*. Oxford: Oxford University Press, 2020. p. 1-19. p. 2.

¹⁹ LAW, J. (ed.). *A dictionary of business and management*. 6. ed. Oxford: Oxford University Press, 2016.; STATT, D. *The Routledge dictionary of business management*. London: Taylor & Francis e-Library, 2004.

²⁰ GUAMÁN, A.; TOLE MARTÍNEZ, J. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022. p. 301.

²¹ BJÖRNSTJERN, B. Due diligence and the duty to protect human rights. In: BYRNES, A.; COSTA, K. (ed.). *Due diligence in the international legal order*. Oxford: Oxford University Press, 2020. p. 92-108.

²² LAMBOOY, T. Corporate due diligence as a tool to respect human rights. *Netherlands Quarterly of Human Rights*, v. 28, n. 3, p. 404-448, 2010. Disponible en: <https://doi.org/10.1177/016934411002800304>. p. 416.

²³ BARRERA TRABOL, S. E.; GONZÁLEZ CANTIN, M. F. Mecanismo de debida diligencia según los Principios Rectores de Naciones Unidas para empresas y derechos humanos: elementos para su aplicación en terreno. *Anuario de Derechos Humanos*, v. 16, n. 2, p. 297-330, 2020. Disponible en: <https://doi.org/10.5354/0718-2279.2020.55735>.

²⁴ PETERS, A.; KRIEGER, H.; KREUZER, L. Due diligence in the international legal order: dissecting the leitmotif of current accountability debates. In: PETERS, A.; KRIEGER, H.; KREUZER, L. (ed.). *Due diligence in the international legal order*. Oxford: Oxford University Press, 2020. p. 1-19. p. 5.

caso en concreto, tres factores: 1) la materialización de un riesgo previsible que afecta un bien o interés jurídicamente protegido; 2) que se busque una reparación y compensación por los daños; y, 3) la capacidad del Estado para actuar protegiendo efectivamente los derechos humanos conculcados.

Ahora bien, desde la perspectiva del Estado, la debida diligencia se refiere a las medidas tomadas y las acciones ejecutadas utilizando todos los medios posibles a su alcance, considerados proporcionales y apropiados de acuerdo con el riesgo de daño existente en el caso concreto. La debida diligencia para prevenir daños a los derechos humanos no es reciente, es un deber que en el derecho internacional se le ha asignado al Estado. Martín-Ortega pone de relieve que:

El concepto de diligencia debida con respecto a las obligaciones de los Estados en materia de derechos humanos se desarrolló por primera vez en el contexto regional interamericano y estuvo directamente relacionado con la búsqueda de justicia tras la represión y las violaciones masivas de los derechos humanos durante las dictaduras latinoamericanas²⁵.

Concretamente, el término debida diligencia se empleó inicialmente en la sentencia del caso Velázquez Rodríguez contra Honduras (1988) donde la Corte Interamericana de Derechos Humanos argumentó que la desaparición forzada del Sr. Velásquez era una violación a la Convención Americana sobre Derechos Humanos. Lambooy, explica frente a este caso que:

La Corte Interamericana de Derechos Humanos introdujo este término como el estándar con el que se podía contrastar el comportamiento del Estado. [...] La Corte argumentó que Honduras podía ser considerada responsable, no por el acto en sí, sino por la falta de la debida diligencia para prevenir la violación o para responder a ella como lo exige la Convención²⁶.

De igual manera, es en el contexto del Sistema Regional de Derechos Humanos, es decir, el Sistema Interamericano, donde resalta la jurisprudencia de la Corte Interamericana de Derechos Humanos (CIDH) en materia de debida diligencia en el contexto de empresa y derechos humanos.

Como lo muestra Cantú Rivera, la CIDH ha puesto de presente en su jurisprudencia, en relación con los proyectos de infraestructura y desarrollo, la necesidad de consulta previa y la protección de los derechos de los pueblos indígenas. La debida diligencia según la CIDH consiste en:

el requerimiento de tomar todas las medidas y hacer todas las investigaciones y gestiones necesarias para lograr su objetivo de protección de los derechos humanos, lo cual incluye deberes correlativos de prevenir, castigar, investigar y reparar los daños ocasionados por los actos de personas o entidades privadas²⁷.

La teoría y doctrina más ortodoxa sostiene “la idea de que el único sujeto de derecho internacional es el Estado y por consiguiente, es el único responsable ante los organismos e instancias internacionales de derechos humanos”²⁸. Mientras que el ser humano es el sujeto de protección del derecho interno y del derecho internacional público en el marco de la DDDH, las empresas no son sujetos de derecho internacional.

En suma, la DDDH en el derecho público internacional es una herramienta jurídica y un estándar de conducta exigible a los Estados para prevenir vulneraciones a los derechos humanos.

4.3 La debida diligencia en la Gobernanza Corporativa

El término Gobernanza Corporativa (en adelante GC) o Gobierno Corporativo no tiene una definición unívoca, hay distintas teorías que analizan y explican este concepto. Sin embargo, en su acepción más básica y restringida, hace referencia a gobernar, esto es, controlar, guiar y dirigir una compañía. De la misma forma, la GC implica los sistemas o mecanismos de control que permiten poner en balanza los intereses de los distintos actores que interactúan en la cadena de suministro y generación de valor de una compañía; esto, al producir rentabilidad de la manera más eficiente, responsable y sostenible posible²⁹.

²⁵ MARTIN-ORTEGA, O. Human rights due diligence for corporations: from voluntary standards to hard law at last? *Netherlands Quarterly of Human Rights*, v. 32, n. 1, p. 44-74, 2014. Disponible en: <https://doi.org/10.1177/016934411403200104>.

²⁶ LAMBOOY, T. Corporate due diligence as a tool to respect human rights. *Netherlands Quarterly of Human Rights*, v. 28, n. 3, p. 404-448, 2010. Disponible en: <https://doi.org/10.1177/016934411002800304>. p. 419.

²⁷ CANTÚ RIVERA, H. Debida diligencia en derechos humanos: breves reflexiones. In: INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS (org.). *Derechos humanos y empresas: reflexiones desde América Latina*. San José: Instituto Interamericano de Derechos Humanos, 2017. p. 425.

²⁸ GALVIS ORTIZ, L. *Comprensión de los derechos humanos: una visión para el siglo XXI*. Bogotá: Ediciones Aurora, 2008. p. 77.

²⁹ GARZÓN CASTRILLÓN, M. A. The concept of corporate governance. *Revista Científica Visión de Futuro*, v. 18, n. 25, n. 2, p.

Por otra parte, la GC, también está constituida por los marcos institucionales, legales, económicos y políticos de los Estados, junto con la regulación vía códigos de conducta y comportamiento ético voluntarios, planeados por las mismas empresas o entidades supranacionales e intergubernamentales.

La GC establece quiénes están llamados a asumir la responsabilidad por las actuaciones de la persona jurídica o accountability, todo ello atendiendo los entornos regulatorios internos y, a la vez, garantizando el cumplimiento de los sistemas normativos externos a la empresa, con el objetivo de generar valor. La GC tiene dos pilares: La estructura de Gobierno Corporativo y el proceso de Gobierno Corporativo.

La discusión de la debida diligencia en derechos humanos en la GC transita entre la voluntariedad, no vinculante jurídicamente (soft law), propias de las “directrices, resoluciones o principios”³⁰ y los marcos normativos de obligatorio cumplimiento, como las leyes o los instrumentos internacionales de derechos humanos firmados y ratificados por los Estados (hard law).

A partir de lo anterior, se establece que la DDDH en el ámbito de los derechos humanos y las empresas se nutre del diálogo, convergencias y divergencias, entre las distintas perspectivas en la materia, desde el contexto empresarial, el derecho público internacional, la gobernanza corporativa, los instrumentos de soft law y las normas de obligatorio cumplimiento.

La DDDH, en el campo de Empresa y derechos Humanos, se entiende como un proceso muy similar al que se realiza en una Evaluación de Impacto en los Derechos Humanos. Esto es, evaluar y analizar las formas en que la actividad de la empresa pudiese tener un impacto negativo sobre los derechos humanos de los distintos actores presentes en su cadena de suministro y valor. Lo anterior, con el objetivo de identificar riesgos

potenciales sobre los derechos para poderlos gestionar adecuadamente.

Márquez Carrasco enfatiza en que:

El enfoque de la debida diligencia de derechos humanos de las empresas se centra en el riesgo para la empresa en sí, mientras que la debida diligencia en materia de derechos humanos se trata del riesgo para aquellos humanos que sufren el impacto o podrían verse afectados por las actividades comerciales³¹.

Por otra parte, la DDDH no solo es un proceso, también es un estándar de cuidado y de conducta para medir y evaluar el comportamiento de las empresas. Ollino, aclara que

[e]l término diligencia debida se utiliza para definir la conducta exigida a los agentes no estatales, suele referirse a un proceso que estos agentes deben llevar a cabo para identificar, evaluar y gestionar los riesgos relacionados con la inversión o las actividades³².

No obstante, en este contexto las obligaciones que se derivan de la DDDH son distintas a las obligaciones de debida diligencia que tienen los Estados. Las empresas deben respetar los derechos humanos y el Estado debe proteger y exigir el cumplimiento de esa responsabilidad. Además, debe investigar y sancionar a los responsables de la vulneración, en caso de que ocurra, y reparar a las víctimas de la conculcación de derechos.

5 Instrumentos no vinculantes en materia de DDDH

Teniendo presente que existen varios instrumentos no vinculantes en materia de DDDH que han tenido relevancia en la producción normativa de obligatorio cumplimiento. El siguiente apartado está enfocado a señalar sus aportes a la discusión de la DDDH en el campo de la Empresa y los Derechos Humanos. Los instrumentos en referencia son: 4.1) Normas sobre la responsabilidad de las empresas transnacionales y otras empresas comerciales; 4.2) El Pacto Global; 4.3) Líneas

154-177, jul./dic. 2021.; SARBAH, A.; XIAO, W. Good corporate governance structures: a must for family businesses. *Open Journal of Business and Management*, v. 3, p. 40-57, 2015. Disponible en: <http://dx.doi.org/10.4236/ojbm.2015.31005>; L'HUILLIER, B. M. What does «corporate governance» actually mean? *Corporate Governance: International Journal of Business in Society*, v. 14, n. 3, p. 300-319, 2014. Disponible en: <https://doi.org/10.1108/CG-10-2012-0073>.

³⁰ WILLIAMS, O. F. The United Nations Global Compact: what did it promise? In: FLYNN, G. (ed.). *Leadership and business ethics*. Dordrecht: Springer, 2022. Disponible en: https://doi.org/10.1007/978-94-024-2111-8_20.

³¹ MÁRQUEZ CARRASCO, C. Instrumentos sobre la debida diligencia en materia de derechos humanos: orígenes, evolución y perspectivas de futuro. *Cuadernos de Derecho Transnacional*, v. 14, n. 2, p. 605-642, 2022. Disponible en: <https://doi.org/10.20318/cdt.2022.7198>. p. 612.

³² OLLINO, A. *Due diligence obligations in international law*. Cambridge: Cambridge University Press, 2022. Disponible en: <http://doi.org/10.1017/9781009053082>. p. 17.

Directrices de la OCDE para Empresas Multinacionales; y, 4.4) Los Principios Rectores sobre las empresas y los Derechos Humanos de las Naciones Unidas.

5.1 Normas sobre la responsabilidad de las empresas transnacionales y otras empresas comerciales

Agosto 13 del 2003, fue el día en que la Subcomisión de Promoción y Protección de los Derechos Humanos, subsidiaria del Consejo Económico y Social de las Naciones Unidas, aprobó, mediante Resolución 2003/16, una serie de normas relacionadas con la necesidad de regular las actividades de las Empresas Transnacionales. Ello con el objetivo de reducir los impactos adversos de las operaciones de este tipo de empresas en los Derechos Humanos.

Weissbrodt, miembro de la Subcomisión que elaboró las Normas explica:

Las Normas representan un paso histórico para responsabilizar a las empresas de sus abusos de los derechos humanos y constituyen una reafirmación sucinta, pero exhaustiva, de los principios jurídicos internacionales aplicables a las empresas en materia de derechos humanos, derecho humanitario, derecho laboral internacional, derecho del medio ambiente, derecho del consumidor, derecho anti-corrupción, etc.³³

Las Normas fundamentalmente buscaban construir un marco jurídico internacional de obligatorio cumplimiento, donde se crean obligaciones en materia de Derechos Humanos, derivadas de los tratados internacionales, que recaen directamente ya no sobre el Estado, sino sobre las Empresas Transnacionales. Este es su mayor aporte y la principal crítica que se le hace, o sea, las Normas cambian el estatus jurídico de las Empresas en el derecho público internacional al endilgarles responsabilidades como sujeto legal, es un replanteamiento de “los principios jurídicos internacionales aplicables a las empresas”³⁴.

En lo relacionado con la DDDH, se establece en las Normas, siguiendo a Miretski & Bachmann, una

responsabilidad de la empresa: En el apartado “Obligaciones generales” de la Parte A de las Normas se enumeraban las siguientes responsabilidades: “el deber de diligencia debida para garantizar que las actividades empresariales no contribuyan directa o indirectamente a la vulneración de los derechos humanos”³⁵.

Las críticas principales y razones fundamentales para que esta iniciativa no prosperará fueron:

1) El cambio disruptivo que conllevaban la transformación del estatus jurídico de la Empresa Transnacional como sujeto en el marco tradicional del derecho público internacional; y, 2) a las Empresas Transnacionales se les podría endilgar responsabilidad por las acciones de terceros, como proveedores u otros actores en la cadena de suministro, sobre los que la empresa no tiene un control total. Por las razones enunciadas, a pesar de haber sido aprobadas en 2003, las Normas fueron abandonadas en 2005.

A partir del abandono de las Normas, la Comisión le recomienda al Secretario General de la ONU nombrar un Representante especial para estudiar lo relacionado con el campo de la empresa y los derechos humanos. Significa que del fracaso de esta iniciativa provienen las lecciones aprendidas que permitieron elaborar los Principios Rectores sobre las Empresas y los Derechos Humanos de las Naciones Unidas, como se expone más adelante.

5.2 El Pacto Global

En el año 2000, las Naciones Unidas lanzan el Pacto Global respondiendo a una preocupación compartida entre distintos actores, esto es, la insuficiencia de los Estados para regular las actividades de las empresas transnacionales. Clavero apunta que dicha preocupación estaba centrada en “los efectos del desbordamiento de los Estados por la transnacionalización de las empresas en relación con los derechos humanos”³⁶.

El secretario General de las Naciones Unidas, para ese momento, sugirió que se llegase a un consenso me-

³³ WEISSBRODT, D.; KRUGER, M. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. *American Journal of International Law*, v. 97, n. 4, p. 901-922, 2003. p. 901.

³⁴ WEISSBRODT, D.; KRUGER, M. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. *American Journal of International Law*, v. 97, n. 4, p. 901-922, 2003. p. 903.

³⁵ MIRETSKI, P. P.; BACHMANN, S.-D. The UN “Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights”: a requiem. *Deakin Law Review*, v. 17, n. 1, p. 5-41, 2012. Disponible en: https://search.informit.org/doi/10.3316/agis_archive.20125041. p. 19.

³⁶ CLAVERO, B. *Derecho global: por una historia verosímil de los derechos humanos*. Madrid: Editorial Trotta, 2014. p. 162.

dian­te una plataforma de diálogo multi-actor don­de se acordase unos valores universales. Fundamen­talmente, en las áreas de derechos humanos, los estándares y las normas laborales, junto con prácticas empresariales ambiental­mente sostenibles.

Williams, aduce que esta plataforma de diálogo multi-actor encuentra su razón de ser en la medida en que:

no disponemos de un Estado global que formule las normas y convenciones para una economía global, el Pacto Global de las Naciones Unidas UNGC sería una plataforma en la que las empresas y las diversas partes interesadas, a través del debate y la discusión, llegarían a un acuerdo mínimo sobre normas y prácticas globales³⁷.

En el acápite dedicado a los de los Derechos Humanos, o sea, los principios 1 y 2 se determina que “1: Las empresas deben apoyar y respetar la protección de los derechos humanos proclamados internacionalmente; y 2: asegurarse de que no sean cómplices de abusos contra los derechos humanos”³⁸. Esta iniciativa es de carácter voluntario, está basada en principios o estándares de conducta que no son jurídicamente exigibles o coercibles. Si bien no hace mención explícita a la DDDH, tampoco la excluye.

No obstante, el principal aporte de este instrumento de soft law, es haber abierto el camino de la discusión en términos de la necesidad de llegar a consensos sobre unos valores universales, normas y prácticas globales para las empresas. Las principales críticas que se le hacen es su carácter no vinculante y que, como lo advierte Esteve Molto:

el único mecanismo para verificar el cumplimiento de esos estándares en materia de derechos humanos, laborales y medioambientales queda en manos de las propias empresas que se convierten en juez y parte de sus actividades³⁹.

³⁷ WILLIAMS, O. F. The United Nations Global Compact: what did it promise? In: FLYNN, G. (ed.). *Leadership and business ethics*. Dordrecht: Springer, 2022. Disponible en: https://doi.org/10.1007/978-94-024-2111-8_20.

³⁸ WILLIAMS, O. F. The United Nations Global Compact: what did it promise? In: FLYNN, G. (ed.). *Leadership and business ethics*. Dordrecht: Springer, 2022. Disponible en: https://doi.org/10.1007/978-94-024-2111-8_20.

³⁹ ESTEVE MOLTO, J. E. Empresas transnacionales y derechos humanos: la tortuosa búsqueda de responsabilidades en una globalización injusta e insostenible. *Derecho y Realidad*, v. 19, n. 37, p. 33-51, 2021.

5.3 Líneas Directrices de la OCDE para empresas multinacionales

Las Líneas Directrices de la OCDE para empresas multinacionales se adoptaron el 21 de junio de 1976 y han sido actualizadas varias veces, puntualmente, 1979, 1984, 1991, 2000 y 2011, para abordar desafíos emergentes en la actividad empresarial global y mantenerlas acordes con las circunstancias contemporáneas. Según la OCDE, sus Líneas Directrices para Empresas Multinacionales son:

[...] recomendaciones dirigidas por los gobiernos a las empresas multinacionales que operan en países adherentes o que tienen su sede en ellos. Contienen principios y normas no vinculantes para una conducta empresarial responsable dentro del contexto global, conformes con las leyes aplicables y las normas reconocidas internacionalmente. Las Directrices constituyen el único código de conducta responsable, exhaustivo y acordado multilateralmente, que los gobiernos se han comprometido a promover⁴⁰.

En consecuencia, se observa que los destinatarios de estas recomendaciones hechas por los gobiernos son las empresas multinacionales que operan en su jurisdicción o tienen su asiento en ella. Sin embargo, como estas no son sujetos del derecho internacional público, quienes se adhieren a ellas son los Estados, es decir, el Estado es el sujeto activo y las empresas multinacionales el sujeto pasivo. El respeto a los derechos humanos por las empresas es una expectativa de comportamiento global.

La DDDH se incorpora como una obligación para las empresas multinacionales en la parte primera de las Líneas Directrices, bajo el Título II, obligaciones generales, numeral 10, acción que consiste en:

Implementar la debida diligencia basada en los riesgos, incorporándola, por ejemplo, a sus sistemas de gestión de riesgos, con el fin de identificar, prevenir o atenuar los impactos negativos, reales o potenciales, [...] e informar sobre cómo se reacciona ante dichos impactos negativos. La naturaleza y el alcance de la debida diligencia dependen de las circunstancias de cada situación particular⁴¹.

La DDDH se basa en un deber de conducta dictado por el esfuerzo hecho para impedir o atenuar los im-

⁴⁰ OECD. *Líneas directrices de la OCDE para empresas multinacionales*. Paris: OECD Publishing, 2013. Disponible en: <https://doi.org/10.1787/9789264202436-es>. p. 3.

⁴¹ OECD. *Líneas directrices de la OCDE para empresas multinacionales*. Paris: OECD Publishing, 2013. Disponible en: <https://doi.org/10.1787/9789264202436-es>. p. 23.

pactos negativos de las actividades propias o vinculadas con las relaciones comerciales que se originan a partir de estas, se lleva a cabo para: “Evitar que las actividades propias generen o contribuyan a generar impactos negativos en los campos contemplados por las Directrices y tomar las medidas necesarias para tratarlos cuando se produzcan dichos impactos”⁴².

La DDDH, en las Líneas Directrices es un proceso de seis pasos cuyo objetivo consiste en:

evaluar los impactos reales o potenciales sobre los derechos humanos, integrar los resultados de dicha evaluación y poner en práctica las acciones correspondientes, hacer un seguimiento de las respuestas y comunicar las medidas tomadas para hacer frente a los impactos⁴³.

A los cinco pasos anteriores se suma la integración de la conducta empresarial responsable en las políticas y los sistemas de gestión de las empresas.

Una vez identificados los impactos deben tomarse medidas de prevención, también de existir impactos debe haber medios para lograr la reparación. Los impactos negativos pueden ser ocasionados por la misma empresa u otros socios comerciales, esto es, cualquier entidad que participe de la cadena de suministro, en el marco de sus actividades comerciales.

Las empresas, siguiendo los postulados de Fernández Martínez, bajo las Líneas directrices:

estarán obligadas a respetar los derechos humanos, a poner en práctica la debida diligencia y a articular mecanismos para remediar los daños causados en los derechos humanos en la medida en que así lo establezcan las normas nacionales o internacionales sobre la cuestión, pero no porque lo señalan las Directrices de la OCDE⁴⁴.

Si no en virtud de que estos derechos están contenidos en tratados de derechos humanos internacionalmente reconocidos y al ser suscritos por los Estados parte, se hacen de obligatorio cumplimiento.

⁴² OECD. *Líneas directrices de la OCDE para empresas multinacionales*. París: OECD Publishing, 2013. Disponible en: <https://doi.org/10.1787/9789264202436-es>.

⁴³ OECD. *Líneas directrices de la OCDE para empresas multinacionales*. París: OECD Publishing, 2013. Disponible en: <https://doi.org/10.1787/9789264202436-es>. p. 38.

⁴⁴ FERNÁNDEZ MARTÍNEZ, S. Las líneas directrices de la OCDE para las empresas multinacionales y su puesta en práctica por los puntos nacionales de contacto. *Lex Social: Revista de Derechos Sociales*, v. 10, n. 2, p. 101-129, 2020. Disponible en: <https://doi.org/10.46661/lexsocial.5066>. p. 114-115.

En suma, este instrumento de soft law intergubernamental, no imponen jurídicamente ninguna obligación o sanción para la empresa cuando se incumpla lo estipulado, son recomendaciones, y expectativas de conducta no coercibles. Está dirigido exclusivamente a las empresas multinacionales. Uno de sus principales aportes es que incorpora la DDDH como una manera de gestionar los riesgos en derechos humanos para las empresas multinacionales, entendida como un proceso, paso a paso, y un estándar de conducta.

5.4 Los Principios Rectores sobre las empresas y los Derechos Humanos de las Naciones Unidas

El Pacto Global no fue lo esperado, es así que la Comisión de Derechos Humanos de la ONU, de ese momento, le solicita al Secretario General nombrar a un Representante Especial para los Derechos Humanos y las empresas transnacionales, es decir, John Ruggie, en 2005, con el propósito de crear un marco que prevenga los impactos negativos de las empresas. El mandato duró seis años, entre estudios, investigación y generación de la propuesta de los Principios. Finalmente, esta fue aprobada mediante Resolución del Consejo de Derechos Humanos de 6 de julio de 2011, A/HRC/RES/17/4, del 17º período de sesiones.

El informe del Representante Especial del Secretario General para la cuestión de los derechos humanos y las empresas transnacionales y otras empresas, que busca poner en práctica los Principios, lleva por nombre: Principios Rectores sobre las empresas y los derechos humanos: puesta en práctica del marco de las Naciones Unidas para “proteger, respetar y remediar” 21 de marzo de 2011, A/HRC/17/31⁴⁵.

Los principios tienen tres pilares fundados en el conocimiento de:

- a) Las actuales obligaciones de los Estados de respetar, proteger y cumplir los derechos humanos y las libertades fundamentales; b) El papel de las empresas como órganos especializados de la sociedad que desempeñan funciones especializadas y que deben cumplir todas las leyes aplicables y respetar los derechos humanos; c) La necesidad de que los

⁴⁵ NACIONES UNIDAS. Asamblea General. Resolución aprobada por el Consejo de Derechos Humanos. Consejo de Derechos Humanos de 6 de julio de 2011, A/HRC/RES/17/4, del 17º período de sesiones. *UNHCR*, 2011. Disponible en: <https://www.refworld.org/es/pdfid/5d714e284.pdf>.

derechos y obligaciones vayan acompañados de recursos adecuados y efectivos en caso de incumplimiento⁴⁶.

En el Título II, La Responsabilidad de las Empresas de Respetar los Derechos Humanos, numeral 17, acápite LA DEBIDA DILIGENCIA EN MATERIA DE DERECHOS HUMANOS, se establece que esta es un proceso continuo de identificación de riesgos. Tiene por objeto prevenir y mitigar las potenciales afectaciones a los derechos humanos en las relaciones comerciales de las empresas y las partes interesadas en su cadena de suministro y valor. El proceso varía según el tamaño y el contexto específico de cada empresa.

De igual manera, se determina que es un proceso continuo el cual deberá incluir

una evaluación del impacto real y potencial de las actividades sobre los derechos humanos, la integración de las conclusiones, y la actuación al respecto; el seguimiento de las respuestas y la comunicación de la forma en que se hace frente a las consecuencias negativas⁴⁷.

Uno de los mayores aportes de este instrumento de soft law es incorporar la DDDH como una forma de idioma común, comprensible para los órganos intergubernamentales, supranacionales, los Estados, las empresas, las ONG, los y las defensoras de derechos humanos y otras organizaciones de base, en el ámbito nacional e internacional. En palabras de Deva, la DDDH “se ha convertido en la nueva *lingua franca* del discurso en torno a la responsabilidad de las empresas de respetar los derechos humanos”⁴⁸.

McCorquodale y Nolan ponen de manifiesto que aun cuando la debida diligencia como estándar de conducta y proceso de gestión del riesgo ha sido usado antes y que:

resuena con las normas existentes del deber de diligencia en el derecho de responsabilidad civil y conceptos comparables en el derecho civil no se había utilizado en relación con los impactos sobre los derechos humanos y las actividades

empresariales hasta su uso en los UNGP (Principios Rectores)⁴⁹.

Entre sus debilidades se señalan su carácter voluntario y su falta de mecanismos jurídicamente vinculantes⁵⁰.

La DDDH implica un deber de cuidado y un proceso, paso a paso, de gestión del riesgo de naturaleza preventiva que da origen a un deber de reparación si no es eficaz, con el cual las empresas están familiarizadas e igualmente los Estados e incluso otras partes interesadas; a pesar de que impliquen responsabilidades distintas y diferenciadas para cada actor. Los Estados tienen la obligación de proteger los derechos humanos, mientras que las empresas tienen la responsabilidad de respetarlos, no hay vínculo normativo o jurídico en esta responsabilidad.

A la vez, la DDDH, es un estándar de conducta. De acuerdo con Cantú Rivera

el contenido de la debida diligencia es similar para el Estado y para las empresas, en vista de que se basa en una expectativa de que ambos entes desarrollarán sus deberes con suficiente cuidado para evitar una violación de una obligación o responsabilidad⁵¹.

A diferencia de la debida diligencia, en el contexto empresarial, ya no se trata de identificar y gestionar el riesgo para la propia empresa, sino de gestionar los riesgos que pueden ocasionar las actividades comerciales de las empresas para las partes interesadas en su cadena de suministro y valor, utilizando un proceso de gestión que ya conocen. En el ámbito empresarial, la Debida diligencia es un proceso puntual que se hace con un objetivo en particular, mientras que la DDDH es un proceso continuo que, además, implica consultar a las partes interesadas.

Una vez analizados los instrumentos de *soft law* que proponen directrices, resoluciones o principios no vinculantes más relevantes en materia de DDDH en el cam-

⁴⁶ ONU. *Principios rectores sobre las empresas y los derechos humanos*: puesta en práctica del marco de las Naciones Unidas para “proteger, respetar y remediar”. New York: ONU, 2011. p. 1.

⁴⁷ ONU. *Principios rectores sobre las empresas y los derechos humanos*: puesta en práctica del marco de las Naciones Unidas para “proteger, respetar y remediar”. New York: ONU, 2011. p. 20.

⁴⁸ DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023. Disponible en: <https://doi.org/10.1017/S0922156522000802>. p. 390.

⁴⁹ MCCORQUODALE, R.; NOLAN, J. The effectiveness of human rights due diligence for preventing business human rights abuses. *Netherlands International Law Review*, v. 68, p. 455-478, 2021. Disponible en: <https://doi.org/10.1007/s40802-021-00201-x>. p. 458.

⁵⁰ BARNES, M. M. The United Nations guiding principles on business and human rights, the State Duty to protect human rights and the State-business nexus. *Revista de Direito Internacional*, Brasília, v. 15, n. 2, p. 41-63, 2018. Disponible en: <https://www.publicacoacademicas.uniceub.br/rdi/article/view/5476/3974>.

⁵¹ CANTÚ RIVERA, H. Debida diligencia en derechos humanos: breves reflexiones. In: INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS (org.). *Derechos humanos y empresas: reflexiones desde América Latina*. San José: Instituto Interamericano de Derechos Humanos, 2017. p. 435.

po de derechos humanos y empresa, es posible advertir que, a pesar, de contener avances importantes, también tienen limitaciones significativas. En especial, para lograr responsabilizar a las empresas ante una eventual vulneración a los Derechos Humanos derivada de sus actividades a lo largo de la cadena de suministro y valor. No obstante, estos instrumentos han sido fundamentales, ya que han introducido el concepto y desarrollado la práctica de la DDDH en el campo de las Empresas y los Derechos Humanos. En suma, siguiendo a Santarelli:

lejos de considerar que las declaraciones y códigos empresariales deben ser rechazados y han de ser considerados siempre como inútiles o problemáticos en el sentido de que distraen frente a iniciativas vinculantes, [...] aquellas iniciativas de naturaleza normativa privada voluntaria pueden tener impactos positivos en términos de la posible generación de una cultura corporativa de respeto y de la creación de pasos concretos que ofrezcan, por ejemplo, mecanismos de reclamación voluntarios no judiciales que no excluyan ni nieguen la posibilidad de acudir a los jurisdiccionales y los complementen⁵².

Uno de los puntos de discusión se debate sobre la necesidad de que se les reconozca subjetividad jurídica internacional a las empresas para poder determinar su responsabilidad ante una conculcación de derechos. Sin embargo, la respuesta ha sido negativa, mayormente sobre la base de que esto significaba una reducción en la soberanía y poder del Estado. Es preciso recordar que la soberanía es un pilar del Estado-Nación, además, es el atributo que hace posible el diálogo entre naciones y le otorga la legitimidad para ejercer el poder dentro de su territorio. Más aún, Iglesias Márquez advierte que:

[...] la creación de obligaciones internacionales de carácter vinculante para las empresas implica disminuir las obligaciones de los Estados de respetar, proteger, garantizar y promover los derechos humanos, ya que se corre el riesgo de que los Estados deleguen funciones en el sector privado, afectando así la plena protección de los derechos humanos⁵³.

Los derechos humanos a nivel Estado se encuentran protegidos por el marco constitucional y en virtud de las obligaciones contraídas por este, mediante los tratados

⁵² CARRILLO SANTARELLI, Nicolás. Declaraciones empresariales “voluntarias” sobre derechos humanos, y la necesidad de una regulación institucional (internacional e interna) externa. *Revista de Direito Internacional*, Brasília, v. 16, n. 3, p. 23-49, 2019. p. 44.

⁵³ IGLESIAS MÁRQUEZ, D. Las obligaciones de las empresas en virtud del Derecho Internacional: retos y oportunidades en materia de empresas y derechos humanos. In: ABELLO-GALVIS, R.; ARÉVALO-RAMÍREZ, W. (ed.). *Derechos humanos, empresas y Sistema Interamericano de Derechos Humanos: reflexiones y diálogos*. Bogotá: Editorial Universidad del Rosario, 2019. p. 67-102.

internacionales en materia Derechos Humanos de los que sea parte. Por tanto, es un hecho difícil de discutir que las leyes nacionales pueden imponer obligaciones en materia de Derechos Humanos a las empresas, incluida la DDDH. En consecuencia, es a este nivel donde la DDDH se ha convertido en obligatoria mediante leyes, cuyo incumplimiento pueda dar origen a responsabilidad civil o administrativa, junto con la obligación de reparar el daño causado.

A continuación se realizará un análisis descriptivo de estas leyes utilizando un sistema híbrido entre la metodología propuesta por Guamán y Tole⁵⁴ y Amaya-Castro y Henao Zuluaga⁵⁵ haciendo énfasis en: el ámbito de aplicación, los destinatarios de la ley, los bienes jurídicos protegidos, lo establecido como obligaciones en DDDH, consecuencias y responsabilidades por incumplimiento, para observar de igual forma características similares en cuanto a la implementación de la debida diligencia obligatoria, la vigilancia administrativa y posibles regímenes de responsabilidad.

6 Leyes de DDDH y otros instrumentos

Las leyes nacionales vinculantes en materia de DDDH comparten ciertas características, a pesar de que su origen es distinto: son reglas de conducta obligatorias. De ellas se puede predicar que son generales, imperativas, mayormente bilaterales, inviolables y exigibles. Además, en ellas se expresan derechos, obligaciones, permisiones y prohibiciones⁵⁶. A continuación, desarrollaremos el marco analítico siguiendo el orden cronológico de expedición de las leyes bajo consideración.

⁵⁴ GUAMÁN, A.; TOLE MARTÍNEZ, J. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022.

⁵⁵ AMAYA-CASTRO, J. M.; HENAO ZULUAGA, S. El régimen de debida diligencia obligatoria: estado del arte e implicaciones desde una perspectiva latinoamericana. *Estudios en Derecho, Comercio & Globalización*, n. 1, 2022. Disponible en: <https://derecho.uniandes.edu.co/sites/default/files/el-regimen-de-debida-diligencia-obligatoria.pdf>.

⁵⁶ MONROY CABRA, M. *Introducción al derecho*. Bogotá: Editorial Temis S.A., 2018.; NOGUERA LABORDE, R. *Introducción general al derecho*. Bogotá: Editorial Universidad Sergio Arboleda, 2015.

6.1 Ley francesa sobre el deber de vigilancia de las sociedades matrices y las empresas contratistas

La Ley N° 2017-399 entró en vigor el 27 de marzo del año 2017, es una de las primeras manifestaciones de *hard law* que impone una obligación de vigilancia basada en la DDDH, cuya inobservancia determina la responsabilidad civil de las empresas por los daños causados. Su artículo primero modificó el Art. L. 225-102-4 del código de comercio francés, e indica:

La sociedad que emplee, al término de dos ejercicios económicos consecutivos, por lo menos cinco mil trabajadores en ella y en sus filiales directas o indirectas cuyo domicilio social esté situado en territorio francés, o al menos diez mil empleados dentro de ella y en sus filiales directas o indirectas cuya sede social se encuentra en Francia o en el extranjero, establece y aplica efectivamente un plan de vigilancia⁵⁷

El plan consiste en cinco medidas obligatorias de vigilancia razonable para estas sociedades, con el objetivo de identificar riesgos y prevenir posibles violaciones a los derechos humanos, a la salud y seguridad de las personas y al medio ambiente, derivados de sus actividades directas e indirectas o provenientes de subcontratistas o proveedores. La norma no se refiere exclusivamente a los riesgos para los derechos humanos y las libertades fundamentales, también incorpora los riesgos y los daños graves para la salud y la seguridad y el medio ambiente.

En otras palabras, las cinco medidas obligatorias son: mapa de identificación, análisis y clasificación de riesgos; procedimiento para la evaluación periódica de mapeo de riesgos de las filiales, subcontratistas o proveedores con las que se tiene una relación comercial; medidas y acciones encaminadas a prevenir graves daños y mitigar el riesgo; un mecanismo de alerta y recolección de informes relativos a la existencia u ocurrencia de riesgos, determinado en conjunto o en consulta con sindicatos de la empresa; y, un sistema de seguimiento a las medidas implementadas para poder evaluar su eficacia.

En lo relativo al acceso a la reparación y la coercibilidad de la norma, Deva expone que

la legislación francesa prevé dos vías: cualquier parte interesada puede solicitar (i) una orden judicial

⁵⁷ FRANCE. *LOI n° 2017-399 du 27 mars 2017*. Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1). Disponible en: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/2023-07-18>. art. L. 225-102-4.-I.

que ordene a la empresa cumplir la ley; y (ii) una indemnización por daños y perjuicios por el incumplimiento por parte de la empresa de su obligación de vigilancia que cause un daño evitable⁵⁸.

El demandante debe demostrar que la empresa fue negligente y el nexo entre la falta de la empresa y el daño sufrido; esto, por la vía del derecho civil, sin embargo, no contempla la sanción administrativa.

6.2 Ley de debida diligencia en trabajo infantil de los Países Bajos

Norma del 24 de octubre de 2019, mediante la cual se introduce un deber de cuidado para evitar el suministro de bienes y servicios creados con trabajo infantil en las cadenas de suministro de empresas que venden sus productos o bienes y prestan sus servicios en los Países Bajos, siendo su usuario final de este país.

El Artículo 5 de la Ley determina que, si existe sospecha razonable de que los bienes o servicios a suministrar al mercado holandés han sido producidos con trabajo infantil, la empresa deberá implementar un plan de DDDH con el objeto de identificar este riesgo. Además, como lo expresa, Iglesias Márquez y Erice Aranda,

En caso de verificarse el riesgo de producción con mano de obra infantil, las empresas deben establecer un plan de acción para impedirlo. Asimismo, la ley obligará a las empresas a preparar una declaración manifestando que se actuó con la diligencia debida⁵⁹.

En lo relativo al acceso a la reparación y la coercibilidad de la norma, el artículo 3 señala que el encargado de velar por el cumplimiento de la norma es el superintendente. Asimismo, determina que cualquier persona, ya sea natural o jurídica, cuyos intereses se hayan visto afectados por las acciones u omisiones de la empresa; en las circunstancias establecidas, podrá presentar una queja ante la autoridad de control, es decir, el superintendente.

⁵⁸ DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023. Disponible en: <https://doi.org/10.1017/S0922156522000802>. p. 407.

⁵⁹ IGLESIAS MÁRQUEZ, D.; ERICE ARANDA, L. S. La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina. *Homa Publica*. Revista Internacional de Derechos Humanos y Empresas, v. 6, n. 1, e100, p. 1-26, 2022. Disponible en: <https://periodicos.ufjf.br/index.php/HOMA/article/view/37339>. p. 15.

El superintendente podrá imponer una multa administrativa si la empresa incumple el deber de declarar y reportar que cumple con el proceso de DDDH establecido en la Ley. La norma también contempla responsabilidad penal en su artículo 9, “si se ha impuesto una multa administrativa por el mismo delito por parte de la empresa, cometida por instrucciones o bajo la dirección del mismo director”⁶⁰.

6.3 Ordenanza sobre diligencia debida y transparencia en relación con los minerales y metales procedentes de zonas afectadas por conflictos y el trabajo infantil

La legislación suiza sobre DDDH, de 2021, es producto de una propuesta ciudadana fallida. Conocida como Iniciativa empresarial responsable suiza o Iniciativa popular para las empresas responsables y la protección de los derechos humanos y el medioambiente, que pretendía modificar la Constitución de este país. Esto con el propósito de introducir nuevas disposiciones frente a la DDDH y la responsabilidad de las empresas por la vulneración de derechos humanos. Se sometió a voto popular en noviembre de 2020, pero no fue aprobada.

La Ordenanza regula las obligaciones de debida diligencia e información de las personas naturales, jurídicas y sociedades cuya sede, domicilio o actividad comercial principal se localice en Suiza a lo largo de su cadena de suministro; modificando el código de obligaciones suizo parte del derecho privado⁶¹. La actividad debe estar relacionada con los minerales y metales procedentes de zonas afectadas por conflictos, o productos o servicios de los que se sospeche que hubo mano de obra infantil involucrada en su elaboración⁶².

El proceso de DDDH es concebido como un sistema de gestión del riesgo, implica implementar unas po-

líticas en la cadena de suministro de minerales en orden de determinar la procedencia y trazabilidad del mineral, a saber, si proviene de un área afectada por conflicto. De igual manera, busca identificar los riesgos e impactos negativos de su actividad y adoptar medidas para evitarlos o mitigarlos, evaluando los resultados y comunicando los hallazgos.

El proceso para la implementación de la Política de la cadena de suministro sobre el trabajo infantil también es un sistema de gestión del riesgo basado en la DDDH, que busca prevenir el riesgo de trabajo infantil, cuando haya motivos razonables para sospechar que participe mano de obra infantil en la fabricación de un producto. No aplica para pequeñas y medianas empresas.

En los dos casos, existe para la empresa una obligación de brindar información actual, tanto al público como a los proveedores, sobre su política de la cadena de suministro. Garantizando que haya un canal de comunicación para las preocupaciones sobre los riesgos.

La ordenanza no hace mención de que el incumplimiento de las obligaciones de debida diligencia acarree sanciones civiles por daños o administrativas. Ni establece mecanismo para hacerla exigible, distinto a una sanción penal consistente en multa, contenida en el artículo 325 del código penal suizo, por no informar sobre el cumplimiento de las obligaciones de debida diligencia. Una de sus principales deficiencias es la falta de un mecanismo para hacerla exigible⁶³.

6.4 Ley alemana sobre la diligencia debida para la prevención de violaciones de los derechos humanos en las cadenas de suministro (Ley de Diligencia Debida en la Cadena de Suministro-LkSG)

Fue aprobada el 11 de junio de 2021 por el parlamento alemán. Está dirigida a la protección de los derechos humanos, laborales y del medio ambiente, evitando su vulneración a lo largo de toda la cadena de suministro y valor de las empresas. Aplica para las empresas que tienen su sede central, sucursal o domicilio social en Alemania y por lo menos 3000 empleados laborando en dicho país; el umbral podrá cambiar. Incluidas sucur-

⁶⁰ KONINKRIJK DER NEDERLANDEN. *Wet 401 van 24 oktober 2019*. Houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid). Disponible en: <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>. Art. 9.

⁶¹ THE SWISS FEDERAL COUNCIL. Ordinance on due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour: (DDTrO). *Fedlex*, 3 Dec. 2021. Disponible en: <https://www.fedlex.admin.ch/eli/cc/2021/847/en>. Art.

⁶² THE SWISS FEDERAL COUNCIL. Ordinance on due diligence and transparency in relation to minerals and metals from conflict-affected areas and child labour: (DDTrO). *Fedlex*, 3 Dec. 2021. Disponible en: <https://www.fedlex.admin.ch/eli/cc/2021/847/en>. Art. 1.

⁶³ BUENO, N.; KAUFMANN, Ch. The Swiss human rights due diligence legislation: between law and politics. *Business and Human Rights Journal*, v. 6, n. 3, p. 542-549, 2021. Disponible en: <https://doi.org/10.1017/bhj.2021.42>.

sales de empresas extranjeras que operen en territorio alemán siempre y cuando empleen más de 3000 ciudadanos en ese país⁶⁴.

El ámbito de aplicación de la ley son los riesgos a los derechos humanos, el medioambiente y, también, a los derechos laborales. Las empresas deberán evitar y minimizar estos riesgos en su cadena de suministro. La fuente de las obligaciones son los convenios de derecho internacional en la materia.

Se debe tomar medidas preventivas para gestionar estos riesgos, no desde la perspectiva de lo que pueden significar para la propia empresa, sino desde enfoque del riesgo a los derechos de las partes que pueden verse afectadas a raíz de la actividad empresarial. Es una obligación de medio, no de resultado. No se le exige a la empresa que evite la vulneración, se le exige que haga un esfuerzo razonable para lograr evitarla. De presentarse una vulneración se tomarán medidas correctivas.

Aunado a lo anterior, se establece un procedimiento de reclamación y quejas para que las partes afectadas tengan una vía de comunicación con la empresa y así poder ponerla en conocimiento de información sobre posibles vulneraciones relacionadas con su actividad comercial o la de proveedores inmediatos. La ley no prevé la responsabilidad civil o sanciones penales. No obstante, según lo observado por Deva, la ley sí contempla: “la imposición de sanciones económicas y multas administrativas por parte de la Oficina Federal de Asuntos Económicos y Control de las Exportaciones”⁶⁵.

6.5 Ley relativa a la transparencia de las empresas y su labor en materia de derechos humanos fundamentales y condiciones de trabajo dignas (Ley de Transparencia Noruega)

La Ley entró en vigor el 1 de julio de 2022, tiene por objeto, según el artículo 1, promover el respeto de los

derechos humanos y las condiciones de trabajo dignas por parte de las empresas en la producción de bienes y prestación de servicios. Asimismo, busca que las empresas garanticen el acceso público a la información sobre la manera en que ellas abordan los impactos negativos sobre los derechos humanos y las condiciones de trabajo dignas.

Los destinatarios de la ley son las grandes empresas que tengan su domicilio en Noruega, sin importar si ofrecen sus bienes y servicios en el mercado nacional o internacional. De igual forma, aplica para las grandes empresas que ofrecen bienes o servicios en el mercado noruego y que, además, están sujetas a cargas fiscales de acuerdo con la legislación interna del país. Se hace extensiva a la cadena de suministro y socios comerciales⁶⁶.

El artículo cuatro determina el deber de debida diligencia en los términos en que es desarrollada por las líneas Directrices de la OCDE para Empresas Multinacionales. El proceso implica adoptar una política de conducta empresarial responsable e identificar los

impactos adversos reales y potenciales sobre los derechos humanos fundamentales y las condiciones de trabajo dignas que la empresa haya causado o contribuido a causar, o que estén directamente relacionados con las operaciones, productos o servicios de la empresa a través de la cadena de suministro o de socios comerciales⁶⁷.

Una vez identificados los impactos, se aplican medidas para prevenirlos, cesarlos o mitigarlos, de acuerdo con la priorización realizada en el paso anterior. Luego se hace seguimiento a los resultados de las medidas adoptadas, y se comunica, a los titulares de los derechos conculcados y a las demás partes interesadas, esos resultados. Es debido, cooperar en la reparación e indemnización; si llegase a ser necesario.

Se destaca que la DDDH entraña un proceso continuo determinado por el tamaño y naturaleza de la empresa junto con su contexto de operación. La empresa

⁶⁴ DEUTCHLAND. *Teil | Nr. 46, ausgegeben zu Bonn am 22. Vom. 16 Juli 2021*. Gesetz über die unternehmerischen sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz - LkSG). Disponible en: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#bgbl%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D1689700104727. art. 1.

⁶⁵ DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rights holders? *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023. Disponible en: <https://doi.org/10.1017/S0922156522000802>. p. 411.

⁶⁶ NORWAY. *Act 18 June 2021 No 99*. Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act). Disponible en: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent>. art. 1.

⁶⁷ NORWAY. *Act 18 June 2021 No 99*. Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act). Disponible en: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent>. art. 5, lit b.

está en obligación de rendir cuentas sobre la Debida Diligencia, Iglesias Márquez y Erice Aranda, aclaran que ello significa:

divulgar información sobre las políticas y prácticas que desarrollan para gestionar los riesgos de derechos humanos y para asegurar las condiciones para un trabajo decente. También deben divulgar información sobre los impactos negativos reales de sus actividades, los riesgos significativos para los derechos humanos y el trabajo decente y sobre las medidas para prevenir dichos impactos y riesgos⁶⁸.

La ley no menciona la responsabilidad civil o penal para las empresas por el incumplimiento de la DDDH. No obstante, Deva, pone de presente que:

la Autoridad de Consumo puede emitir prohibiciones y órdenes para garantizar el cumplimiento de diversas disposiciones relacionadas con la DDDH y el derecho a la información. El artículo 13 también prevé sanciones coercitivas en caso de incumplimiento de dichas órdenes⁶⁹.

Las dos propuestas que vienen a continuación, son más abarcadoras que las leyes nacionales, en tanto que la primera sería un instrumento de carácter supranacional aplicable a los Estados que integran la Unión Europea. Por otra parte, la segunda es un proceso en marcha que tiene la pretensión de ser vinculante internacionalmente, por lo tanto, serán abordadas como sigue.

6.6 La directiva europea sobre debida diligencia en materia de sostenibilidad

El 13 de junio de 2024, el Parlamento Europeo y el Consejo de la Unión Europea adoptaron la Directiva 1760 sobre Debida Diligencia de las Empresas en Materia de Sostenibilidad, que establece normas sobre:

a) las obligaciones que incumben a las empresas en relación con los efectos adversos, reales y potenciales, para los derechos humanos y el medio ambiente de sus propias operaciones, de las operaciones de sus filiales y de las operaciones efectuadas por sus socios comerciales en las cadenas de actividades de dichas empresas;

⁶⁸ IGLESIAS MÁRQUEZ, D.; ERICE ARANDA, L. S. La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina. *Homa Publica: Revista Internacional de Derechos Humanos y Empresas*, v. 6, n. 1, e100, p. 1-26, 2022. Disponible en: <https://periodicos.ufjf.br/index.php/HOMA/article/view/37339>. p. 15.

⁶⁹ DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders? *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023. Disponible en: <https://doi.org/10.1017/S0922156522000802>. p. 410.

b) la responsabilidad que se deriva del incumplimiento de las obligaciones a que se refiere la letra a), y

c) la obligación de las empresas de adoptar y llevar a efecto un plan de transición para la mitigación del cambio climático que tenga por objeto garantizar, poniendo todos los medios para ello, la compatibilidad del modelo de negocio y de la estrategia de la empresa con la transición a una economía sostenible y con la limitación del calentamiento global a 1,5 C en consonancia con el Acuerdo de París.

Los Estados miembros tienen un plazo de dos años para integrar esta normativa en su legislación nacional. Esta se aplicará a las empresas establecidas en la UE que cuenten con más de 1.000 empleados en promedio y una facturación neta global superior a 450 millones de euros. También se aplicará a las empresas no ubicadas en la UE que generen más de 450 millones de euros en ingresos dentro del mercado europeo. La Directiva prevé exenciones parciales para las instituciones financieras, los fabricantes de armamento y las empresas que producen otros productos regulados por el control de exportaciones, como la tecnología de vigilancia.

6.7 Proyecto de instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, Consejo de Derechos Humanos, ONU

En el periodo 26° de sesiones del Consejo de Derechos Humanos, el 26 de junio de 2014, impulsada por Bolivia, Cuba, Ecuador, Sudáfrica y Venezuela, se presentó una iniciativa, mediante resolución 26/9, de nombre Elaboración de un instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos. En ella se le dio el mandato a un Grupo de Trabajo Intergubernamental para su creación, a la fecha hay una tercera versión del borrador revisada.

Esta última versión de 2021 producida por el Grupo de Trabajo intergubernamental de composición abierta (GTICA) sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos en el artículo 6 denominado prevención, establece la obligación de los Estados de regular efectivamente en la legislación nacional las actividades de las empresas, introduciendo la DDDH obligatoria como la manera de prevenir posibles vulneraciones de derechos. Los Estados deben requerir a las empresas para que implemente la DDDH

obligatoria a lo largo de su cadena de valor, sin importar su tamaño, naturaleza o contexto de operación⁷⁰.

La obligación de respetar los derechos humanos se le exige a las empresas mediante un proceso de DDDH de cuatro pasos, contenidos en el numeral 6.3 del mismo artículo, simplificados de la siguiente manera: 1. Identificar, evaluar y hacer pública cualquier violación real o potencial de los derechos humanos; 2. Adoptar las medidas razonables y adecuadas para evitar, prevenir y mitigar eficazmente los abusos de los derechos humanos que la empresa pueda causar con ocasión de sus relaciones comerciales; 3. Supervisar la eficacia de las medidas tomadas; 4. Comunicar a las partes interesadas las medidas y políticas implementadas para abordar violaciones reales o potenciales a los derechos humanos. Es muy próximo al proceso establecido por los Principios Rectores de la ONU⁷¹.

7 Contexto Latinoamericano

Si bien de momento no existen leyes de DDDH en Latinoamérica, los Planes de acción nacional (PAN) sobre empresas y derechos humanos, son instrumentos a través de los cuales se ha tratado de incidir vía políticas públicas en el ámbito de la Empresa y los Derechos Humanos. Los PAN son la manera en la que los Estados implementan los Principios Rectores de la ONU.

Al respecto, Cantú Rivera, deja sentado que:

En la regulación del Sistema Interamericano se tiene como fuentes jurídicas más importantes: la Resolución 2840 de 2014 y la Resolución 2887 de 2016 de la Asamblea General de la OEA, las cuales crearon las facultades de los Estados miembros para desarrollar estándares en el ámbito de las empresas y los Derechos Humanos, y además desde el 2016 se incluyó a los Planes Nacionales de Acción como una forma de implementar los Principios Rectores⁷².

⁷⁰ ONU. Tercer proyecto revisado 17.08.2021: proyecto de instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos. *OHCHR*, 2021. Disponible en: <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf>.

⁷¹ ONU. Tercer proyecto revisado 17.08.2021: proyecto de instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos. *OHCHR*, 2021. Disponible en: <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf>.

⁷² CANTÚ RIVERA, H. Debida diligencia en derechos humanos: breves reflexiones. In: INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS (org.). *Derechos humanos y empresas: reflex-*

iones desde América Latina. San José: Instituto Interamericano de Derechos Humanos, 2017. p. 220-221.

En materia de Debida Diligencia, Iglesias Márquez y Erice Aranda aclaran que el PAN de Chile “contempla como objetivo general la promoción de la diligencia debida en derechos humanos dentro de la gestión empresarial responsable”⁷³. En la misma línea los autores apuntan que el PAN de Colombia: “exhorta a que las empresas desarrollen procesos de diligencia debida que les permitan evaluar sus impactos en derechos humanos y desarrollar planes de acción frente a ellos”⁷⁴. Por último, estos autores argumentan, el PAN de Perú reconoce que las empresas deberían tomar medidas en materia de DDDH, luego es el único instrumento de política pública de la región que: “contempla una línea acción que podría dar lugar a una ley de diligencia debida, ya que se incluye la evaluación de la pertinencia de una normativa específica de rango legal que regule la diligencia debida empresarial”⁷⁵.

Ahora bien, que no exista una ley en materia de DDDH en América latina, no quiere decir que la región sea ajena al impulso regulatorio que se observa en otras partes del mundo. Esto sobre la base de que hay legislación relacionada y propuestas normativas en curso, para convertir la DDDH en leyes. A partir del análisis efectuado por Guamán & Tole⁷⁶, se colige que en tres países de la región existen propuestas de esta naturaleza, a saber: Brasil, México y Perú.

iones desde América Latina. San José: Instituto Interamericano de Derechos Humanos, 2017. p. 220-221.

⁷³ IGLESIAS MÁRQUEZ, D.; ERICE ARANDA, L. S. La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina. *Homa Publica: Revista Internacional de Derechos Humanos y Empresas*, v. 6, n. 1, e100, p. 1-26, 2022. Disponible en: <https://periodicos.ufjf.br/index.php/HOMA/article/view/37339>. p. 19.

⁷⁴ IGLESIAS MÁRQUEZ, D.; ERICE ARANDA, L. S. La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina. *Homa Publica: Revista Internacional de Derechos Humanos y Empresas*, v. 6, n. 1, e100, p. 1-26, 2022. Disponible en: <https://periodicos.ufjf.br/index.php/HOMA/article/view/37339>. p. 16.

⁷⁵ IGLESIAS MÁRQUEZ, D.; ERICE ARANDA, L. S. La diligencia debida empresarial como mecanismo para reforzar el respeto de los derechos humanos laborales en América Latina. *Homa Publica: Revista Internacional de Derechos Humanos y Empresas*, v. 6, n. 1, e100, p. 1-26, 2022. Disponible en: <https://periodicos.ufjf.br/index.php/HOMA/article/view/37339>. p. 19-20.

⁷⁶ GUAMÁN, A.; TOLE MARTÍNEZ, J. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022.

7.1 Brasil

El Decreto N° 9.571, del 21 de noviembre de 2018, norma vigente expedida por el ejecutivo, establece los Lineamientos Nacionales sobre Empresas y Derechos Humanos, para las medianas y grandes empresas, incluidas las empresas multinacionales que operan en el país⁷⁷. La adopción de esos lineamientos por parte de las empresas es voluntaria. Están basadas sobre los Principios Rectores de la ONU y su marco Proteger, Respetar y Remediar.

Este proceso de DDDH trae consigo identificación y gestión de riesgos en materia de derechos Humanos, reporte e información sobre los impactos, junto con las medidas tomadas para prevenirlos y mitigarlos, además de rendición de cuentas y participación de las partes interesadas. La empresa debe implementar un mecanismo de denuncia y reparar en caso de infracciones.

La reparación integral podría incluir compensación, de naturaleza pecuniaria y no económica, además de sanciones punitivas, tales como multas, sanciones penales o sanciones administrativas. Es un supuesto, deja abierta la posibilidad, lo cual no significa que, en efecto, el Decreto establezca responsabilidad administrativa, civil o penal alguna. Hay obligaciones generales y específicas, pero no existe la forma de garantizarlas, no hay un régimen de responsabilidad, Guamán & Tole, plantean que “el vacío u omisión normativa de la responsabilidad deja sin un procedimiento o mecanismos para garantizarlos”⁷⁸.

7.2 México

El Grupo Parlamentario del Partido Movimiento de regeneración Nacional (MORENA), el 6 de octubre de 2020, presentó un proyecto de decreto para crear la Ley General de Responsabilidad Empresarial y Debida Diligencia Corporativa. La ley busca reglamentar la conducta responsable de las empresas para mitigar impactos adversos:

⁷⁷ BRASIL. Decreto n° 9.571, de 21 de novembro de 2018. Estabelece as Diretrizes Nacionais sobre Empresas e Direitos Humanos. Disponible en: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9571.htm. art. 1.

⁷⁸ GUAMÁN, A.; TOLE MARTÍNEZ, J. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022. p. 319.

en lo relativo a las condiciones de los trabajadores, el respeto a los derechos humanos, el cuidado del medio ambiente, el combate a la corrupción, la protección a los derechos de los consumidores y la exigibilidad del gobierno corporativo y los programas de control y cumplimiento⁷⁹.

La ley aplica para todas las empresas mexicanas, micro, pequeñas, medianas y grandes empresas, incluso con actividades comerciales en el exterior, y para las empresas extranjeras que operen en su jurisdicción, lo anterior, siempre y cuando hayan sido debidamente autorizadas legalmente para llevar a cabo su actividad.

Se entiende la DDDH como un deber de cuidado basado en acciones, prevención, mitigación y control de riesgos con el cual deben cumplir las empresas de cualquier sector productivo en cualquier ciclo de producción del bien o servicio.

El mecanismo de DDDH comprende un compromiso político de respeto y cumplimiento de los derechos humanos, diagnóstico y análisis de impacto de las actividades de la empresa sobre los derechos humanos, identificando riesgos reales y potenciales de vulneración, el plan de acción para implementar las medidas de prevención y mitigación, junto con mecanismos de remediación. También, requiere la conformación de un mecanismo de DDDH como un órgano de operación transversal.

La responsabilidad empresarial existirá por afectación directa e indirecta a los derechos humanos cuando se derive de las actividades de la propia empresa o de otras entidades con las cuales esta sostiene relaciones comerciales y su cadena de suministro. Se prevén sanciones para las empresas en caso de demostrarse su responsabilidad en violaciones a los derechos humanos. La medida menos gravosa son las sanciones pecuniarias y la más: la disolución de la empresa.

Además, establece que las empresas tienen la obligación de remediar los daños causados con ocasión de sus actividades, por tanto, deben contar con procedimientos normados en el mecanismo de DDDH en caso de que proceda la reparación. La ley prevé sanciones para las empresas en caso de demostrarse su responsabilidad en violaciones a los derechos humanos; además,

⁷⁹ ESTADOS UNIDOS MEXICANOS. Senado de la República. Gaceta LXIV/3PPO-26-2711/112449. Proyecto de Decreto: Ley General de Responsabilidad Empresarial y Debida Diligencia Corporativa. *Gaceta del Senado*, 6 oct. 2020. Disponible en: https://www.senado.gob.mx/65/gaceta_del_senado/documento/112449. Art. 1.

hace remisión a la ley penal. Se denuncia las infracciones a la ley mediante un procedimiento administrativo de carácter sancionador. Guamán y Tole, concluyen, que este proyecto de ley determina “un régimen integral de responsabilidad administrativa y penal en materia de debida diligencia”⁸⁰.

7.3 Perú

La propuesta de Ley para regular la Actividad Empresarial y la Debida Diligencia en materia de Derechos Humanos y Ambiente en el Perú, está impulsada por una plataforma multi-actor de organizaciones de la sociedad civil, este objetivo está enmarcado en las acciones estratégicas del Plan Nacional de Acción sobre Empresas y Derechos Humanos. Las empresas tienen la obligación de DDDH, consistente en la identificación, prevención y mitigación de riesgos a los Derechos Humanos, contando con la participación de las partes interesadas.

El artículo 2 de la propuesta determina que: Esta Ley es aplicable a todas las empresas, nacionales o con participación de capital extranjero, privadas, públicas o con participación estatal, con independencia de su tamaño, sector de actividad, ubicación, propietarios y estructura, cuyas actividades u operaciones se realicen o tengan impacto dentro del territorio nacional⁸¹.

En esta propuesta hay lugar a responsabilidad administrativa, civil o penal por parte de la empresa por afectaciones a los derechos humanos, Guamán y Tole, aducen “Cabe resaltar que esta iniciativa de ley determina que la responsabilidad de las personas jurídicas no excluye la responsabilidad civil o penal de las personas naturales involucradas, incluyendo a aquellas en instancias directivas”⁸².

⁸⁰ GUAMÁN, A.; TOLE MARTÍNEZ, J. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022. p. 325.

⁸¹ FERNÁNDEZ-MALDONADO, E. (coord.). *Conducta empresarial responsable y derechos humanos: normas vinculantes y debida diligencia*. Lima: Equidad, 2022. Disponible en: <https://equidad.pe/publicacion/conducta-empresarial-responsable-yderechos-humanos-normas-vinculantes-ydebidadiligencia/>. p. 124.

⁸² GUAMÁN, A.; TOLE MARTÍNEZ, J. Iniciativas legislativas y leyes de debida diligencia empresarial en derechos humanos: visiones del Sur y experiencias del Norte. *Anuario Mexicano de Asuntos Globales*, v. 1, n. 1, p. 299-328, 2022. p. 320.

Luego, es claro a la luz de estas normas, como lo menciona Villajos de Silva que:

Si el Estado realmente desea cumplir con sus obligaciones internacionales en esta materia, la adopción de una norma que atribuya responsabilidad civil o administrativa a la empresa es esencial [...] Un paso más consistiría en poder atribuir también responsabilidad penal a las personas jurídicas ante determinadas prácticas empresariales [...] que acarreen graves violaciones de derechos humanos y un ataque a la comunidad internacional en su conjunto⁸³.

8 Contexto colombiano

En Colombia este estándar de cuidado y metodología para la gestión de riesgos de impactos adversos a los derechos humanos ocasionados por las actividades de las empresas se ha ido introduciendo al contexto nacional por dos vías, a saber: los Planes Nacionales de Acción en Derechos Humanos y Empresas (PAN), esto es, política pública y a través de la jurisprudencia de la Corte Constitucional sobre DDDH.

8.1 Planes nacionales de acción en derechos humanos y empresas

Los PAN son instrumentos de política pública, elaborados para un periodo de 3 años sobre las bases del marco de los Principios Rectores de la ONU: Proteger, Respetar y Remediar, con el fin de garantizar el respeto de los derechos humanos por parte de las empresas en el desarrollo de sus actividades. Están alineados con la Estrategia Nacional de Derechos Humanos 2014-2034 y los Lineamientos para una Política Pública de Empresas y Derechos Humanos publicados en 2014 por el gobierno colombiano.

8.1.1 Plan Nacional de Acción en Derechos Humanos y Empresas “Colombia Avanza” 2015-2018

Está dirigido a las empresas públicas y privadas, de origen nacional o extranjero, sin importar su tamaño,

⁸³ VILLAJOS DE SILVA, C. La obligación de la debida diligencia por parte de las empresas: un análisis de la situación en España a la luz de la práctica reciente. In: LÓPEZ MARTÍN, A. G. (ed.). *Empresas, armas y derechos humanos*. Valencia: Tirant Lo Blanch, 2024. p. 113-141. p. 138.

actividad empresarial, contexto operacional o estructural que estén domiciliadas en Colombia. Dentro de sus objetivos específicos se ha trazado el “Contribuir a la implementación de la debida diligencia como proceso de gestión de las empresas y como base para una inversión responsable en Colombia”⁸⁴.

La debida diligencia se entiende como un estándar de conducta basado en la prudencia y un proceso de gestión, expresado como:

el conjunto de medidas que de manera sistemática realiza una empresa que actúe con prudencia, para cumplir con su responsabilidad de respetar los derechos humanos, atendiendo a sus circunstancias específicas por el sector de actividad, contexto operativo, dimensión y factores similares⁸⁵.

8.1.2 Plan Nacional de Acción en Derechos Humanos y Empresas “Juntos lo Hacemos Posible” 2020-2022

El Plan se elabora como una herramienta para que las empresas, sin importar su tamaño o sector, alineen sus actividades con el deber de respetar los derechos humanos. Este PNA incorpora la DDDH con el objeto de que las empresas identifiquen impactos en derechos humanos y en concordancia elaboren planes de acción para contrarrestarlos.

Asimismo, dentro de sus objetivos específicos está el fomentar: “la adopción y apropiación de procesos de debida diligencia empresarial para efectos de fortalecer el respeto por los derechos humanos y eventual remediación de impactos adversos”⁸⁶. Se entiende que la DDDH es la forma en que las empresas cumplen con la responsabilidad de respetar los derechos humanos.

8.2 Jurisprudencia de la Corte Constitucional Colombiana en materia de DDDH

Los fundamentos constitucionales de las empresas en Colombia, en cuanto a sus límites, función y obligaciones, están dados por el Artículo 333 de la Constitu-

ción Política. Este determina que los límites a la iniciativa privada los traza el bien común, además, se reconoce que la empresa es una base del desarrollo, por tanto, tiene una función social, lo cual conlleva obligaciones. Luego, las empresas, además de generar beneficios económicos a sus propietarios, tienen obligaciones para con la sociedad en su conjunto, entre ellas no vulnerar los derechos humanos por medio de sus actividades.

Los pronunciamientos de la corte constitucional se han desarrollado en el contexto de las prácticas de Responsabilidad Social Empresarial ancladas a instrumentos internacionales como el Pacto Global o los Principios Rectores de la ONU.

Sin embargo, esta labor de la CCC se dio de manera escalonada. De un lado, porque la jurisprudencia adoptó los estándares y buenas prácticas de empresas y derechos humanos, aunque sin especificar que la fuente eran los GBHR. Por otra parte, esto fue cambiando y las referencias a estos instrumentos se fueron haciendo más puntuales a medida que la resolución de los problemas lo requería; por ejemplo, no es gratuito que se hayan citado los principios rectores, de forma expresa, en los casos de explotación de hidrocarburos o de actividad extractiva. Es de considerar que la Corte haya tenido que reforzar las obligaciones constitucionales frente a los derechos fundamentales con recomendaciones de *Soft Law* que afecta tanto a los Estados como a las empresas, pues estos pueden incidir de manera directa en actividades comerciales –como las de las empresas mineras– que funcionan como sociedades multinacionales. Aquí, suponemos, que un argumento traído del derecho internacional de los derechos humanos resulta más disuasivo, prima facie, que el del derecho interno de la República de Colombia.⁸⁷

Lorenzoni Escobar en su análisis de la responsabilidad social empresarial en la jurisprudencia de la Corte Constitucional colombiana⁸⁸, argumenta que, en el contexto minero-energético, la afectación a derechos humanos se ha tramitado por vía de la acción constitucional de tutela, la autora hace referencia a la sentencia T-732 donde el juez constitucional advierte:

Los particulares están obligados a no interferir en el goce de derechos y especialmente, las empresas, deben actuar de conformidad con la protección al ambiente y los derechos de las personas que habi-

⁸⁴ REPÚBLICA DE COLOMBIA. *Plan Nacional de Acción en Derechos Humanos y Empresas “Colombia Avanza” 2015-2018*. 2015. p. 8.

⁸⁵ REPÚBLICA DE COLOMBIA. *Plan Nacional de Acción en Derechos Humanos y Empresas “Colombia Avanza” 2015-2018*. 2015. p. 19.

⁸⁶ REPÚBLICA DE COLOMBIA. *Plan Nacional de Acción en Derechos Humanos y Empresas “Juntos lo Hacemos Posible” 2020-2022*. 2020. p. 22.

⁸⁷ GÓMEZ PATIÑO, D.; CALDERÓN VALENCIA, F. Empresa y derechos humanos: desarrollo desde la jurisprudencia constitucional colombiana. *Revista Ius et Praxis*, v. 29, n. 2, p. 107-125, 2023.

⁸⁸ LORENZONI ESCOBAR, L. Responsabilidad social empresarial en la jurisprudencia de la Corte Constitucional colombiana: dimensiones de obligatoriedad en la voluntariedad. *Revista de Estudios Socio-Jurídicos*, v. 23, n. 1, p. 347-369, 2020. Disponible en: <https://doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.9085>.

tan en las zonas en las que pueden generar alguna afectación. [...] Ello implica [...] que el juez constitucional puede proferir órdenes a su cargo por su afectación a derechos fundamentales⁸⁹.

Es claro, la empresa tiene obligaciones y el Estado debe prevenir que las empresas vulneren derechos o interfieran en su goce con ocasión de sus actividades. Igualmente, la corte sienta posición para dar cumplimiento a la Constitución y lo ordenado en su jurisprudencia a las entidades de la rama ejecutiva del poder público pertenecientes al Sector Minero-energético (SME), en sentencia de unificación SU-095 de 2018. En particular, ordena robustecer la política pública del sector e incluir en los contratos de concesión, estrategias y cláusulas contractuales para que las empresas del SME realicen acciones de debida diligencia en la gestión de los riesgos ambientales y sociales que se pueden derivar de sus operaciones.

Por último, en la parte resolutive de la sentencia de unificación se ordena a las entidades de la rama ejecutiva del poder público pertenecientes al Sector Minero-energético (SME) que en la política pública de los sectores de hidrocarburos y de minería, así como en los contratos de concesión exijan a las empresas del sector minero energético:

que respeten los derechos humanos, realicen acciones de debida diligencia para la gestión de los riesgos ambientales y sociales con ocasión de las operaciones de sus actividades y amplíen espacios de información con los alcaldes de los municipios donde operan⁹⁰.

9 Conclusiones

La interacción entre las actividades empresariales y los derechos humanos ha cobrado una relevancia crítica en el contexto de la globalización, donde las empresas operan a través de cadenas de valor que trascienden fronteras y culturas. A lo largo de este análisis, se ha evidenciado que las empresas, ya sea de manera voluntaria o inadvertida, pueden incurrir en prácticas que generan riesgos o vulneraciones a los derechos humanos. Este fenómeno exige un marco normativo robusto que promueva la debida diligencia en derechos humanos,

orientado a prevenir y mitigar dichas vulneraciones, pero también a remediar de manera efectiva cuando así proceda.

La globalización ha facilitado la expansión de las empresas a mercados emergentes, pero también ha generado un entorno en el que los derechos humanos pueden ser comprometidos. Las dinámicas de competencia y la búsqueda de reducción de costos a menudo llevan a las empresas a externalizar procesos y emplear prácticas laborales en condiciones que pueden vulnerar derechos fundamentales. Este contexto subraya la necesidad de un enfoque normativo que promueva la responsabilidad empresarial en la salvaguarda de los derechos humanos.

El reconocimiento de que las empresas tienen un impacto significativo en los derechos humanos ha llevado a un cambio de paradigma. Las empresas no son meros actores económicos que se ocupan sólo de generar lucro; sino que son actores socialmente relevantes con un alto poder de incidencia en los entornos donde operan y más allá. En tal sentido, tener una operación que reconozca y gestione sus impactos en derechos humanos fomenta la sostenibilidad y la confianza en el entorno social y empresarial. En consecuencia, la debida diligencia empresarial en derechos humanos se convierte en una herramienta indispensable para que las empresas asuman su responsabilidad y respondan adecuadamente a las expectativas de sus grupos de interés.

Para esto, existen diversos instrumentos no vinculantes que guían a las empresas en la implementación de prácticas responsables. Directrices como los Principios Rectores de la ONU sobre Empresas y Derechos Humanos ofrecen un marco que promueve la responsabilidad empresarial en la protección de los derechos humanos. Sin embargo, la falta de obligatoriedad de estos instrumentos puede limitar su eficacia en la práctica, lo que resalta la necesidad de regulaciones más estrictas.

A medida que se avanza en la construcción de un marco normativo, se han desarrollado leyes que incorporan la DDHH en la regulación empresarial. En varios países, se han promulgado normativas que requieren a las empresas realizar due diligence, lo que representa un paso significativo hacia la formalización de las responsabilidades en esta materia. Sin embargo, su aplicación y eficacia varían considerablemente entre jurisdicciones.

En América Latina, la preocupación por la protección de los derechos humanos en el contexto empresarial ha crecido en respuesta a las vulneraciones y la

⁸⁹ REPÚBLICA DE COLOMBIA. Corte Constitucional. *Sentencia T-732/16*. M. P. Gloria Estella Ortiz Delgado, 2016.

⁹⁰ REPÚBLICA DE COLOMBIA. Corte Constitucional. *Sentencia de Unificación SU-095/18*. M. P. Cristina Pardo Schlesinger, 2018.

creciente influencia de las empresas multinacionales. Los países de la región están comenzando a desarrollar sus propios marcos regulatorios y políticas públicas que promueven la debida diligencia, aunque los desafíos persistentes, como la corrupción, la debilidad institucional y, en algunos países el conflicto o actores armados ilegales, pueden obstaculizar su implementación efectiva.

Respecto a Colombia, el país no ha desarrollado una ley específica en materia de DDDH. No obstante, tampoco ha sido ajena al debate global sobre la necesidad de incluir esta forma de gestión de riesgos como una herramienta para la salvaguarda de los derechos humanos que pueden verse afectados con ocasión de las actividades de las empresas. Ello se ha dado mayormente en el Sector Minero-Energético mediante los PAN y la jurisprudencia de la Corte Constitucional.

De otro lado, la manera en que el concepto y la práctica de la DDDH se manifiesta en el contexto colombiano está dada por los marcos internacionales de *soft law*. Principalmente, las Líneas Directrices de la OCDE, organización de la que el país hace parte desde 2020, y los Principios Rectores sobre las Empresas y los Derechos Humanos de la ONU recogidos en los Lineamientos para una Política Pública de Empresas y Derechos Humanos.

Asimismo, la Corte Constitucional ha sido clara en establecer que a las empresas les asiste la obligación de respetar los derechos humanos y no interferir en el goce y ejercicio de los mismos. De igual forma, ha sido categórica en determinar que en caso de que la vulneración ocurra el juez de tutela puede dar órdenes a la empresa para que cese ese estado de cosas, incluida la reparación si procede. Sin embargo, no se determina ningún régimen de responsabilidad en particular para las empresas o las personas naturales cuando esto sucede. Al decir en particular hacemos referencia a una sola norma, pues con el fin de establecer responsabilidades, de índole civil o administrativo para la persona jurídica o penal para las personas naturales, habría que remitirse a diversas piezas legislativas.

Las bases constitucionales de la empresa en Colombia, esto es, la función social que desempeña dentro del marco del bien común, junto con los principios de igualdad y solidaridad, le imponen obligaciones que van más allá de la generación de riqueza para sus propietarios. Por tanto, existen los fundamentos constitucionales que permitirían proponer un proyecto de ley encaminado

a la obligatoriedad de la DDDH; de haber la voluntad política para hacerlo.

De momento existe una clara asimetría que podría ser contraria al principio de igualdad, pues la empresa como persona jurídica puede acceder a la justicia para reclamar la protección de ciertos derechos relacionados con su actividad comercial. Sin embargo, no tiene obligaciones directas en materia de derechos humanos cuando de sus actividades se deriven vulneraciones a los mismos, por tanto, la persona natural no tiene otra vía para lograr el amparo de sus derechos que el mecanismo constitucional de la Acción de Tutela.

Una Ley de DDDH podría establecer obligaciones claras y equitativas para las empresas en materia de derechos humanos y, a la vez, facilitar el acceso a la justicia para las personas naturales cuando sus derechos humanos se han visto afectados con ocasión de la actividad de las empresas. Una futura ley de DDDH en Colombia para lograr un tránsito efectivo de la voluntariedad a la obligatoriedad deberá retomar un aspecto central del debate internacional, esto es, el régimen de responsabilidad aplicable en caso de incumplimiento.

Colombia ya habla esa *lingua franca* en la que se ha convertido la DDDH. A la luz de los desarrollos normativos internacionales en esta materia es posible que la adopción temprana de legislación nacional en DDDH contribuya a la protección de los DDHH en contextos operacionales complejos, a su vez, brinde garantías a las comunidades en cuanto a prevención de vulneraciones y reparación en caso de que estas ocurran, ofrezca mecanismos de información clara y transparente a todas las partes interesadas sobre las salvaguardas implementadas por las empresas y determine un régimen de responsabilidad ante el incumplimiento.

Además, la adopción de esta legislación puede alinear el sistema jurídico nacional con los de países del norte global, lo que podría representar una ventaja competitiva para el país. Asimismo, un marco legal claro para las empresas puede mejorar su posicionamiento en el mercado y reputación, reduciendo riesgos legales y financieros. De igual forma, el esfuerzo normativo en ese sentido contribuye al fomento del desarrollo sostenible y los compromisos internacionales adquiridos por Colombia en este campo.

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Devida diligência em direitos humanos: entre esforços externos e medidas *interna corporis* de combate às violações causadas por empresas

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Resumo

A violação de direitos humanos por empresas multinacionais é uma realidade presente na história dos países do Sul Global. No entanto, até o momento, a responsabilização desses entes tem se mostrado difícil, senão impossível, justamente por operarem na esfera transnacional, beneficiando-se de complexas estruturas societárias e da falta de jurisdição sobre fatos ocorridos fora do território da sede da empresa matriz. Na tentativa de enfrentar as violações de direitos humanos causadas por empresas, as Nações Unidas lançaram mão, em 2011, do documento conhecido como Princípios Orientadores sobre Empresas e Direitos Humanos, os quais inserem a noção de “devida diligência em direitos humanos” no centro da estrutura tríplice “Proteger, Respeitar e Remediar”. Com efeito, o presente trabalho tem como objetivo geral examinar a eficácia da proposta onusiana como instrumento preventivo das violações de direitos humanos causadas por empresas. Analisou-se, ainda, o processo histórico que resultou na adoção do documento onusiano e estudou-se, de forma analítica, o conceito de devida diligência em direitos humanos. Os resultados apontam para a insuficiência do uso isolado da devida diligência em direitos humanos como medida para evitar as violações de direitos humanos por entes privados. Utilizaram-se o método dialético e a técnica de pesquisa bibliográfica.

Palavras-chave: direitos humanos e empresas; devida diligência; direito internacional.

Abstract

The violation of human rights by multinational corporations is a harsh reality embedded in the history of Global South countries. However, to this day, holding these entities accountable has proven difficult, if not impossible, precisely because they operate transnationally, benefiting from complex corporate structures and the lack of jurisdiction over events that occur outside the territory of the parent company's headquarters. In an attempt to address human rights violations caused by corporations, the United Nations intro-

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duced, in 2011, the document known as the Guiding Principles on Business and Human Rights, which places the notion of «human rights due diligence» at the core of the tripartite framework: «Protect, Respect, and Remedy.» Accordingly, the general objective of this paper is to examine the effectiveness of the UN proposal as a preventive instrument against corporate-related human rights violations. It also analyzes the historical process that led to the adoption of the UN document and studies, analytically, the concept of human rights due diligence. The results indicate the insufficiency of relying solely on human rights due diligence as a measure to prevent human rights violations by private entities. The dialectical method and bibliographic research technique were employed.

Keywords: human rights and business; due diligence; international law.

1 Introdução

O conceito de empresas multinacionais não é recente na história e está conectada à noção de economia mundial, que emergiu no início da década de 1960.¹ No entanto, com o término da Guerra Fria, o processo de globalização econômica favoreceu a expansão desse modelo empresarial, cujo foco principal está na dimensão financeira.²

A globalização também acentuou o caráter grave e irreversível de potenciais danos, aumentando a margem de incerteza global.³ Isso porque os riscos passaram a ser, a partir de então, globais e seus efeitos se perpetuam ao longo do tempo.⁴ É o que o filósofo Marshall

Mcluhan intitulou de “aldeia global”⁵, referindo-se à transformação da sociedade internacional, com fronteiras menos distantes e fenômenos locais que passam a ser sentidos em todo o globo.

No campo político-econômico, a globalização fez com que os Estados passassem a funcionar como instrumento de forças de mercados regionais e globais, objeto de manipulação por corporações, bancos transnacionais e agentes financeiros.⁶ A partir de então, o mercado, antes sujeito ao controle estatal, emancipa-se e assume o protagonismo no cenário mundial, ditando regras às nações.⁷

A consequente desregulamentação dos mercados e a emergência de normas protetivas de investimentos no exterior, oriundas do processo de densificação dos tratados bilaterais de investimentos, a partir da década de 1970, permitiram que as multinacionais passassem a desenvolver suas atividades sem se preocupar com o aspecto humano.⁸ O Estado, a seu turno, mesmo que queira proteger os direitos humanos, às vezes, encontra óbices impostos pelas estruturas criadas para possibilitar que os investimentos fossem recebidos.⁹

Dados revelam, contudo, que as empresas multinacionais, ou transnacionais na linguagem das Nações Unidas, têm se aproveitado da vulnerabilidade econômica, da necessidade de investimentos e da fiscalização deficitária dos países do Sul Global, para deslocar a produção mais agressiva, em termos socioambientais, para esses Estados, o que, não raras vezes, tem resultado em violações massivas de direitos humanos.^{10,11} O debate

¹ DELMAS-MARTY, Mireille. *La refondation des pouvoirs: les forces imaginantes du droit (III)*. Paris: Le Seuil, 2009. Disponível em: <https://www.cairn.info/la-refondation-des-pouvoirs--9782020912501.htm>. p. 141.

² DELMAS-MARTY, Mireille. *La refondation des pouvoirs: les forces imaginantes du droit (III)*. Paris: Le Seuil, 2009. Disponível em: <https://www.cairn.info/la-refondation-des-pouvoirs--9782020912501.htm>. p. 142.

³ DELMAS-MARTY, Mireille. *Vers une communauté de valeurs ? les forces imaginantes du droit (IV)*. Paris: Le Seuil, 2011. Disponível em: <https://www.cairn.info/vers-une-communauté-de-valeurs--9782021039627.htm>. p. 356.

⁴ DELMAS-MARTY, Mireille. *Vers une communauté de valeurs ? les forces imaginantes du droit (IV)*. Paris: Le Seuil, 2011. Disponível em: <https://www.cairn.info/vers-une-communauté-de-valeurs--9782021039627.htm>. p. 361.

⁵ MCLUHAN, Marshall. *The Gutenberg Galaxy: the making of Typographic Man*. Toronto: University of Toronto Press, 2011. p. 74.

⁶ FALK, Richard. *Globalização predatória: uma crítica*. Lisboa: Instituto Piaget, 1999. p. 77.

⁷ FLORES, Joaquín Herrera. *A reinvenção dos direitos humanos*. Florianópolis: Boiteux, 2009. p. 24.

⁸ FACHIN, Melina; PAMPLONA, Danielle Anne. Empresas e direitos humanos (BHR) e responsabilidade social corporativa (CSR): aproximações e distinções. In: NALIN, Paulo; COPI, Lygia (org.). *As novas fronteiras do direito contratual*. Belo Horizonte: Fórum, 2021.

⁹ PAMPLONA, Danielle Anne. Um projeto comum para a América Latina e os impactos das empresas em direitos humanos. *Revista Brasileira de Políticas Públicas*, v. 9, n. 2, p. 286-301, 2019. p. 286.

¹⁰ OLSEN, Ana Carolina Lopes; PAMPLONA, Danielle Anne. Violações a direitos humanos por empresas transnacionais na América Latina: perspectivas de responsabilização. *Revista Direitos Humanos e Democracia*, v. 7, n. 13, p. 129-151, 2019. p. 131.

¹¹ Dentre os diversos casos de violações de direitos humanos por empresas, destaca-se o caso da maior mina de ouro da América Latina, a canadense Kinross, na cidade mineira de Paracatu (Brasil). Cf. TÜRKE, Mariana Aparecida Vilmondes. Business and human rights

em relação aos direitos humanos deixa, assim, a matriz Estado-indivíduo. Isso porque estes não são mais os únicos beneficiários de direitos humanos e aqueles não são mais os únicos a terem a obrigação de respeitar, proteger e promovê-los.¹²

De outro lado, a responsabilização de entes privados por violações de direitos humanos tem sido difícil, senão impossível, justamente por operarem na esfera transnacional, o que permite mudar as operações de uma jurisdição para outra, a fim de evitar eventuais condenações no âmbito doméstico.¹³ No país sede da empresa, a impossibilidade de responsabilização refere-se à falta de jurisdição sobre fatos ocorridos fora de seu território ou por suas estruturas societárias.¹⁴

Com o objetivo de combater as violações de direitos humanos, o Conselho de Direitos Humanos das Nações Unidas adotou, em 2011, os Princípios Orientadores sobre Empresas e Direitos Humanos. Constituídos a partir de uma estrutura tríplice, o instrumento reconhece e reafirma o papel do Estado de proteção de direitos humanos; reconhece que os entes privados têm responsabilidade de respeitar direitos humanos, e, finalmente, aponta para a responsabilidade de ambos em enfrentar as consequências de impactos negativos sofridos pelas pessoas. Ao estabelecer a responsabilidade das empresas, os princípios colocam a noção de “devida diligência em direitos humanos” no centro da estrutura tríplice “Proteger, Respeitar e Remediar”.

Ocorre, no entanto, que a devida diligência pode assumir distintos papéis no mundo jurídico, dependendo das partes envolvidas e do ramo do direito aplicável, confusão que pode passar despercebida, sobretudo, porque se tem utilizado a mesma expressão para designar institutos jurídicos distintos.

O presente trabalho, assim, tem como objetivo explicitar quais têm sido os esforços das Nações Unidas para prevenir as violações de direitos humanos causadas por empresas e como a noção de devida diligência em

direitos humanos, instrumento voluntário ou chamado de *soft law*¹⁵, pode contribuir para evitar as violações de direitos humanos por entes privados.

O artigo é composto desta breve introdução, da análise dos esforços onusianos para evitar as violações de direitos humanos por empresas, do exame da devida diligência em direitos humanos, como mecanismo voluntário de prevenção de danos, e das considerações finais. Utilizaram-se a técnica de pesquisa bibliográfica e o método dialético, partindo-se das premissas adotadas pela proposta onusiana, da análise, na sequência, das críticas formuladas pela doutrina a respeito do tema, para se chegar, então, à conclusão sobre a (in)eficácia da devida diligência em direitos humanos como instrumento preventivo das violações de direitos humanos.

2 Esforços externos: o papel das Nações Unidas no contexto das violações de direitos humanos por empresas

Dois eventos em especial, ocorridos na década de 1970, envolvendo multinacionais, marcam o início das tentativas de limitar a atuação empresarial no âmbito da Organização das Nações Unidas (ONU): a participação da *International Telephone and Telegraph Corporation* e da *Kennecott Copper Corporation* no golpe de estado de Pinochet, no Chile, e os investimentos de empresas, em pleno regime do *Apartheid*, na África do Sul.¹⁶

A organização cria, então, um grupo de trabalho para elaborar um Código de Conduta para Empresas Multinacionais e, na esfera da Convenção Internacional para Eliminação e Repressão ao Crime de *Apartheid* de 1973, estabelece um grupo para avaliar o papel das

in Brazil: exploring human rights due diligence and operational-level grievance mechanisms in the case of Kinross Paracatu gold mine. *Revista de Direito Internacional*, v. 15, n. 2, p. 221-241, 2018.

¹² DEVA, Surya. *Regulating corporate human rights violations: humanizing business*. London: Routledge, 2012. p. 3.

¹³ DEVA, Surya. *Regulating corporate human rights violations: humanizing business*. London: Routledge, 2012. p. 4.

¹⁴ PAMPLONA, Danielle Anne. Um projeto comum para a América Latina e os impactos das empresas em direitos humanos. *Revista Brasileira de Políticas Públicas*, v. 9, n. 2, p. 286-301, 2019. p. 288.

¹⁵ Trata-se de uma espécie de regra que tem um valor normativo limitado. Geralmente, as normas de *soft law* são criadas por instrumentos normativos que não são juridicamente obrigatórios ou, quando existentes em um instrumento vinculante, não criam obrigações de direito positivo ou criam obrigações pouco vinculantes, mas essa característica não impede a produção de efeitos jurídicos, cf. HENNEBEL, Ludovic; TIGROUDJA, Hélène. *Traité de droit international des droits de l'Homme*. Paris: Pedone, 2016. p. 159.

¹⁶ MARTIN-CHENUT, Kathia. Droits de l'homme et responsabilité des entreprises: les «principes directeurs des Nations Unies». In: GIUDICELLI-DELAGÉ, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 231.

multinacionais na manutenção do regime do *Apartheid*, na África do Sul. Em 1973, a Subcomissão de Direitos Humanos decide nomear um Relator Especial sobre as consequências para o exercício dos direitos humanos da ajuda fornecida aos regimes racistas e colonialistas do sul da África. Em 1977, o Relator passa também a ter a missão de criar, todos os anos, uma lista atualizada sobre as empresas que investem na África do Sul.¹⁷

Embora a tentativa de criar um Código de Conduta não tenha logrado êxito perante a ONU, a questão tornou-se objeto de discussão em outros organismos, como a Organização para a Cooperação e Desenvolvimento Econômico (OCDE), que enfrentou o papel das grandes organizações privadas e seus impactos em direitos por meio das chamadas “Diretrizes da OCDE para Empresas Multinacionais sobre Conduta Empresarial Responsável”¹⁸, criadas em 1976, e a Organização Internacional do Trabalho (OIT), que, com a aprovação da “Declaração Tripartite de Princípios sobre Empresas Multinacionais e Política Social”¹⁹, de 1977, também ressalta o papel de entes privados na garantia de proteção e respeito de direitos dos trabalhadores.

O tema da responsabilidade empresarial somente retomou à pauta da ONU nos anos 2000, com a criação do Pacto Global. O documento é uma das primeiras expressões universais que se dirige diretamente para as empresas.²⁰ Foi lançado, inicialmente, com 9 princípios relativos aos direitos humanos e trabalhistas, à liberdade sindical e ao meio ambiente. Em 2004, um 10º princípio foi adicionado, relativo à luta contra a corrupção. Até o

momento, já aderiram ao documento mais de 9700 empresas.²¹ Uma das críticas mais comuns feitas à iniciativa diz respeito ao seu caráter voluntário.²²

Desde 2003, as empresas aderentes ao Pacto Global são obrigadas a enviar um relatório anual (*Communication on Progress* – COP), a fim de avaliar a implementação dos princípios por parte das corporações. Em 2006, houve um reforço desse controle, por meio de três frentes: (i) a análise do uso abusivo da logo da ONU, com a aplicação de eventuais sanções, como a retirada do status de participante da iniciativa, o ajuizamento de ação judicial e a comunicação às autoridades governamentais; (ii) a menção de empresas inativas ou que não apresentaram tempestivamente o respectivo relatório anual (COP), e (iii) a criação de um procedimento para avaliar alegações de uso abusivo, sistemático ou flagrante da finalidade ou dos princípios previstos no Pacto.²³

Paralelamente ao Pacto Mundial, a Subcomissão para a Promoção e Proteção dos Direitos Humanos, vinculada à então Comissão de Direitos Humanos, órgão que precedeu o atual Conselho de Direitos Humanos da ONU, elaborou, entre 1998 e 2003, um documento intitulado “Normas sobre Responsabilidade em Direitos Humanos de Corporações Transnacionais e outros Negócios Empresariais”. O documento enunciou normas que já faziam parte do *corpus iuris* internacional, e que se aplicavam não somente aos Estados, mas também às empresas, em alusão à referência feita no preâmbulo da Declaração Universal de Direitos Humanos a “todo indivíduo e órgão da sociedade”.²⁴ Defendia-se, portanto,

¹⁷ MARTIN-CHENUT, Kathia. *Droits de l’homme et responsabilité des entreprises: les «principes directeurs des Nations Unies»*. In: GIUDICELLI-DELAGE, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 232.

¹⁸ ORGANIZAÇÃO PARA A COOPERAÇÃO E DESENVOLVIMENTO ECONÔMICO. *Diretrizes da OCDE para Empresas multinacionais sobre conduta empresarial responsável*. Paris: OCDE, 2023. Disponível em: <https://www.oecd-ilibrary.org/docserver/663b7592-pt.pdf?expires=1715710115&id=id&accname=guest&checksum=2D5A0EFD5998ACB10F64DCFCB5433CF6>. Acesso em: 25 abr. 2024.

¹⁹ ORGANIZAÇÃO INTERNACIONAL DO TRABALHO. *Declaração tripartite de princípios sobre empresas multinacionais e política social*. Genebra: OIT, 2012. Disponível em: https://webapps.ilo.org/wcmsp5/groups/public/---cd_emp/---emp_ent/---multi/documents/publication/wcms_211136.pdf. Acesso em: 25 abr. 2024.

²⁰ MARTIN-CHENUT, Kathia. *Panorama en droit international des droits de l’homme*. In: MARTIN-CHENUT, Kathia; QUENAUDON, René de (org.). *La RSE saisie par le droit: perspectives interne et internationale*. Paris: Pedone, 2016. p. 27-48. p. 31.

²¹ UNITED NATIONS. *Global Compact. See who’s involved: our participants*. Disponível em: https://unglobalcompact.org/what-is-gc/participants/search?search%5Bkeywords%5D=&search%5Borganization_types%5D%5B%5D=5&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc&search%5Bper_page%5D=10. Acesso em: 25 abr. 2024.

²² Após todas as alterações feitas na iniciativa, há que proponha que o Pacto Global possui um caráter regulatório da atividade empresarial: “At this point in time, regulation is seen in a much more broad sense and the Compact does, in fact, regulate the behaviour of companies by asking them to adopt and embrace the ten principles in the conduct of their business”. DEVA, Surya. *Regulating corporate human rights violations: humanizing business*. London: Routledge, 2012. p. 97.

²³ MARTIN-CHENUT, Kathia. *Droits de l’homme et responsabilité des entreprises: les «principes directeurs des Nations Unies»*. In: GIUDICELLI-DELAGE, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 234.

²⁴ OLSEN, Ana Carolina Lopes; PAMPLONA, Danielle Anne. *Violações a direitos humanos por empresas transnacionais na Amé-*

que a obrigação das empresas de respeitar os direitos humanos já existia no Direito Internacional.²⁵

No entanto, o projeto não foi bem recebido pela antiga Comissão de Direitos Humanos, órgão político da ONU, em oposição à composição da referida Subcomissão e dos Comitês de Tratados, ambos formados por *experts*. Representantes de governos, alguns dos quais sofreram lobby de organizações empresariais, sustentavam que a doutrina clássica do Direito Internacional previa obrigações apenas aos Estados e não a atores privados.²⁶

Ante a ausência de consenso, a proposta foi totalmente descartada, porém a Comissão de Direitos Humanos sofria pressão para debater o tema, o que acabou por inscrevê-lo na ordem do dia da organização.²⁷

Assim, em 2005, o professor de Harvard, John Gerard Ruggie, foi nomeado Representante Especial do então Secretário Geral da ONU, para a temática dos direitos humanos e corporações transnacionais e outras empresas. Ruggie havia participado da elaboração do Pacto Global e, desde seus primeiros relatórios em 2006, demonstrava preferência por mecanismos empresariais voluntários.²⁸

Refutando completamente o projeto de normas de 2003, Ruggie abordou a temática sob um viés distinto e, até certo ponto, inovador, tratando a questão a partir da linguagem econômica, de modo a considerar os potenciais impactos e riscos econômicos que as violações

de direitos humanos podem causar para os negócios, circunstância que possibilitou uma certa convergência dos interesses dos Estados, organizações empresariais e sociedade civil, tendo, assim, a estrutura tríplice apresentada (“Proteger, Respeitar e Remediar”) sido aprovada de forma unânime, na 17ª Sessão do Conselho de Direitos Humanos.²⁹

Para atingir o consenso da comunidade global, o Representante Especial afastou-se dos fundamentos jurídicos da doutrina de Direito Internacional, estratégia utilizada anteriormente pela Subcomissão para a Promoção e Proteção dos Direitos Humanos da ONU, para focar em argumentos que dialogavam também com os interesses das empresas.³⁰ Em um de seus discursos, em Junho de 2006, reconheceu que os problemas de direitos humanos no setor privado decorrem, efetivamente, da falha estatal em protegê-los, mas enfatizou também que as empresas deveriam respeitar os direitos humanos em áreas em que a governança estatal se mostrava frágil.³¹

Para Ruggie, o trabalho das empresas e dos Estados deveria se concentrar nos pontos de convergência, porque o tema é de interesse comum e a negligência dos direitos humanos acarreta consequências para ambos os setores. Com efeito, a tônica por ele empregada ao longo de todo o mandato, conciliando a linguagem jurídica, política e econômica, em especial, para realçar os perigos e riscos econômicos advindos da inobservância dos direitos humanos, estabeleceu novas estratégias argumentativas à discussão do tema, facilitando o alcance do consenso entre os atores envolvidos.³²

O Representante especial, hábil negociador, aproximou-se também de outros atores internacionais, como a Organização Internacional de Normalização, a fim de que o capítulo sobre direitos humanos da ISO 26000³³

rica Latina: perspectivas de responsabilização. *Revista Direitos Humanos e Democracia*, v. 7, n. 13, p. 129-151, 2019. p. 136.

²⁵ PAMPLONA, Danielle Anne; SILVA, Ana Rachel Freitas da. Os princípios orientadores das Nações Unidas sobre empresas e direitos humanos: houve avanços? In: VAILATTI, Diogo Basílio; DOMINIQUINI, Eliete Doretto (org.). *A sustentabilidade da relação entre empresas transnacionais e direitos humanos*. Curitiba: CRV, 2016. p. 147-168. p. 153.

²⁶ BUHMANN, Karin. Business and human rights: analysing discursive articulation of stakeholder interests to explain the consensus-based construction of the ‘Protect, Respect, Remedy UN Framework’. *International Law Research*, v. 1, n. 1, p. 88-101, 2012. p. 95.

²⁷ MARTIN-CHENUT, Kathia. Panorama en droit international des droits de l’homme. In: MARTIN-CHENUT, Kathia; QUENAUDON, René de (org.). *La RSE saisie par le droit: perspectives interne et internationale*. Paris: Pedone, 2016. p. 27-48. p. 34.

²⁸ MARTIN-CHENUT, Kathia. Droits de l’homme et responsabilité des entreprises: les «principes directeurs des Nations Unies». In: GIUDICELLI-DELAGE, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 239.

²⁹ BUHMANN, Karin. Business and human rights: analysing discursive articulation of stakeholder interests to explain the consensus-based construction of the ‘Protect, Respect, Remedy UN Framework’. *International Law Research*, v. 1, n. 1, p. 88-101, 2012. p. 96.

³⁰ RUGGIE, John Gerard. *Just business: multinational corporations and human rights*. New York: W. W. Norton & Company, 2013. p. 79.

³¹ BUHMANN, Karin. Business and human rights: analysing discursive articulation of stakeholder interests to explain the consensus-based construction of the ‘Protect, Respect, Remedy UN Framework’. *International Law Research*, v. 1, n. 1, p. 88-101, 2012. p. 96.

³² BUHMANN, Karin. Business and human rights: analysing discursive articulation of stakeholder interests to explain the consensus-based construction of the ‘Protect, Respect, Remedy UN Framework’. *International Law Research*, v. 1, n. 1, p. 88-101, 2012. p. 96.

³³ Trata-se de uma norma internacional, adotada em novembro

fosse readequado, a OCDE, ressaltando a necessidade de as Diretrizes para Empresas Multinacionais dispor, especificamente, sobre direitos humanos, a Sociedade Financeira Internacional³⁴, para que houvesse um tópico de direitos humanos no chamado Padrões de Desempenho — documento desenvolvido para empresas avaliarem e mitigarem os riscos socioambientais vinculados aos projetos que desenvolvem, e a OIT, com o objetivo de que houvesse o reconhecimento conjunto da Carta Internacional dos Direitos Humanos da ONU (formada pela Declaração Universal dos Direitos Humanos e pelos Pactos Internacionais de 1966) e da Declaração de 1998 sobre os Princípios e Direitos Fundamentais do Trabalho. Além disso, houve também um trabalho junto ao Pacto Global, a fim de que os princípios relativos aos direitos humanos fossem aperfeiçoados.³⁵

Em síntese, os três pilares dos chamados Princípios Orientadores da ONU para Empresas e Direitos Humanos indicam o dever dos Estados de *proteger* os direitos humanos contra violações e abusos perpetrados por empresas, a responsabilidade das corporações em *respeitar* os direitos humanos e, por fim, dirigida tanto para empresas quanto para entes estatais, a necessidade de *remediar* os danos causados às vítimas de violações de direitos humanos cometidas por empresas, seja por meio de mecanismos de solução de disputas judiciais e não judiciais, mas ainda pertencentes à estrutura estatal, seja por modelos privados de resolução de controvérsias.³⁶

Pela linguagem utilizada no documento, percebe-se, claramente, que a responsabilidade das empresas não se confunde com as obrigações impostas aos Estados. O termo empregado para fazer referência aos Estados é “dever” ou “obrigações” — o que já é amplamente consolidado no Direito Internacional —, enquanto para

fazer menção às empresas utilizou-se a expressão “responsabilidade” ou “respeitar”.³⁷ Vale dizer que respeitar significa não apenas agir em conformidade com standards protetivos de direitos humanos, mas também implementar a chamada devida diligência em direitos humanos (objeto de análise na próxima seção), de modo a gerenciar os riscos de danos a esses direitos, com o intuito, sobretudo, de evitá-los.³⁸ Por ora, registra-se, apenas, que a obrigação negativa de evitar violações aos direitos humanos resulta, também, em obrigações positivas de devida diligência para todas as empresas.³⁹

Segundo Chirwa e Amodu, o professor Ruggie falhou ao não reconhecer a rápida evolução entre Direito Constitucional Comparado e o Direito Internacional dos Direitos Humanos, com relação às corporações, bem como as mais variadas formas encontradas por legislações nacionais para impor deveres às empresas e responsabilizá-las. Além disso, ele teria ignorado o fato de que alguns tratados não consideram a visão estado-centrista, tradicionalmente utilizada quando se fala dos direitos humanos, impondo deveres também aos indivíduos.⁴⁰ Desse modo, a distinção que Ruggie estabeleceu, enfatizam os autores, impediu a evolução do Direito Internacional dos Direitos Humanos na temática dos abusos perpetrados por atores não estatais.⁴¹

Por outro lado, critica-se o conteúdo do documento, por conter formulações vagas, não ser vinculante e

de 2010, que define diretrizes da Responsabilidade Social e Ambiental das empresas, por meio de 7 eixos, dentre os quais os direitos humanos.

³⁴ Órgão do grupo do Banco Mundial, cuja missão é a promoção de investimentos em países em desenvolvimento.

³⁵ MARTIN-CHENUT, Kathia. *Droits de l'homme et responsabilité des entreprises: les «principes directeurs des Nations Unies»*. In: GIUDICELLI-DELAGE, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 242.

³⁶ ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios Orientadores da ONU para Empresas e Direitos Humanos*. New York: United Nations, 2011. Disponível em: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. Acesso em: 8 ago. 2021.

³⁷ PAMPLONA, Danielle Anne; SILVA, Ana Rachel Freitas da. Os princípios orientadores das Nações Unidas sobre empresas e direitos humanos: houve avanços? In: VAILATI, Diogo Basílio; DOMINQUINI, Eliete Doretto (org.). *A sustentabilidade da relação entre empresas transnacionais e direitos humanos*. Curitiba: CRV, 2016. p. 147-168. p. 154.

³⁸ BUHMANN, Karin. Business and human rights: analysing discursive articulation of stakeholder interests to explain the consensus-based construction of the ‘Protect, Respect, Remedy UN Framework’. *International Law Research*, v. 1, n. 1, p. 88-101, 2012. p. 98.

³⁹ RUGGIE, John Gerard. *Just business: multinational corporations and human rights*. New York: W. W. Norton & Company, 2013. p. 72-74.

⁴⁰ Por exemplo, a Declaração Universal dos Direitos Humanos (v. art. 30), a Convenção Europeia de Direitos Humanos (v. art. 17), os Pactos Internacionais sobre Direitos Civis e Políticos e sobre Direitos Econômicos, Sociais e Culturais (v. preâmbulos), a Convenção sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher (v. art. 2.e), e a Convenção Africana sobre Direitos Humanos e dos Povos (v. arts. 27-29).

⁴¹ CHIRWA, Danwood; AMODU, Nojeem. Economic, social and cultural rights, sustainable development goals, and duties of corporations: rejecting the false dichotomies. *Business and Human Rights Journal*, v. 6, n. 1, p. 21-41, 2021. p. 31.

por limitar-se à menção da Carta Internacional de Direitos Humanos e da Declaração sobre os Princípios e Direitos Fundamentais do Trabalho da OIT (princípios constante das 8 convenções centrais da organização), olvidando outros importantes instrumentos de proteção dos direitos humanos.⁴²

No que diz respeito à chamada devida diligência, como se verá na próxima seção, os Princípios Orientadores trazem uma conceituação subjetiva do mecanismo e parecem indicar que se trata, apenas, de uma obrigação de meio, sem a necessidade de efetivamente contribuir para evitar violações aos direitos humanos.⁴³ Corre-se, assim, o risco de deixar a critério das empresas a definição e operacionalização dessa ferramenta.⁴⁴

Em 2011⁴⁵, o Conselho de Direitos Humanos aprovou a criação de um grupo de trabalho encarregado da “questão dos direitos humanos e corporações transnacionais e outros negócios”, com o mandato de promoção, disseminação e implementação dos Princípios Orientadores da ONU para Empresas e Direitos Humanos.⁴⁶

Embora não conte com a possibilidade de receber comunicações individuais, como outros procedimentos especiais da ONU, o grupo pode realizar visitas *in loco*, a fim de constatar a prática de eventuais violações de direitos humanos por empresas. O grupo trabalha tam-

bém para trocar e promover boas práticas e lições colhidas com a implementação dos Princípios Orientadores, bem como para fazer recomendações sobre o guia e avaliá-lo. Tal mandato já foi renovado quatro vezes desde a sua criação (2014, 2017, 2020 e 2023).

A título exemplificativo sobre as visitas *in loco*, cita-se a missão realizada no Brasil, no mês de dezembro de 2015. O Grupo de Trabalho da ONU apontou que, mesmo após alguns anos da adoção dos Princípios Orientadores pela organização, algumas empresas ainda não tinham conhecimento do documento e, dentre aquelas que o conheciam, não o aplicavam. Além disso, ainda compreendiam os riscos aos direitos humanos como ameaças para as empresas e, não, para as potenciais pessoas afetadas. A questão era concebida, na maioria, de modo bastante restritivo, como se estivesse circunscrita aos direitos trabalhistas. O relatório também abordou temas relevantes no país, como a construção da Usina Hidrelétrica de Belo Monte, o desastre de Mariana e obras para as Olimpíadas de 2016.⁴⁷

O Grupo de Trabalho também indica a necessidade de os Estados elaborarem um Plano de Ação Nacional, documento que contém as diretrizes para elaboração de políticas públicas e legislações, com o objetivo de avançar, no âmbito interno, a proteção e o respeito dos direitos humanos. Na prática, porém, os Planos elaborados, até o momento, têm se revelado ainda mais vagos que os próprios Princípios Orientadores.⁴⁸

Importa destacar, ainda, em relação ao Grupo de Trabalho da ONU, as propostas de reforçar o pilar dos “Remédios/Reparação” dos Princípios Orientadores.⁴⁹ A primeira iniciativa é um projeto, ainda em trâmite, cujo objetivo é reforçar a responsabilização e implementação efetiva do acesso à justiça, expressão que deve ser compreendida para além dos instrumentos de efetivação da justiça ou a reparação meramente financeira, mas de

⁴² MARTIN-CHENUT, Kathia. Droits de l’homme et responsabilité des entreprises: les «principes directeurs des Nations Unies». In: GIUDICELLI-DELAGE, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 243.

⁴³ MARTIN-CHENUT, Kathia. Droits de l’homme et responsabilité des entreprises: les «principes directeurs des Nations Unies». In: GIUDICELLI-DELAGE, Geneviève; MANACORDA, Stefano (org.). *La responsabilité pénale des personnes morales: perspectives européennes et internationales*. Paris: Société de Législation Comparée, 2013. p. 229-247. p. 244.

⁴⁴ Sobre as críticas a respeito da Devida Diligência em Direitos Humanos, cf. RUGGIE, John Gerard; SHERMAN III, John F. The concept of ‘Due Diligence’ in the UN guiding principles on business and human rights: a reply to Jonathan Bonnitcha and Robert McCorquodale. *European Journal of International Law*, v. 28, n. 3, p. 921-928, 2017.

⁴⁵ UNITED NATIONS HUMAN RIGHTS. *Human rights and transnational corporations and other business enterprises* [Resolução nº 17/4 do Conselho de Direitos Humanos]. OHCHR, 06 July 2011. Disponível em: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4. Acesso em: 8 ago. 2021.

⁴⁶ WORKING Group on the issue of human rights and transnational corporations and other business enterprises. OHCHR, [2024]. Disponível em: <https://www.ohchr.org/en/special-procedures/wg-business>. Acesso em: 29 abr. 2024.

⁴⁷ ASSIS, Vinicius de; PAMPLONA, Danielle Anne. Princípios orientadores das nações unidas e a complexidade de proteção e respeito aos direitos humanos no combate ao trabalho escravo no Brasil. *Revista Eletrônica Direito e Política*, Itajaí, SC, v. 14, n. 1, p. 1-29, jan./abr. 2019. Disponível em: <https://periodicos.univali.br/index.php/rdp/article/view/14226/8019>. Acesso em: 28 abr. 2024. p. 14.

⁴⁸ PAMPLONA, Danielle Anne. Um projeto comum para a América Latina e os impactos das empresas em direitos humanos. *Revista Brasileira de Políticas Públicas*, v. 9, n. 2, p. 286-301, 2019. p. 290.

⁴⁹ OHCHR accountability and remedy project: improving accountability and access to remedy in cases of business involvement in human rights abuses. OHCHR. Disponível em: <https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project>. Acesso em: 1 maio 2024.

modo a estabelecer uma mudança nas estruturas sociais, políticas e econômicas da sociedade afetada.⁵⁰ A segunda é um guia publicado com o objetivo de aprimorar a responsabilidade empresarial e o acesso aos mecanismos de reparação⁵¹, que, inclusive, inovou ao estabelecer que os sistemas jurídicos domésticos devem conter a previsão de responsabilidade criminal corporativa, a fim de assegurar uma resposta adequada às vítimas.⁵²

A adoção dos Princípios Orientadores não satisfaz o conjunto de atores envolvidos no tema, especialmente por sua voluntariedade. Assim, voltou-se, no próprio Conselho de Direitos Humanos, à tentativa de criar normas vinculantes para regular atividades de transnacionais. Por iniciativa do Equador e da África do Sul, em 2014, foi criado o Grupo de Trabalho Intergovernamental de Natureza Aberta sobre Corporações Transnacionais e Outras Empresas em Relação aos Direitos Humanos. Desde então, esse Grupo trabalha⁵³ na confecção de um tratado internacional, cujo objeto é estabelecer as condições para que os Estados regulamentem, de forma adequada, as atividades empresariais, bem como identificar e assegurar que obrigações em direitos humanos sejam respeitadas e cumpridas pelas corporações. Desde 2018, o grupo tem trabalhado na redação do tratado, a qual se encontra na terceira versão.⁵⁴

Esse processo também é objeto de críticas, especialmente, porque não cria obrigações diretas para em-

presas, mas tão somente estabelece a obrigação de os Estados partes implementarem mecanismos de devida diligência empresarial em direito interno. Essa situação foi bastante debatida no início dos trabalhos, e a capacidade de um organismo internacional, cujos membros são Estados, foi determinante para a decisão de que o tratado poderia impor obrigações a Estados, e não às empresas. De outro lado, questiona-se também a possibilidade de êxito dessa proposta, uma vez que países da União Europeia⁵⁵, Estados- Unidos, Japão e mesmo países da América Latina⁵⁶ não apoiaram a iniciativa, revelando uma evidente crise na formulação do consenso para aprovação de documentos internacionais multilaterais⁵⁷ na atualidade. Essa situação, no entanto, é bastante sazonal e sofre influências de diferentes temas que são discutidos no âmbito internacional, inclusive em outros fóruns. Por isso, é normal que haja uma volatilidade no apoio demonstrado por diferentes países. O relevante é que o processo chegue a termo com apoio suficiente para a adoção do instrumento.

De toda sorte, a emergência dessas normativas de *soft law* tem impulsionado a criação de normativas vinculantes (*hard law*), tanto em âmbito doméstico como na esfera regional europeia, tornando obrigatória a implementação de mecanismos empresariais de devida diligência em direitos humanos, o que acaba por relevar o potencial dessas conexões de internormatividade num mundo jurídico fragmentado, como se verá a seguir.

3 Medidas *interna corporis*: adoção de mecanismos de devida diligência pelas empresas para evitar violações de direitos humanos

Iniciativas autorregulatórias que abordam diretrizes de direitos humanos não são absolutamente novas no

⁵⁰ BERTHOLDI, Juliana; PAMPLONA, Danielle Anne. Reflexões acerca da responsabilidade penal da pessoa jurídica a partir do caso Pinheiro. *Cadernos de Direito Actual*, v. 23, p. 158-190, 2024. p. 173-174.

⁵¹ NATIONS UNIES. Assemblée Générale. *Améliorer la responsabilisation des entreprises et l'accès à des voies de recours pour les victimes de violations des droits de l'homme liées aux activités des entreprises*: rapport du Haut-Commissaire des Nations Unies aux droits de l'homme. Nations Unies, 10 maio 2016. Disponível em: <https://documents.un.org/doc/undoc/gen/g16/093/79/pdf/g1609379.pdf>. Acesso em: 1 maio 2024.

⁵² BERTHOLDI, Juliana; PAMPLONA, Danielle Anne. Reflexões acerca da responsabilidade penal da pessoa jurídica a partir do caso Pinheiro. *Cadernos de Direito Actual*, v. 23, p. 158-190, 2024. p. 178.

⁵³ UNITED NATIONS HUMAN RIGHTS. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* [Resolução nº 26/9 do Conselho de Direitos Humanos]. OHCHR, 14 July 2014. Disponível em: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9. Acesso em: 8 ago. 2021.

⁵⁴ OPEN-ENDED intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. OHCHR, [2024]. Disponível em: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>. Acesso em: 26 abr. 2024.

⁵⁵ RIVERA, Humberto Cantú. El proceso hacia un tratado internacional en materia de empresas y derechos humanos: reflexiones sobre sus causas y efectos. In: RIVERA, Humberto Cantú (org.). *El tratado sobre las empresas y los derechos humanos*: perspectivas latinoamericanas. Ciudad de México: Tirant lo Blanch, 2022. p. 37-72. p. 57.

⁵⁶ MARTIN-CHENUT, Kathia. Panorama en droit international des droits de l'homme. In: MARTIN-CHENUT, Kathia; QUENAUDON, René de (org.). *La RSE saisie par le droit*: perspectives interne et internationale. Paris: Pedone, 2016. p. 27-48. p. 37.

⁵⁷ BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 197.

mundo corporativo. As primeiras empresas a adotarem tais medidas aparecem no início do século XX. Certamente, à época, tratava-se mais de uma exceção do que uma regra. No entanto, o número de empresas que passaram a adotar códigos de conduta ou políticas de direitos humanos, na década de 1990, aumentou consideravelmente.⁵⁸ Com o advento dos Princípios Orientadores da ONU⁵⁹, a questão ficou ainda mais evidente, já que o Princípio 16 traz a recomendação de que as empresas adotem políticas de direitos humanos.

Logo na sequência (Princípio 17), o documento aponta a necessidade de implementação da chamada “*human rights due diligence*”, que pode ser traduzida para o português como “auditoria em direitos humanos”, instrumento que tem ocupado um lugar de especial destaque nas metodologias empregadas para evitar violações de direitos humanos por empresas.

No entanto, faz-se necessário descortinar as diferenças existentes entre a regra de devida diligência do Direito Internacional e os instrumentos de devida diligência em direitos humanos do direito nacional ou de iniciativa voluntária das empresas. A justificativa para tanto reside no fato de que institutos distintos utilizam a mesma expressão para designar a tarefa de prevenção, compreendida aqui em sentido amplo. Sobre essa diversidade de institutos e a necessidade de bem compreendê-los, destaca-se o alerta feito por Samantha Besson:

Il est essentiel, toutefois, non seulement de saisir la diversité de ces standards de corporate human rights due diligence entre eux, d'un régime de droit national à l'autre et d'un instrument de soft law à l'autre, d'une part, mais aussi leurs différences du standard de due diligence applicable aux institutions publiques, que sont l'Etat et les OI, présentés dans ce cours et ce tant du point de vue de ses fondements que de son contenu, d'autre part.⁶⁰

⁵⁸ BERNAZ, Nadia. *Business and human rights: history, law and policy: bridging the accountability gap*. New York: Routledge, 2017. p. 212-213.

⁵⁹ ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios Orientadores da ONU para Empresas e Direitos Humanos*. New York: United Nations, 2011. Disponível em: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. Acesso em: 8 ago. 2021.

⁶⁰ “É essencial, contudo, não apenas entender a diversidade desses padrões de devida diligência em direitos humanos corporativos entre si, de um regime de direito nacional para outro e de um instrumento de soft law para outro, por um lado, mas também suas diferenças em relação ao padrão de devida diligência aplicável às instituições públicas, que são o Estado e as organizações internacionais, apresentado neste curso, tanto do ponto de vista de seus fundamentos quanto de seu conteúdo, por outro lado”. [Tradução livre] BESSON,

O conceito de devida diligência não é novidade no Direito Internacional. Trata-se de uma noção amplamente reconhecida, tanto no regime geral quanto em regimes especiais, como o Direito Internacional dos Direitos Humanos, o Direito Internacional Ambiental e o Direito Internacional da Cibersegurança. A jurisprudência também tem reafirmado essa regra, como ilustrado pelas decisões da Corte Internacional de Justiça.⁶¹

Tecnicamente, trata-se de uma regra ou *standard* normativo que decorre de uma obrigação previamente existente para instituições públicas de Direito Internacional (Estados e Organizações Internacionais). Isto é, a devida diligência, no regime geral de Direito Internacional, é uma regra que decorre de uma obrigação à qual ela está associada. Não se trata, portanto, de uma obrigação, pura e simples, de não causar dano. É preciso identificar quais são os direitos e deveres que devem ser protegidos para, em seguida, extrair uma obrigação de não causar dano por negligência, como bem explica Samantha Besson:

comme d'autres l'ont très bien expliqué, il n'y a dans cette référence à une «obligation» de due diligence ou à un «devoir de diligence» qu'une facilité, voire un abus de langage. La due diligence est en effet un standard ou une norme de comportement qui se greffe sur une obligation qu'elle qualifie et à laquelle elle peut ensuite être associée. [...] Il ne peut pas en effet s'agir d'une obligation de ne pas nuire tout court, à tous et en tout temps. Encore faut-il, en effet, pouvoir identifier les droits et intérêts qui doivent être protégés et dont l'identification permet ensuite de fonder une obligation de ne pas leur nuire par négligence.⁶²

Por tal razão, utilizar tão simplesmente a expressão “obrigação de devida diligência” seria, segundo a dou-

Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 355.

⁶¹ BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 171.

⁶² “Como outros explicaram muito bem, não há nessa referência a uma ‘obrigação’ de devida diligência ou a um ‘dever de diligência’ nada além de uma facilidade, ou até mesmo um abuso de linguagem. A devida diligência é, de fato, um padrão ou uma norma de comportamento que se implanta em uma obrigação que ela qualifica e à qual pode ser posteriormente associada. [...] Não pode, de fato, tratar-se de uma obrigação de não prejudicar pura e simplesmente, a todos e em todo momento. É preciso ainda, de fato, poder identificar os direitos e interesses que devem ser protegidos e cuja identificação permite, em seguida, criar uma obrigação de não os prejudicar por negligência” [Tradução livre]. BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 211-212.

trina, um abuso de linguagem, porque, no Direito Internacional, sem a existência prévia de uma obrigação específica para uma instituição internacional, sobre a qual se implanta a regra de devida diligência, a “obrigação de devida diligência” não é ainda uma exigência a ser observada, tendo de obrigação apenas o nome.⁶³

Ademais, o fato de conceituar a devida diligência como uma regra que se implanta em determinada obrigação internacional tampouco significa dizer que se trata de uma norma jurídica de menor qualidade ou, ainda, de uma norma não jurídica ou de *soft law*.⁶⁴

No que diz respeito às consequências oriundas da inobservância da regra de devida diligência, por parte das instituições públicas de Direito Internacional, há também um particular aspecto a ser considerado. O desrespeito desse *standard* normativo desencadeia uma responsabilização específica, prevista no regime de responsabilidade das instituições internacionais.⁶⁵ Trata-se, em síntese, de espécie de responsabilidade que não depende de culpa, ou seja, basta a constatação da violação pelo Estado ou Organização Internacional para que seja configurada a responsabilidade, e isso, claro, se não houver alguma excludente de ilicitude.⁶⁶

À medida que a regra de devida diligência em Direito Internacional depende, portanto, da previsão de uma obrigação internacional, que é criada tão somente por meio de tratados, dos costumes ou de princípios gerais de Direito Internacional, não é possível estender, segundo uma visão clássica do sistema⁶⁷, o seu campo de aplicação para entes privados, já que, até o momento, como visto na seção anterior, não há um instrumento internacional que estabeleça obrigações diretamente para empresas no Direito Internacional, tampouco existe uma Corte Internacional que julgue empresas e

perante a qual as vítimas de violações de direitos humanos possam pleitear a devida reparação.

Por essa razão, não se pode falar em responsabilidade por negligência de pessoas jurídicas de direito privado no Direito Internacional, uma vez que, por enquanto, não há obrigações diretas para as empresas, sobre as quais possa ser aplicada a regra de devida diligência no âmbito internacional.⁶⁸ Tal afirmativa (não possuir obrigação autônoma de direitos humanos⁶⁹) não significa, contudo, que empresas não têm responsabilidades.

O Direito Internacional dos Direitos Humanos tem criado diversos instrumentos de *soft law*⁷⁰ que reafirmam a necessidade de empresas respeitarem os direitos humanos, a exemplo do já citado Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos, replicando para o âmbito do Direito Internacional, iniciativas nacionais voluntárias de autorregulação, decorrente do movimento conhecido como Responsabilidade Social Corporativa⁷¹.

De forma pioneira em um documento internacional, os Princípios Orientadores da ONU estabelecem, no pilar II, que as empresas têm a responsabilidade de respeitar os direitos humanos, o que tem sido identificado pela doutrina como uma obrigação negativa de evitar qualquer forma de violação desses direitos.⁷²

Para atender a essa obrigação negativa, a realização da devida diligência tem sido apontada como um imperativo no auxílio às empresas a cumprir com a responsabilidade de respeitar os direitos humanos.⁷³ Os Princí-

⁶³ BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 212.

⁶⁴ BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 215.

⁶⁵ NATIONS UNIES. *Projet d'articles sur la responsabilité de l'état pour fait internationalement illicite*. 2001. Nations Unies, 2005. p. 3880404. Disponível em: https://legal.un.org/ilc/texts/instruments/french/draft_articles/9_6_2001.pdf. Acesso em: 23 jul. 2024.

⁶⁶ BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 286.

⁶⁷ BERNAZ, Nadia. *Business and human rights: history, law and policy: bridging the accountability gap*. New York: Routledge, 2017. p. 81.

⁶⁸ BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 234.

⁶⁹ Essa afirmação tem sido objeto de especial controvérsia na doutrina, cf. BERNAZ, Nadia. *Business and human rights: history, law and policy: bridging the accountability gap*. New York: Routledge, 2017. p. 86.

⁷⁰ DELMAS-MARTY, Mireille. *Vers une communauté de valeurs? les forces imaginantes du droit (IV)*. Paris: Le Seuil, 2011. Disponível em: <https://www.cairn.info/vers-une-communaute-de-valeurs--9782021039627.htm>.

⁷¹ FACHIN, Melina; PAMPLONA, Danielle Anne. Empresas e direitos humanos (BHR) e responsabilidade social corporativa (CSR): aproximações e distinções. In: NALIN, Paulo; COPI, Lygia (org.). *As novas fronteiras do direito contratual*. Belo Horizonte: Fórum, 2021.

⁷² LOPEZ, Andres Felipe. Contemporary responses to businesses' negative human rights impact. *Revista de Direito Internacional*, v. 17, n. 1, p. 340-361, 2020. p. 350.

⁷³ MICHALOWSKI, Sabine. Due diligence and complicity: a relationship in need of clarification. In: DEVA, Surya; BILCHITZ, David (org.). *Human rights obligations of business: beyond the corporate*

pios Orientadores da ONU (Princípio 12⁷⁴) estabelecem um piso protetivo mínimo que as empresas devem observar nesse processo, quais sejam: a Carta Internacional de Direitos Humanos (formada pela Declaração Universal de Direitos Humanos de 1948 e pelos Pactos Internacionais de Direitos Civis e Políticos e Econômicos, Sociais e Culturais, ambos de 1966) e a Declaração sobre os Princípios e Direitos Fundamentais do Trabalho da OIT (princípios constante das 8 convenções centrais da organização).

Apesar de também utilizar a expressão “devida diligência”, esse conceito é distinto daquele previsto como regra de Direito Internacional. Segundo a OCDE,

entende-se por devida diligência o processo através [sic] do qual as empresas podem identificar, prevenir, mitigar e se responsabilizar pela forma como abordam os seus impactos adversos reais e potenciais como parte integrante da tomada de decisão empresarial e dos sistemas de gestão de riscos.⁷⁵

O Princípio n.º 13 da iniciativa onusiana⁷⁶ impõe, expressamente, a necessidade de implementação de mecanismos de devida diligência, a fim de não somente deixar de, ou não contribuir para, violar direitos humanos, mas também para prevenir ou mitigar os impactos negativos da atividade empresarial nesses direitos.

Essa obrigação negativa desencadeia, portanto, deveres de caráter positivo de devida diligência, ou seja, as empresas passam a ter que desenvolver e implementar políticas de identificação, prevenção e mitigação de riscos em todos os seus processos e atividades, inclusive, perante toda a cadeia de produção, com o objetivo de, sobretudo, evitar reais e potenciais violações de direitos

responsibility to respect? Cambridge: Cambridge University Press, 2015. p. 218-242. Disponível em: <https://archive.org/details/humanrightsoblig0000unse/page/n15/mode/2up>. p. 221.

⁷⁴ ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios Orientadores da ONU para Empresas e Direitos Humanos*. New York: United Nations, 2011. Disponível em: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. Acesso em: 8 ago. 2021.

⁷⁵ ORGANIZAÇÃO PARA A COOPERAÇÃO E DESENVOLVIMENTO ECONÔMICO. *Diretrizes da OCDE para Empresas multinacionais sobre conduta empresarial responsável*. Paris: OCDE, 2023. Disponível em: <https://www.oecd-ilibrary.org/docserver/663b7592-pt.pdf?expires=1715710115&id=id&accname=guest&checksum=2D5A0EFD5998ACB10F64DCFCB5433CF6>. Acesso em: 25 abr. 2024.

⁷⁶ ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios Orientadores da ONU para Empresas e Direitos Humanos*. New York: United Nations, 2011. Disponível em: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. Acesso em: 8 ago. 2021.

humanos. Afinal, conforme Lopez, “[t]he action of prevention and mitigation is much more than mere avoidance; it is a requirement to do something that could include corporate policies, social programs, and internal mechanisms to provide remedies for victims”⁷⁷.

O Princípio n.º 17⁷⁸ explicita o processo de devida diligência em 5 fases: i) avaliar reais e potenciais impactos nos direitos humanos; ii) integrar as conclusões de avaliação de impacto e tomar as medidas necessárias, iii) acompanhar respostas das medidas adotadas; iv) comunicar como os impactos estão sendo respondidos, e v) reparar ou contribuir para reparação por meio legítimos.

Para a doutrina, as definições trazidas pelos Princípios onusianos ainda são muito vagas em relação à extensão da devida diligência e aos aspectos práticos de sua implementação⁷⁹, dificultando a exata compreensão de quais atitudes específicas precisam ser evitadas:

the SRSG’s statements concerning the definitions of complicity are very large. It is, for example, not discussed at all under what circumstances, if any, behaviour such as mere silence, mere presence in a country, or benefiting from abuse committed by others could amount to non-legal complicity. This makes it difficult to define the scope of due diligence that is required and to determine which corporate activities, and which consequences thereof, need to be avoided.⁸⁰

⁷⁷ “A ação de prevenção e mitigação é muito mais do que um mero evitar; é uma exigência de fazer algo que pode incluir políticas corporativas, programas sociais e mecanismos internos para fornecer reparações às vítimas”. [Tradução livre] LOPEZ, Andres Felipe. Contemporary responses to businesses’ negative human rights impact. *Revista de Direito Internacional*, v. 17, n. 1, p. 340-361, 2020. p. 351.

⁷⁸ ORGANIZAÇÃO DAS NAÇÕES UNIDAS. *Princípios Orientadores da ONU para Empresas e Direitos Humanos*. New York: United Nations, 2011. Disponível em: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. Acesso em: 8 ago. 2021.

⁷⁹ Sobre aspectos práticos da devida diligência, cf. MC-CORQUODALE, Robert *et al.* Human Rights due diligence in law and practice: good practices and challenges for business enterprises. *Business and Human Rights Journal*, v. 2, n. 2, p. 195-224, 2017.; WETTSTEIN, Florian. *Business and human rights: ethical, legal, and managerial perspectives*. Cambridge: Cambridge University Press, 2022.

⁸⁰ “as declarações do SRSG sobre as definições de cumplicidade são muito amplas. Não é discutido, por exemplo, em que circunstâncias, se houver, comportamentos como mero silêncio, mera presença em um país ou beneficiar-se de abusos cometidos por outros poderiam constituir uma não jurídica cumplicidade. Isso torna difícil definir o escopo da devida diligência exigida e determinar quais atividades corporativas e quais consequências respectivas precisam ser evitadas”. [Tradução livre] MICHALOWSKI, Sabine. Due diligence and complicity: a relationship in need of clarification. *In:*

Em 2018, visando à implementação das Diretrizes para Empresas Multinacionais, a OCDE criou o Guia de Devida Diligência para uma Conduta Empresarial Responsável⁸¹, o qual descreve o processo de devida diligência, de forma mais precisa, em 6 etapas: i) incorporar a conduta empresarial responsável nas políticas e sistemas de gestão; ii) identificar e analisar impactos adversos reais e potenciais associados com as operações, produtos e/ou serviços da empresa; iii) cessar, prevenir e mitigar impactos adversos; iv) monitorar a implementação e os resultados; v) comunicar como os impactos estão sendo enfrentados, e vi) prover ou cooperar para remediar os impactos quando necessário. Por tratar-se de medidas voluntárias, ficam a cargo das empresas quais critérios deverão adotar.

Em relação à inobservância dos mecanismos de devida diligência em direitos humanos, como dependem exclusivamente das previsões do sistema de justiça de cada Estado, fica vinculado ao direito interno também o regime de responsabilidade civil no caso de violação desses deveres de diligência⁸², Situação que resulta em um conteúdo de tais instrumentos extremamente vago, dificultando uma eventual harmonização na esfera global. Ressalta-se que a implementação das chamadas auditorias em direitos humanos pelas empresas não as isenta, por completo e a priori, das consequências decorrentes de eventual violação desses direitos.⁸³ É preciso avaliar caso a caso, a fim de verificar em que medida a responsabilidade das empresas pode ser atenuada pelo exercício da devida diligência em direitos humanos.

DEVA, Surya; BILCHITZ, David (org.). *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2015. p. 218-242. Disponível em: <https://archive.org/details/humanrightsoblig0000unse/page/n15/mode/2up>. p. 225.

⁸¹ ORGANIZAÇÃO PARA A COOPERAÇÃO E DESENVOLVIMENTO ECONÔMICO. *Guia da OCDE de devida diligência para uma conduta empresarial responsável*. [S. l.]: OCDE, 2018. Disponível em: <https://mneguidelines.oecd.org/guia-da-ocde-de-devida-diligencia-para-uma-conduta-empresarial-responsavel-2.pdf>. Acesso em: 14 maio 2024.

⁸² BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L'Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 233.

⁸³ MICHALOWSKI, Sabine. Due diligence and complicity: a relationship in need of clarification. In: DEVA, Surya; BILCHITZ, David (org.). *Human rights obligations of business: beyond the corporate responsibility to respect?* Cambridge: Cambridge University Press, 2015. p. 218-242. Disponível em: <https://archive.org/details/humanrightsoblig0000unse/page/n15/mode/2up>. p. 219.

Inspirando-se nesses documentos internacionais de *soft law*, o fluxo da internormatividade se inverte novamente e regras vinculantes (*hard law*) de devida diligência empresarial em direitos humanos têm sido criadas, de forma precursora, em direito interno de alguns países⁸⁴, como França⁸⁵, Países Baixos⁸⁶ e Alemanha⁸⁷.

No Brasil, ainda não há uma legislação tratando do tema. Os documentos até então aprovados, não trazem obrigações juridicamente vinculantes para pessoas jurídicas. Está, contudo, em trâmite, na Câmara dos Deputados, o Projeto de Lei n.º 572/2022⁸⁸, que pretende criar o marco nacional sobre Direitos Humanos e Empresas e estabelecer diretrizes para a promoção de políticas públicas no tema.

No final de 2022, o Ministério da Economia publicou o PACER – Plano de Ação em Conduta Empresarial Responsável⁸⁹. O documento contou com a participação do Ministério da Mulher, da Família e dos Direitos Humanos. Trata-se de um documento que tem como objetivo nortear o governo brasileiro na implementação de novas políticas de Conduta Empresarial Responsável nos próximos anos, a partir da apresenta-

⁸⁴ Para uma análise das legislações de países anglo-saxões (Estados Unidos, Reino Unido e Austrália), cf. NOLAN, Justine. Hardening soft law: are the emerging corporate social disclosure laws capable of generating substantive compliance with human rights? *Revista de Direito Internacional*, v. 15, n. 2, p. 64-83, 2018.

⁸⁵ Sobre o tema, cf. SILVA, Sandro Gorski; PEREIRA, Helly Elisabeth Bowens. direitos humanos e empresas: uma análise da lei francesa sobre o dever de vigilância empresarial. *Revista da Ajuris*, v. 50, p. 373-402, 2023.

⁸⁶ NEDERLAND. *Wet van 24 oktober 2019*. Houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid) [Child Labour Due Diligence Act]. Staatsblad van het Koninkrijk der Nederlanden. Disponível em: <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>. Acesso em: 27 ago. 2024.

⁸⁷ DEUTSCHLAND. Bundesministerium für Arbeit und Soziales. *Act on Corporate Due Diligence Obligations in Supply Chains of July 16 2021*. Berlin: Bundesministerium für Arbeit und Soziales, 2021. Disponível em: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3. Acesso em: 27 ago. 2024.

⁸⁸ BRASIL. Câmara dos Deputados. *Projeto de Lei nº 572, de 2022*. Cria a lei marco nacional sobre Direitos Humanos e Empresas e estabelece diretrizes para a promoção de políticas públicas no tema. Disponível em: <https://www.camara.leg.br/propostas-legislativas/2317904>. Acesso em: 11 abr. 2023.

⁸⁹ BRASIL. Ministério da Economia. *Plano de Ação em Conduta Empresarial Responsável*. PACER. Brasília, 2022. Disponível em: <https://www.gov.br/mdic/pt-br/assuntos/camex/pcn/PACER2212225.pdf>. Acesso em: 11 abr. 2023.

ção de um repertório do que já foi realizado pelo Estado brasileiro no tema.

A respeito da União Europeia, as normativas de *soft law* também têm inspirado a adoção de instrumentos vinculantes, visando à regulamentação da atividade empresarial. Foi aprovada pelo Parlamento Europeu, em 24 de abril de 2024, a Diretiva Europeia sobre Devida Diligência Corporativa em Sustentabilidade, que estabelece a obrigatoriedade de algumas empresas realizarem devida diligência em direitos humanos e ambientais nas suas operações.⁹⁰ Em relação ao texto projetado e aquele que foi aprovado houve um certo retrocesso, sobretudo, em relação ao número de empresas que deverão observar a diretiva. Ainda assim, trata-se de importante instrumento cuja repercussão deverá ser sentida globalmente, a partir de sua internalização pelos países europeus.⁹¹

Esse processo de internormatividade revela uma tensão e verdadeira porosidade existente entre essas duas categorias de normas (*hard law* e *soft law*), a demonstrar uma mútua e recíproca sinergia entre esses dois institutos, ressignificando os efeitos jurídicos das normas internacionais.⁹² É o que Samantha Besson intitula de processo de “hibridização” progressivo das normas de *hard law* e *soft law*:

Bien entendu, comme indiqué, il est difficile en pratique de lutter contre la confusion progressive de ces différents standards homonymes de due diligence, puis, et c’est lié, contre leur entrée progressive dans le *hard law*, notamment par le biais du droit international des contrats et de l’arbitrage. En fait, la longue histoire du standard de due diligence en droit international aura été, comme nous l’avons vu dans le premier chapitre, l’histoire d’une « hybridisation » progressive de multiples standards au fil de sa réception dans divers ordres juridiques, dans

⁹⁰ Para uma análise crítica de amplitude sobre os efeitos da diretiva europeia, cf. MONEBHURRUN, Nitish. Should non-European Union member states be cautious about the E.U corporate sustainability due diligence directive? *Revista de Direito Internacional*, v. 21, n. 2, p. 12-14, 2024.

⁹¹ NIRULA, Maya. CSDDD: a step in the right direction, but not the end of the road. *Business & Human Rights Resource Centre*, 1 maio 2024. Disponível em: <https://www.business-humanrights.org/en/latest-news/csddd-a-step-in-the-right-direction-but-not-the-end-of-the-road/>. Acesso em: 3 maio 2024.

⁹² MARTIN-CHENUT, Kathia. Juridicisation et judiciarisation de la SER: le rôle du droit international des droits de l’homme. In: CHANTEAU, Jean-Pierre; MARTIN-CHENUT, Kathia; CAPRON, Michel (org.). *Entreprise et responsabilité sociale en questions: savoirs et controverses*. Paris: Classiques Garnier, 2017. p. 239-260.

divers domaines juridiques et dans diverses sources du droit.⁹³

Percebe-se, portanto, que, ainda que sejam de iniciativa voluntária, os Princípios Orientadores da ONU têm se mostrado de grande relevância, à medida que têm impulsionado a criação diversas normativas vinculantes (*hard law*), no norte global, sobre devida diligência em direitos humanos, antecipando-se, eventualmente, aos efeitos do futuro tratado internacional sobre a temática em questão.

Embora louvável a adoção de normativas vinculantes sobre devida diligência em direitos humanos em direito interno, o que se tem visto é que os Estados não têm respondido de forma efetiva às verdadeiras raízes do problema que envolve a temática Direitos Humanos e Empresas. Como aponta Barnali Choudhury,

Yet, HRDD initiatives, while laudable, may simply be a form of window dressing. They can put a smart spin on state efforts to address BHR problems without addressing some of the root causes of that predicament. In that vein, they are a helpful step forward, but are, in and of themselves, insufficient.

This is because the root cause of many BHR problems is the way in which corporations operate, a modus operandi that is supported by state-sanctioned corporate law. So long as states fail to transform the way in which corporations operate – in part, by reconceptualizing corporate law – even the best drafted HRDD initiatives will be inadequate to halt corporate harms.⁹⁴

⁹³ “É claro que, como indicado, é difícil na prática lutar contra a confusão progressiva desses diferentes padrões homônimos de devida diligência e, conseqüentemente, contra sua entrada progressiva em *hard law*, notadamente por meio do direito internacional dos contratos e da arbitragem. De fato, a longa história do standard de devida diligência no direito internacional tem sido, como vimos no primeiro capítulo, a história de uma ‘hibridização’ progressiva de múltiplos padrões ao longo de sua recepção em diversos sistemas jurídicos, em diversos campos jurídicos e em diversas fontes do direito”. [Tradução livre] BESSON, Samantha. La due diligence en droit international. *Recueil des Cours de L’Académie du Droit International de La Haye*, v. 409, p. 153-398, 2020. p. 355.

⁹⁴ “Mesmo assim, as iniciativas de HRDD, embora louváveis, podem ser apenas uma forma de maquiagem. Elas podem dar uma aparência positiva aos esforços do Estado para resolver problemas de BHR sem abordar algumas das causas profundas dessa situação. Nesse sentido, são um passo adiante, mas são, por si só, insuficientes. Isso ocorre porque a causa raiz de muitos problemas de BHR é a forma como as corporações operam, um modus operandi que é apoiado pelo direito corporativo sancionado pelo Estado. Enquanto os estados não transformarem a maneira como as corporações operam – em parte, reconceituando o direito corporativo – mesmo as iniciativas de HRDD mais bem elaboradas serão inadequadas para deter os danos corporativos” [Tradução livre]. CHOUDHURY, Barnali. Corporate law’s threat to human rights: why human rights due

É preciso, portanto, somar esforços para, ademais de implementar mecanismos vinculantes de devida diligência em direitos humanos, repensar a estrutura do direito empresarial, em especial, conceitos que escondem os verdadeiros custos da atividade empresarial, como a responsabilidade limitada — cujo objeto é tanto não atingir o patrimônio dos acionistas como da matriz e de outras empresas de um mesmo grupo — e a personalidade jurídica autônoma⁹⁵ — separada dos acionistas e de quem a gerencia —, a fim de tornar a prevenção e responsabilização de empresas por danos nos direitos humanos plenamente efetivas.

A Lei Francesa sobre o Dever de Vigilância já demonstrou, ao menos em relação à responsabilidade limitada, que é possível mitigá-la, exigindo que as filias da empresa submetida à lei, mesmo fora do território francês, implementem e executem a devida diligência em direitos humanos⁹⁶, o que pode ser traduzido como a eliminação indireta da responsabilidade limitada entre matriz e subsidiárias, à medida que a empresa matriz pode ser responsabilizada pela falha no processo de devida diligência da sua cadeia de produção.⁹⁷

4 Considerações finais

A implementação de mecanismos de devida diligência em direitos humanos destacou-se, especialmente, após o advento dos Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos.

Ocorre, no entanto, que a previsão onusiana, ademais da problemática adesão voluntária, por sua natu-

reza, não permite a conceituação específica e a apresentação de diretrizes de operacionalização, o que deixa a cargo das empresas uma grande parcela de discricionariedade na implementação dessa ferramenta. Delegar às corporações tal tarefa traz incertezas quanto à efetividade da devida diligência como instrumento de prevenção, mitigação e reparação das violações de direitos humanos.

Por essa razão, atualmente, há o movimento da União Europeia e de alguns países para elaboração de leis que tornem a devida diligência em direitos humanos e ambientais — como prevista nos Princípios Orientadores — obrigatória, estabelecendo critérios específicos para sua aplicação e, em larga medida, esclarecendo o que os Princípios Orientadores não puderam esclarecer: quem, exatamente, deve ser responsável pela adoção deste procedimento e como o procedimento deve ser executado.

Portanto, os Princípios da ONU têm a sua relevância, à medida que tem influenciado a criação de normativas vinculantes em países do norte global. Esse reconhecimento da relevância dos Princípios, por suas consequências, é uma das conclusões deste artigo. É preciso avançar e questionar qual será a repercussão dos documentos mandatários derivados dos Princípios Orientadores para os países do sul global, notoriamente conhecidos por não possuírem as condições institucionais necessárias — ou por as possuírem, mas de modo fragilizado — para limitar a atuação de empresas em seu território.

A adoção de instrumentos vinculantes de devida diligência em direitos humanos não é a solução mágica para a questão; é preciso utilizá-la em conjunto com outros instrumentos importantes, estruturas caras ao direito empresarial, em especial, conceitos que escondem os verdadeiros custos da atividade empresarial, como a responsabilidade limitada e a personalidade jurídica autônoma, a fim de tornar a prevenção e responsabilização de empresas por danos aos direitos humanos plenamente efetivas.

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⁹⁵ CHOUDHURY, Barnali. Corporate law's threat to human rights: why human rights due diligence might not be enough. *Business and Human Rights Journal*: Osgoode Legal Studies Research Paper, n. 4704135, p. 1-27, 2024. Disponível em: <https://ssrn.com/abstract=4704135>. Acesso em: 22 maio 2024. p. 10.

⁹⁶ SILVA, Sandro Gorski; PEREIRA, Helly Elisabeth Bowens. direitos humanos e empresas: uma análise da lei francesa sobre o dever de vigilância empresarial. *Revista da Ajuris*, v. 50, p. 373-402, 2023. p. 386.

⁹⁷ CHOUDHURY, Barnali. Corporate law's threat to human rights: why human rights due diligence might not be enough. *Business and Human Rights Journal*: Osgoode Legal Studies Research Paper, n. 4704135, p. 1-27, 2024. Disponível em: <https://ssrn.com/abstract=4704135>. Acesso em: 22 maio 2024. p. 18, 23.

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Human rights due diligence and access to remedy: a comparative analysis of twenty-six due diligence laws and proposals

Devida diligência em direitos humanos e acesso à reparação: uma análise comparativa de vinte e seis leis e propostas de devida diligência

Axel Marx

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Axel Marx**

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Abstract

The rise of global value chains and increased outsourcing of production activities to different parts of the world have highlighted the need to better address human rights violations and provide victims of corporate human rights violations with an access to remedy. With the introduction of human rights due diligence legislations, a new approach is taken to confront human rights violations by companies. Several studies have focused on the emergence, scope and reach of due diligence legislations. Little research has been done on what they provide in terms of access to remedy. Providing a comprehensive overview of the rising legal application of due diligence concept, the first part of the paper looks at the transformation of due diligence measures into legally binding mechanisms and its links to access to remedy, while the second part of the paper outlines the operational aspects of remedial action and introduces the process of examination of remedial provisions through comparative case analysis of 26 effective and in-force legislations, as well as proposals and initiatives at different stages of development. By identifying whether the remedy is introduced in a form of “restitution”, “compensation”, or “satisfaction”, either singly or in combination, the third part of the paper points out the severity, comprehensiveness or leniency of the remedial and sanctioning measures, which is then followed by a discussion on if the envisioned measures could potentially provide an effective remedy to the victims of human rights violations. The paper shows that there is significant variation between the different due diligence legislations in terms of access to remedy.

Keywords: due diligence; human rights; access to remedy; remediation; sanctions; EU trade policy.

Resumo

O surgimento das cadeias globais de valor e o aumento da terceirização das atividades produtivas para diferentes partes do mundo evidenciaram a necessidade de enfrentar melhor as violações de direitos humanos e de oferecer às víti-

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mas dessas violações corporativas o acesso à reparação. Com a introdução de legislações sobre devida diligência em direitos humanos, adota-se uma nova abordagem para lidar com as violações cometidas por empresas. Diversos estudos se concentraram no surgimento, escopo e alcance dessas legislações. Poucas pesquisas, no entanto, analisaram o que essas leis oferecem em termos de acesso à reparação. Ao fornecer uma visão abrangente da crescente aplicação jurídica do conceito de devida diligência, a primeira parte do artigo analisa a transformação das medidas de diligência em mecanismos legalmente vinculantes e suas conexões com o acesso à reparação. A segunda parte do artigo descreve os aspectos operacionais das ações reparatórias e apresenta o processo de exame das disposições sobre reparação por meio de uma análise comparativa de 26 legislações vigentes e em vigor, além de propostas e iniciativas em diferentes estágios de desenvolvimento. Ao identificar se a reparação é introduzida sob a forma de “restituição”, “indenização” ou “satisfação”, isoladamente ou em combinação, a terceira parte do artigo aponta a gravidade, abrangência ou flexibilidade das medidas reparatórias e sancionatórias, seguida de uma discussão sobre se as medidas previstas podem potencialmente oferecer uma reparação eficaz às vítimas de violações de direitos humanos. O artigo demonstra que há uma variação significativa entre as diferentes legislações de devida diligência no que diz respeito ao acesso à reparação.

Palavras-chave: devida diligência; direitos humanos; acesso à reparação; remediação; sanções; política comercial da UE

1 Introduction

The involvement of transnational corporations in human rights violations have been well-documented^{1, 2, 3, 4}.

¹ ENNEKING, L.; GIESEN, I.; SHAAP, A.-J.; RYNGAERT, C.; KRISTEN, F.; ROORDA, L. *Accountability, international business operations and the law: providing justice for corporate human rights violations in global value chains*. London: Routledge, 2020.

² MARX, A.; BRIGHT, C.; PINEAU, N.; WOUTERS, J. Corporate accountability mechanisms in EU member states for human rights abuses in third countries. In: CZECH, P.; HESCHL, K.; LUKAS, K.; NOWAK, M.; OBERLEITNER, G. (ed.). *European Yearbook on Human Rights*. [S. l.]: Intersentia, 2019. p. 157-186.

³ MEERAN, R.; MEERAN, J. *Human Rights litigation against multinationals in practice*. Oxford: Oxford University Press, 2021.

⁴ WETTSTEIN, F. *Business and human rights: ethical, legal and managerial perspectives*. Cambridge: Cambridge University Press, 2022.

This involvement can take several forms⁵ including cases where companies are directly responsible for human rights abuses and cases where companies are sourcing products that are produced in violations of human rights by suppliers with whom they operate in the context of global value chains. In order to address these violations and provide victims access to remedy several initiatives have been taking. Initially, several soft “soft law” instruments like the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Due Diligence Guidance for Responsible Business Conduct were introduced. As defined by the OECD, due diligence allows companies to identify and address actual or potential risks through an on-going, proactive and reactive, multi-step process in order to mitigate or prevent adverse impacts associated with their activities or corporate decisions⁶. Both soft law instruments introduce the concept of due diligence in order to prevent human rights abuses from occurring and addressing adverse effects of human rights abuses. The soft law instruments, although they have contributed to raising awareness, have been criticized for their inability to prevent human rights abuses and provide victims access to remedy^{7, 8, 9}, which would entail ensuring that victims can receive appropriate ‘compensation’ for their suffered harm, guaranteed through the access to justice via judicial, administrative or other bodies for human rights violations¹⁰. While these soft law instruments do

⁵ MARX, A.; BRIGHT, C.; PINEAU, N.; WOUTERS, J. Corporate accountability mechanisms in EU member states for human rights abuses in third countries. In: CZECH, P.; HESCHL, K.; LUKAS, K.; NOWAK, M.; OBERLEITNER, G. (ed.). *European Yearbook on Human Rights*. [S. l.]: Intersentia, 2019. p. 157-186.

⁶ OECD. *OECD guidelines for multinational enterprises on responsible business conduct*. Paris: OECD Publishing, 2023.

⁷ MACCHI, C.; BRIGHT, C. Hardening soft law: the implementation of human rights due diligence requirements in domestic legislation. In: BUSCEMI, M.; LAZZERINI, N.; MAGI, L. (ed.). *Legal sources in business and human rights: evolving dynamics in international and european law*. Leiden: Brill Nijhoff, 2020. p. 218-247.

⁸ OTTEBURN, K. Reaching the limit: access to remedy through nonjudicial mechanisms for victims of business-related human rights abuses. *International Journal of Human Rights*, v. 28, n. 2, p. 220-244, 2024.

⁹ OTTEBURN, K.; MARX, A. Seeking remedy for corporate human rights abuses: what is the contribution of the OECD national contact points? In: MARX, A.; VAN CALSTER, G.; WOUTERS, J. (ed.). *Research handbook on global governance, business and human rights*. Cheltenham: Edward Elgar Publishing, 2022. p. 229-253.

¹⁰ BUYSE, A. Lost and regained? Restitution as a remedy for human rights violations in the context of international law. *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)*, v. 68, n. 2008, p. 129-153, 2008.

play an important role in promoting more corporate transparency and raising awareness on responsibilities and expectations placed upon businesses for human rights protection, they do not have much ability to impose legal accountability required to generate, not only procedural, but also operational and substantial human rights compliance¹¹. As a result, initiatives have been taking to transform these soft law commitments into hard law via different types of due diligence based regulatory measures^{12,13}. Examples include Dutch Child Labour Due Diligence Act¹⁴, French Duty of Vigilance Law¹⁵ and the European Union Directive on Corporate Sustainable Development Due Diligence¹⁶. The judicialization of corporate responsibility does not leave it up to the business operators to voluntarily ensure the protection of human rights, but instead introduces a legal duty to comply, as well as sanction non-compliance and provide measures to remediate already occurred violations. This shift towards mandatory due diligence blurs the distinction between private and public regulation¹⁷ and constitutes according to Duval¹⁸ a double movement of the privatization of transnational human rights governance through the empowerment of corporations as legitimate governance actors as well as the publicization of corporate governance through transparency requirements and accountability processes which allow for access to remedy to victims of human rights abuses.

¹¹ NOLAN, J. Hardening soft law: are the emerging corporate social disclosure and due diligence laws capable of generating substantive compliance with human rights norms? *Revista de Direito Internacional*, v. 15, n. 2, p. 64-83, 2018.

¹² BRIGHT, C.; MARX, A.; PINEAU, N.; WOUTERS, J. Toward a corporate duty for lead companies to respect human rights in their global value chains? *Business and Politics*, v. 22, n. 4, p. 667-697, 2020.

¹³ GRABS, J.; FATIMAH, Z. *2023 database of disclosure, due diligence, and trade-based supply chain legislation of potential*. Barcelona: Universitat Ramon Llull; ESADE Business School, 2023.

¹⁴ INDIA COMMITTEE OF THE NETHERLANDS. *Child Labour Due Diligence Act (Wet zorgplicht kinderarbeid)*. 2019. Available at: <https://respect.international/child-labour-due-diligence-law-wet-zorgplicht-kinderarbeid/>.

¹⁵ FRANCE. National Assembly. *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*. Paris, 2017.

¹⁶ EUROPEAN COMMISSION. *Proposal for a Directive of the European Parliament and of The Council on corporate sustainability due diligence and amending directive (EU) 2019/1937, COM/2022/71 final*. Brussels, 15 Mar. 2024.

¹⁷ MENDE, J. Corporate human rights responsibilities: rethinking the public-private divide. *Nordic Journal of Human Rights*, v. 41, n. 3, p. 255-264, 2023.

¹⁸ DUVAL, A. Ruggie's double movement: assembling the private and the public through human rights due diligence. *Nordic Journal of Human Rights*, v. 41, n. 3, p. 279-303, 2023.

Research is emerging on the origin of these regulatory measures^{19,20}, their design^{21,22} and potential flaws in their design^{23,24,25,26,27,28}. While the existing research provides an insight on the primary motivation and preceding conditions that led to the conception of due diligence in a form of various operational models, no research so far has looked into what these regulatory measures provide in terms of access to remedy for victims of human rights violations. What potential outcome or benefits can the legalisation of due diligence entail for victim of human rights violations and which remedial measures can these victims receive? This paper seeks to identify (1) whether due diligence measures include provisions on remediation and (2) how these provisions vary and differ between remediation measures. The analysis is based on a comparison of 26 legislative documents of adopted or proposed due diligence measures. By doing so, the paper intends to assess to what extent remediation measures are included in currently adopted or proposed due diligence initiatives, what type(s) of remediation mechanism legislators most frequently resort to and if these remediation measures can potentially provide an effective remedy to the victims

¹⁹ KRAJEWSKI, M. Mandatory human rights due diligence laws: blurring the lines between state duty to protect and corporate responsibility to respect? *Nordic Journal of Human Rights*, v. 41, n. 3, p. 265-278, 2023.

²⁰ LENNARTZ, B. Business actors' interest in harder and softer regulation of human rights due diligence. *Nordic Journal of Human Rights*, v. 41, n. 3, p. 326-344, 2023.

²¹ BRIGHT, C.; MARX, A.; PINEAU, N.; WOUTERS, J. Toward a corporate duty for lead companies to respect human rights in their global value chains? *Business and Politics*, v. 22, n. 4, p. 667-697, 2020.

²² DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders. *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023.

²³ DEHM, J. Beyond climate due diligence: fossil fuels, 'red lines' and reparations. *Business and Human Rights*, v. 8, n. 2, p. 151-179, 2023.

²⁴ DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders. *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023.

²⁵ HARRISON, J. *Human rights due diligence: challenges of method, power and competition*. Coventry: University of Warwick, 2023. (CHRiP Working Paper series, n. 2).

²⁶ NOLAN, J. Chasing the next shiny thing: can human rights due diligence effectively address labour exploitation in global fashion supply chains? *International Journal for Crime, Justice and Social Democracy*, v. 11, n. 2, p. 1-14, 2022.

²⁷ SCHILLING-VACAFLOR, A.; LENSCHOW, A. Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges. *Regulation and Governance*, v. 17, n. 3, p. 677-693, 2023.

²⁸ SMIT, L.; BRIGHT, C.; NEELY, S. Muddying the waters: the concept of a 'safe harbour' in understanding human rights due diligence. *Business and Human Rights*, v. 8, n. 1, p. 1-17, 2023.

of human rights violations. As the transition of due diligence instruments from “soft law” to “hard law” is a relatively young process, it may be too early to conclusively establish whether this movement can actually provide the intended protection and support to the victims of human rights violations. While the effects on the status quo should be observed over a long term period, through the research covered in the paper, we hope to demonstrate that legally guaranteed effective remedy to the victim is still a process in development, a notion supported by the widening spectrum of remedial and sanctioning measures in adopted and proposed due diligence legislations.

The first part of the paper provides an overview on the growing relevance of the concept of due diligence, the resulting transition of “soft law” due diligence instruments into the “hard law” obligations and its link to access to remedy. The second part introduces the analytic framework and operationalization of access to remedy which is applied in this study. It also provides details on the case selection and identifies 26 due diligence legislations that are effective and in-force, as well as proposals and initiatives at different stages of development. The paper looks at the provisions of the selected due diligence legislations and categorises remediation mechanisms, considering whether they are used in a form of “restitution”, “compensation”, or “satisfaction”, either singly or in combination, or whether they do not contain any provisions on access to remedy. The third part of the paper provides an in-depth analysis of the spectrum of remedies and sanctions in current legislations, pointing to their severity, comprehensiveness or leniency. This section is followed by a discussion on the effectiveness of the types of remediation mechanisms and their weaknesses, also in relation to the sanctioning provisions they include. Finally, conclusions are drawn on what type of remediation approaches are most frequently supported by legislators and whether they can prove to be effective for combatting human rights violations in business activities.

2 Due diligence and human rights

The rise of global value chains allow companies to outsource production activities to different parts of the world in search of efficiency gains and competitive

advantage^{29, 30}. While global value chains can be a source of foreign investment, economic growth, new job opportunities and import of skills and technology, they also represent an important challenge when it comes to human and environmental rights protection. Several studies have documented human and environmental rights violations in global value chains^{31, 32, 33}. Moreover, the presence of multiple production locations in different countries within a singular value chain introduces multiple regulatory frameworks and jurisdictions for companies to operate in. The regulatory stringency concerning human, labour and environmental standards varies between countries as well as their efforts to enforce these standards. As a result, a governance gap emerges, permitting companies to outsource their services to countries with low environmental and human rights standards³⁴.

In order to answer the demand for companies to take accountability for the human rights violations in their value chains, as well as to address the regulatory governance gap, companies have increasingly adopted self-regulatory, voluntary due diligence measures, while the international organisations have developed a range of soft-law measures based on the concept of due diligence³⁵. The UN Guiding Principles on Business and Human Rights (UNGPs) puts the responsibility to safeguard human rights and fundamental freedoms on all States and all business enterprises, regardless of their size, sector, location, ownership and structure. Principle 17 further elaborates on the necessity of business

²⁹ DALLAS, M. P.; PONTE, S.; STURGEON, T. J. Power in global value chains. *Review of International Political Economy*, v. 26, n. 4, p. 666-694, 2019.

³⁰ GEREFFI, G.; HUMPHREY, J.; STURGEON, T. The governance of global value chains. *Review of International Political Economy*, v. 12, n. 1, p. 78-104, 2005.

³¹ KHOURY, S.; WHYTE, D. *Corporate human rights violations: global prospects for legal action*. London: Routledge, 2017.

³² MARX, A.; BRIGHT, C.; PINEAU, N.; WOUTERS, J. Corporate accountability mechanisms in EU member states for human rights abuses in third countries. In: CZECH, P.; HESCHL, K.; LUKAS, K.; NOWAK, M.; OBERLEITNER, G. (ed.). *European Yearbook on Human Rights*. [S. l.]: Intersentia, 2019. p. 157-186.

³³ WETTSTEIN, F. *Business and human rights: ethical, legal and managerial perspectives*. Cambridge: Cambridge University Press, 2022.

³⁴ KOWALSKI, P.; LOPEZ GONZALEZ, J.; RAGOSSISI, A.; UGARTE, C. *Participation of developing countries in global value chains: implications for trade and trade-related policies*. Paris: OECD Publishing, 2015. (OECD Trade Policy Papers, n. 179).

³⁵ LANDAU, I. *Human rights due diligence and labour governance*. Oxford: Oxford University Press, 2023.

enterprises to put in place policies and processes in order to “identify, prevent, mitigate and account” for the impact their business operations have on human rights. The OECD Guidelines for Responsible Business Conduct provide a more elaborate outline of diligence process steps, consisting of six distinct but interrelated elements: (1) embedding responsible business conduct into policies and management systems; (2) identification and assessment of adverse impacts in operations, supply chains and business relationships; (3) cessation, prevention or mitigation of adverse impact; (4) tracking implementation and results; (5) communicating how impacts are addressed; and (6) providing for or cooperating in remediation when appropriate. The end goal of these steps is that businesses and corporations organise their activities and operations in a manner that takes corporate responsibility and due diligence measures into consideration, safeguarding, at minimum, the basic human rights.

This voluntary approach towards dealing with human rights violations by companies is considered to insufficiently address human rights violations of companies. As a result, in the last decade several legislative measures emerged which transform the voluntary soft law guidelines into mandatory hard law requirements for companies^{36, 37, 38}. This push towards hardening of soft law practices reflects the diminishing support for the dichotomy between the responsibilities of states versus companies in the protection of human rights³⁹. Companies increasingly need to address potential adverse human rights effects. This is now operationalized in a number of legislative measures, mainly in the European Union and its Member States.

Following the launch of these new measures, researchers have started paying attention to these due diligence measures. Some researchers analyzed and compared

due diligence regulatory measures from an institutional design perspective focusing on the substantive reach of the laws (narrowly focusing on one issue or more broadly on several human rights and environmental issues including climate change), on the reach of companies (only large companies versus all companies) and on the enforcement mechanisms in place (penalties, civil liabilities)⁴⁰. Focusing on climate change, Dehm⁴¹ critically assessed the current approaches to due diligence on substantive grounds highlighting the conceptual ambiguity in due diligence legislations on what constitutes a substantive commitment to address climate change for companies. Deva⁴² developed a framework and ideal-type due diligence law based on design parameters related to substantive and procedural commitments to environmental and human rights protection. He benchmarked five due diligence laws and showed that these laws fall short on many components, questioning the overall effectiveness of the current design of due diligence measures and voicing the concern that due diligence practices can just become a ‘tick-the-box’ exercise for businesses⁴³. Schilling-Vacaflor and Lenschow⁴⁴ focus on the French Duty of Vigilance Law and zoom in on the accountability mechanisms put in place which would enable affected communities and stakeholders to hold companies to account in case of non-compliance with due diligence regulations. This is one of the first studies delving into issues of access to remedy and shows several weaknesses in the French approach. Some authors argue that one of the reasons for the identified weaknesses of current due diligence approaches lies in the fact that due diligence from a theoretical perspective is an abstract concept that allows for a large variety of interpretative possibilities to coexist and hence there is no real standard or set of rules on how exactly the states should

³⁶ BRIGHT, C.; MARX, A.; PINEAU, N.; WOUTERS, J. Toward a corporate duty for lead companies to respect human rights in their global value chains? *Business and Politics*, v. 22, n. 4, p. 667-697, 2020.

³⁷ LENNARTZ, B. Business actors’ interest in harder and softer regulation of human rights due diligence. *Nordic Journal of Human Rights*, v. 41, n. 3, p. 326-344, 2023.

³⁸ SCHILLING-VACAFLOR, A.; LENSCHOW, A. Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges. *Regulation and Governance*, v. 17, n. 3, p. 677-693, 2023.

³⁹ KRAJEWSKI, M. Mandatory human rights due diligence laws: blurring the lines between state duty to protect and corporate responsibility to respect? *Nordic Journal of Human Rights*, v. 41, n. 3, p. 265-278, 2023.

⁴⁰ BRIGHT, C.; MARX, A.; PINEAU, N.; WOUTERS, J. Toward a corporate duty for lead companies to respect human rights in their global value chains? *Business and Politics*, v. 22, n. 4, p. 667-697, 2020.

⁴¹ DEHM, J. Beyond climate due diligence: fossil fuels, ‘red lines’ and reparations. *Business and Human Rights*, v. 8, n. 2, p. 151-179, 2023.

⁴² DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders. *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023.

⁴³ DEVA, S. Mandatory human rights due diligence laws in Europe: a mirage for rightsholders. *Leiden Journal of International Law*, v. 36, n. 2, p. 389-414, 2023.

⁴⁴ SCHILLING-VACAFLOR, A.; LENSCHOW, A. Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges. *Regulation and Governance*, v. 17, n. 3, p. 677-693, 2023.

develop their legislations and establish obligations⁴⁵. It is becoming more prevalent that the requirements for corporate transparency and due diligence promoted by the existing soft law instruments need to be supported by accountability, mandated via compliance mechanisms, so the corporate efforts are not boiled down to a cosmetic form of human rights protection^{46, 47}.

To delve deeper into the issue of access to remedy and remediation this paper performs an analysis of 26 legislative documents with regard to the type and comprehensiveness of remediation mechanisms envisioned in recent due diligence legislations worldwide. In the next section we focus on the operationalization of access to remedy and the case selection.

3 Access to remedy in due diligence: importance and operationalization

Access to remedy constitutes the third pillar of the UNGPs and a cornerstone of any approach which aims to address human rights violations by companies⁴⁸. The concept of remediation refers to access to justice via judicial, administrative or other bodies for human rights violations and a proper ‘compensation’ for the harm done⁴⁹. While due diligence strives to identify, prevent and mitigate potential impacts on human rights, remediation seeks to bring these adverse impacts to an end and possibly enable restoration into a previous state. OECD Guidelines envision remediation to be carried out through a variety of practical actions proportionate to the significance and scale of the adverse impacts.

⁴⁵ BAADE, B. Due diligence and the duty to protect human rights. In: KRIEGER, H.; PETERS, A.; KREUZER, L. *Due diligence in the international legal order*. Oxford: Oxford University Press, 2020. p. 92-108.

⁴⁶ NOLAN, J. Hardening soft law: are the emerging corporate social disclosure and due diligence laws capable of generating substantive compliance with human rights norms? *Revista de Direito Internacional*, v. 15, n. 2, p. 64-83, 2018.

⁴⁷ QUJIANO, G.; LOPEZ, C. Rise of Mandatory human rights due diligence: a beacon of hope or a double-edged sword?. *Business and Human Rights*, v. 6, n. 2, p. 241-256, 2021.

⁴⁸ CHICHESTER, O.; RIQUELME, M. Access to Remedy. *Business for Social Responsibility*, San Francisco, 2021. Available at: <https://www.bsr.org/reports/bsr-access-to-remedy.pdf>. Access on: 31 July 2024.

⁴⁹ BUYSE, A. Lost and regained? Restitution as a remedy for human rights Violations in the context of international law. *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)*, v. 68, n. 2008, p. 129-153, 2008.

These actions can include: restoration of the affected person or persons to the state prior to the occurrence of the adverse impact; remedy or a combination of remedies, such as apologies, restitution or rehabilitation, financial or non-financial compensation, punitive sanctions and preventative measures of reoccurrence, as dictated by an existing law or international guidelines; consultations with the impacted rights holders and their representatives to determine appropriate remedies. Access to remedy is also one of the foundational pillars included in the UNGPs, which places the responsibility on the States by making it their duty to “take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”.

While the need for those whose rights were violated to have access to an effective remedy is recognised, what does having this “right” actually entail and what constitutes an “effective remedy”? A report published by the UN Working Group clarifies that this “right” consists of procedural and substantive elements, imposing duties both on states and non-state actors, including businesses. The victim’s ability to exercise their right to an effective remedy is dependent on two factors: a) the existence of a remedial mechanism that can provide effective remedies and b) provision of access to such mechanism. Consequently, the two duty bearers, states and non-state actors play a part in the realisation of the “right”: States need to establish effective remedial mechanisms that can deliver effective remedies, whereas business enterprises need to provide remediation that is effective both in process and outcome for the adverse impacts that its activities have caused or contributed to⁵⁰. However, as violations are different in context, significance, scale and severity, there is still significant ambiguity and leeway in deciding what kind of remedies can be provided as effective means of restitution and reparation. Despite there being two main avenues for leading remediation mechanisms, state led judicial avenues and company based non-judicial grievance mechanisms, both can have shortcomings, with governments limiting and restricting judicial avenues for claims and companies delaying their investigations,

⁵⁰ OHCHR. *A/72/162: report on access to effective remedy for business-related human rights abuses*. UN Working Group on the issue of human rights and transnational corporations and other business enterprises. Geneva, 2017.

having poor community consultations and disregarding power imbalances^{51, 52, 53}. Ultimately, both state-led judicial and company-led non-judicial mechanisms end up being inadequate in ensuring that the victims of human rights abuses are provided with an effective remedy⁵⁴. Additionally, countries that adhere to the OECD Guidelines are required to set up National Contact Points (NCPs) to not only promote the guidelines and answer related inquiries, but to also serve as a state-led non-judicial grievance mechanism by making recommendations and facilitating agreements between the involved parties via non-adversarial methods such as mediation. However, while NCPs have been able to facilitate remediation in number of cases in the form of monetary compensation, in-kind reparation, company policy changes etc., the NCP is not authorized to legally order any remedy measure⁵⁵.

The ambiguous and broad nature of due diligence and remediation concepts allows states to produce legislations where remediation processes and measures are filtered and interpreted in different logics and approaches, at times emphasising human and labour rights and the principles of transparency, participation, and accountability, or emphasising corporate risk management and control of international corporate systems⁵⁶. Additionally, as suggested in the UN Working Group's report, it is most effective to take an "all roads to remedy" approach in order to produce operational and actual remedies for cases that occur in diverse settings⁵⁷.

To analyze different approaches towards remediation we conduct a comparative case analysis including 26 legislative initiatives. The selection of relevant due diligence measures to analyze was done in two steps. First, more than 30 proposed or adopted regulatory measures which include a due diligence obligation were identified (starting from the inventory developed by Grabs & Fatimah⁵⁸ and expanded with information from other sources). Next, due diligence measures were selected which require direct action to deal with human rights risks. Some of the due diligence-based measures solely focus on information disclosure and do not directly oblige a company to take action (and hence do not include remediation provisions). Based on this two-step selection process, twenty-six due diligence measures were identified.

For each of the selected ten due diligence measures, a screening was done on whether they include provisions on access to remedy. For the purpose of this paper, we conceptualize remedies according to the forms of reparation provided in Article 34 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts⁵⁹ published by the International Law Commission, which categorises remedies to take form of "restitution", "compensation", or "satisfaction". Article 35 defines "Restitution" as the obligation to "to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". "Compensation" constitutes a second type of reparation (Article 36), paid both in cash or kind, coming into play when the wrongful act cannot be remedied through restitution and should "cover any financially assessable damage including loss of profits insofar as it is established". The third category of remediation, "satisfaction" (Article 37) covers additional reparatory measures employed when the injury caused by that act

⁵¹ BRIGHT, C.; MARX, A.; PINEAU, N.; WOUTERS, J. Toward a corporate duty for lead companies to respect human rights in their global value chains? *Business and Politics*, v. 22, n. 4, p. 667-697, 2020.

⁵² MARX, A.; BRIGHT, C.; PINEAU, N.; WOUTERS, J. Corporate accountability mechanisms in EU member states for human rights abuses in third countries. In: CZECH, P.; HESCHL, K.; LUKAS, K.; NOWAK, M.; OBERLEITNER, G. (ed.). *European Yearbook on Human Rights*. [S. l.]: Intersentia, 2019. p. 157-186.

⁵³ OTTEBURN, K. Reaching the limit: access to remedy through nonjudicial mechanisms for victims of business-related human rights abuses. *International Journal of Human Rights*, v. 28, n. 2, p. 220-244, 2024.

⁵⁴ MCGRATH, S. Fulfilling the forgotten pillar: ensuring access to remedy for business and human rights abuses. *Institute for Human Rights and Business*, Eastbourne, 15 Dec. 2015. Available at: <https://www.ihrb.org/latest/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and>. Access on: 21 July 2024.

⁵⁵ HOW do NCPs handle cases? *OECD*, [2024]. Available at: <https://mneguidelines.oecd.org/neps/how-do-neps-handle-cases.htm>. Access on: 18 May 2024.

⁵⁶ LANDAU, I. *Human rights due diligence and labour governance*. Oxford: Oxford University Press, 2023.

⁵⁷ OHCHR. *A/72/162: report on access to effective remedy for business-related human rights abuses*. UN Working Group on the

issue of human rights and transnational corporations and other business enterprises. Geneva, 2017.

⁵⁸ GRABS, J.; FATIMAH, Z. *2023 database of disclosure, due diligence, and trade-based supply chain legislation of potential*. Barcelona: Universitat Ramon Llull; ESADE Business School, 2023.

⁵⁹ INTERNATIONAL LAW COMMISSION. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1*. New York, 2001. Available at: <https://www.refworld.org/legal/otherinstr/ilc/2001/en/20951>. Access on: 31 July 2024.

“cannot be made good by restitution or compensation.” In this case, a larger variety in remedial approach can be observed, as the action can be in a form of an expression of regret, a formal apology, assurance of non-repetition etc. In sum, we categorize the different measures according to 4 remediation mechanisms categories. First, restitution which includes restoration of victim(s) to original state such as return of lands, rehabilitation etc. Second, compensation which can take the form of financial compensation. Third, satisfaction which includes a broad group of remedies such as verification of facts, apologies, promises to not do it again etc. Fourth, an unspecified category which refers to legislative documents which refer to remediation but do not specify it and leave it open to courts to determine or in the case of the EU, by the Member States.

The paper looks at specific provisions in selected due diligence legislations in order to analyse how the legislations use remediation mechanisms, whether they take the form of “restitution”, “compensation”, or “satisfaction”, either singly or in combination. Each time we found provisions on remediation we categorized them according to the three categories allowing for multiple coding (i.e. provisions being linked to 2 or more categories). In some cases, there were separate provisions on remediation. In some cases, they were included under provisions which deal with sanctioning non-compliance with the due diligence requirements.

As a result of the analysis, a matrix (see Table 1) is created, indicating the legislative status of the document, as well as marking the above-mentioned categories under which the remedies provided in the document fall. Additionally, the table includes a separate category “unspecified” for the type of legislations that may envision a remedial action, however do not elaborate on what form or shape this action could take, thus, not providing enough information to be classified into “restitution”, “compensation”, or “satisfaction” categories. Finally, for the purpose of also highlighting legislations that are lacking in mandating remedial support for the victims due to the absence of any remediation mechanism, the category “none” is included in the table.

Table 1 - Overview of Remediation Mechanism in Twenty-Six Due Diligence Measures

Legislation	Country	Legal Status	Remediation Mechanism				
			Restitution	Compensation	Satisfaction	Unspecified	None
Corporate Duty of Vigilance Law	France	Enforced		X			
Transparency Act	Norway	Enforced	X	X	X		
Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO)	Switzerland	Enforced					X
Child Labour Due Diligence Act (Wet zorgplicht kinderarbeid)	The Netherlands	Enforced					X
The Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichten-gesetz)	Germany	Enforced			X		
Environment Act 2021	The UK	Enforced	X		X		
Motion for a Resolution on a Supply Chain Act	Austria	Motion Submitted				X	
Proposal on Duty of Vigilance	Belgium	Proposed	X		X		
Modern Slavery Act	The UK	Enforced		X	X		
The Bill on Responsible and Sustainable International Business Conduct (RSIBC bill)	The Netherlands	Proposed		X	X		
Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937	The EU	Adopted	X	X	X		
Slave-Free Business Certification Act of 2022	The USA	Proposed		X	X		

Legislation	Country	Legal Status	Remediation Mechanism				
			Restitution	Compensation	Satisfaction	Unspecified	None
General Law of Corporate Responsibility and Corporate Due Diligence	Mexico	Proposed	X	X			
Law For The Protection Of Human Rights, Sustainability And Due Diligence In Transnational Business Activities	Spain	Proposed		X	X		
Framework for Business and Human Rights (PL572/2022)	Brazil	Proposed	X	X			
Fighting Against Forced Labour and Child Labour in Supply Chains Act (Amendment of Customs Tariff)	Canada	Adopted		X			
Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2022	Australia	Proposed					X
Fostering Overseas Rule of Law and Environmentally Sound Trade (FOREST) Act	The USA	Proposed					X
Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010	The EU	Enforced				X	
The Uyghur Forced Labor Prevention Act (Public Law No. 117-78) (UFLPA)	The USA	Enforced			X		

Legislation	Country	Legal Status	Remediation Mechanism				
			Restitution	Compensation	Satisfaction	Unspecified	None
Forced Labour Regulation	Mexico	Enforced					X
Xinjiang Manufactured Goods Importation Prohibition Act	Canada	Proposed					X
Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market	The EU	Proposed		X	X		
MTPS/MMIRDH Interministerial Ordinance No. 4 OF 05/11/2016	Brazil	Enforced					X
Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains	China	Voluntary Compliance					X
Customs Amendment (Preventing Child Labour) Bill 2023	Australia	Enforced					X

4 Analysing the spectrum of remedies in current legislations

In this section we discuss the main differences and similarities between the different legislative documents with regard to remediation. While different occurrences of human rights violations may call for different, proportional remedies restitution clearly stands on top in the hierarchy of modes of remediation. It is the primary mechanism to “make good” on violations, as measures covered under compensation and satisfaction mechanisms only come into play when restitution is not possible or insufficient. However, in real life application, the use of restitution, especially as the exclusive remediation mechanism is rather rare. Practical disadvantages, such as the passage of time make restitution to a prior state difficult or impossible. As a result, the use of compensation as a remediation mechanism is often more

convenient, flexible and quick⁶⁰. This tendency is also reflected in the legislative documents analysed in the paper. Restitution is not envisioned as a singular remediation mechanism in any of the legislative documents. Instead, the majority of the mapped legislations resort to the provision of remedial relief through combining different remediation categories or only mandating remedial action belonging solely to either compensation or satisfaction categories.

There are only six legislative initiatives that include duties or obligations to provide for or cooperate in remediation with remedies that could fall into the restitution category – Norway’s Transparency Act⁶¹, the EU Directive on Corporate Sustainability Due Diligence (CSDDD)⁶², the UK Environmental Act 2021⁶³, Mexico’s General Law of Corporate Responsibility and Corporate Due Diligence⁶⁴, Belgium’s Proposal on Duty of Vigilance⁶⁵, and Brazil’s Framework for Business and Human Rights (PL 572/2022)⁶⁶. However, it should also be noted that all of the above mentioned legislative documents further include either compensation or satisfaction category, or both as other avenues for providing remedies. There are only two legislations to offer remedial action on a wide range that includes restitution, compensation and satisfaction. The first one is the Norway’s Transparency Act, which came into force on 1 July 2022. The Act aims to “promote enterprises’ respect for fundamental human rights and decent

working conditions in connection with the production of goods and the provision of services” by placing an obligation of conducting due diligence of suppliers and other business partners on larger enterprises that are resident in Norway and offer goods and services in or outside Norway, as well as larger enterprises that operate on the Norwegian market and are subject to taxation according to the Norwegian legislation. When it comes to remedies and remediation mechanisms, Section 4 (f) of the Act requires companies to “provide for or cooperate in remediation and compensation where this is required”, as well as to provide the Consumer Authority, an independent administrative body responsible for supervising and enforcing the Act, with “a written confirmation that the illegal conduct will cease” (Section 9).

The second legislation with all-encompassing remedial action is the EU Directive on Corporate Sustainability Due Diligence (CSDDD)^{67, 68}, where remediation avenues are more developed and extensive. CSDDD, applying to major EU and non-EU enterprises operating in the EU market, introduces an obligation to implement sustainability due diligence commitments throughout the company’s business own operations as well as in their supply chain. The Directive defines remediation as “restitution of the affected person or persons, communities or environment to a situation equivalent or as close as possible to the situation they would be in had the actual adverse impact not occurred” (Article 3). The burden of providing proportionate remediation falls on the infringing company and remedies can include financial or non-financial compensation the affected person or persons, as well as reimbursement of the costs incurred by public authorities for any necessary remedial measures. In addition to the violating company-provided remedies falling in the “restitution” and “compensation” categories, the Directive also introduces voluntary remediation which can be provided by the company in case the adverse impact is brought upon by a business partner (Article 8c (2)).

The combination of restitution and compensation as remediation mechanism is observed in only two le-

⁶⁰ BUYSE, A. Lost and regained? Restitution as a remedy for human rights Violations in the context of international law. *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)*, v. 68, n. 2008, p. 129-153, 2008.

⁶¹ NORWAY. Parliament. *Act relating to enterprises’ transparency and work on fundamental human rights and decent working conditions (Transparency Act)*. Oslo, 2021.

⁶² EUROPEAN COMMISSION. *Proposal for a Directive of the European Parliament and of The Council on corporate sustainability due diligence and amending directive (EU) 2019/1937, COM/2022/71 final*. Brussels, 15 Mar. 2024.

⁶³ UNITED KINGDOM. Parliament. *Environment Act 2021 (c. 30)*. Norwich: The Stationery Office Limited, 2021.

⁶⁴ MEXICO. Senate. *Proposal for the General Law of Corporate Responsibility and Corporate Due Diligence*. Mexico City, 2020.

⁶⁵ BELGIUM. Chamber of Representatives. *Proposition de loi instaurant un devoir de vigilance et un devoir de responsabilité à charge des entreprises tout au long de leurs chaînes de valeur/Wetsvoorstel houdende de instelling van een zorg- en verantwoordingsplicht voor de ondernemingen, over hun hele waardeketen heen n° 55-1903/001*. Brussels, 2021.

⁶⁶ SALOMÃO, Helder; CAROLINA, Áurea; MELCHIONNA, Fernanda. Projeto de Lei (PL) 572/2022 / Framework for Business and Human Rights. *Câmara dos Deputados*, 14 mar. 2022. Disponível em: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2317904&fichaAmigavel=nao>.

⁶⁷ BUENO, N.; BERNAZ, N.; HOLLY, G.; MARTIN-ORTEGA, O. The EU Directive on Corporate Sustainability Due Diligence (CSDDD): the final political compromise. *Business and Human Rights Journal*, v. 9, n. 2, p. 294-300, May 2024. Available at: <http://dx.doi.org/10.1017/bhj.2024.10>. Access on: 23 Oct. 2024.

⁶⁸ PRINCIPALE, S. *Fostering sustainability in corporate governance: analysis of the EU sustainable corporate governance and due diligence directives*. Cham: Springer Nature Switzerland, 2023.

gislations - Mexico's General Law of Corporate Responsibility and Corporate Due Diligence and Brazil's Framework for Business and Human Rights (PL 572/2022). Both of these legislative initiatives are currently at the proposal stage and have not been yet adopted. The Mexican General Law of Corporate Responsibility and Corporate Due Diligence aims to impose a large variety of sanctions, including public or private reprimands, penalty and fines, closure of business's premises, prohibitions of carrying out in the future activities, or even dissolution of the company. This legislative document envisions that violating business can be ordered to repair damages caused by the breaches and provide a compensation, thus mandating remediation mechanisms that fall into the restitution and compensation categories. On the other hand, Brazil's Framework for Business and Human Rights takes a notably strict approach to sanctions and remediation. While sanctions range from fines and loss of privileges from receiving contracts with public agencies all the way to the loss of assets and potential compulsory dissolution of the entity, the proposal calls for extra measures to be taken when determining what type of remediation is proportionate to the committed violation. The proposal removes any legal or conventional time limit for arbitration on claims for damage resulting from human rights violations, as well as mandates full compensation and reparations of damages to the affected individuals. Moreover, when determining the extent of compensation for damages, the legislation calls for prioritising and respecting the way of life, culture, practices, beliefs, social organisation and traditions of indigenous peoples, quilombolas, and traditional communities.

Also only two legislations, the UK Environmental Act 2021 and Belgium's Proposal on Duty of Vigilance use a combination of restitution and satisfaction as remediation mechanisms. The UK Environment Act 2021 offers remedies that fall into restitution and satisfaction categories in the form of a variety of orders and notices. As part of restitution remedies, regulators can issue enforcement notices, requiring the business to rectify the breach, as well as clean-up notices that obliges the business to clean up any contamination they have caused in order to return to the state prior to the violation. In terms of satisfaction remedies, the director can be prohibited to lead the business through a disqualification order, crime prevention orders lasting up to five years can be issued towards the convicted indi-

vidual, and assets equal to the financial benefit received from the criminal activity can be confiscated. As for the Belgian Proposal on Duty of Vigilance, the document places the duty to repair damages suffered by victims due to absent or insufficient precautions in business activities and operations.

The majority of the mapped legislations resort to using compensation and satisfaction as remediation. Much like the UK Environment Act 2021, the UK Modern Slavery Act⁶⁹, enforced since 2015, addressing the issues of modern-day slavery in the business operations of companies registered in the UK and their global supply chains, also takes a strict approach to legal violations. The Act uses compensation and satisfaction as remediation mechanisms with the introduction of slavery and trafficking reparation orders (Article 9), "requiring the person against whom it is made to pay compensation to the victim of a relevant offence for any harm resulting from that offence" and the slavery and trafficking prevention orders (Article 17), including prohibitions, applicable in and outside of the territory of the UK, that the court sees as "necessary for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the defendant committed a slavery or human trafficking offence". Meanwhile, the Dutch Bill on Responsible and Sustainable International Business Conduct (RSIBC bill)⁷⁰, originally proposed in 2021, covers a large variety of remedial actions falling into the compensation and satisfaction categories, including specific measures to prevent, mitigate or terminate the adverse impacts, compensation for the loss and damage suffered by affected persons, groups of persons and communities, rehabilitation of the victim and written apologies by a director or the company's board. Similarly at the proposal stage since 2022, the Spanish Law for the Protection of Human Rights, Sustainability and Due Diligence in Transnational Business Activities, modelled after the EU Directive on Corporate Sustainability Due Diligence (CSDDD), calls for a guaranteed access to justice, before the Spanish courts, for victims of corporate abuses, regardless of the place where the violation was committed. The proposal does

⁶⁹ UNITED KINGDOM. Parliament. *Modern Slavery Act 2015* (c.30). Norwich: The Stationery Office Limited, 2015.

⁷⁰ NETHERLANDS. House of Representatives. *Bill for Responsible and Sustainable International Business Conduct (Wetsvoorstel verantwoord en duurzaam internationaal ondernemen)*. The Hague, 2022.

not offer much detail on what kind of sanctions will be used to back up and strengthen the effectiveness of the remediation measures. Another proposal, the U.S. Slave-Free Business Certification Act of 2022⁷¹ calls for compensation and lists a wider range of remedial actions in the satisfaction category in the form of civil action, including a permanent or temporary injunction, restraining order, or any other order deemed appropriate. On the EU level, the Proposal on prohibiting products made with forced labour on the Union establishes a combination of compensation and satisfaction remedial action for violations by entities. While sanctioning methods and severity is left up to the Member States to decide based on their national laws, as part of the remedial action, products made with forced labour are to be banned from the EU market until the violating company has demonstrated that they no longer use forced labour in its production or supply chain and that they have appropriately compensated the workers for the harm done to them.

As for legislations that only use compensation as a singular remediation category, the matrix identifies the Canadian Fighting against Forced Labour and Child Labour in Supply Chains Act (Amendment of Customs Tariff)⁷² and the French Corporate Duty of Vigilance Law⁷³. The Canadian legislation calls for the remediation of the loss of income to the most vulnerable families resulting from measures taken by the business to eliminate the use of forced labour or child labour in activities and supply chains. The Act also incorporates criminal sanctions and fines up to approximately €229,300 as a sanctioning mechanism. Meanwhile, the French Corporate Duty of Vigilance Law, adopted in 2017, a pioneer legislation in human, labour and environmental rights protection, imposes a duty of vigilance on enterprises located on the French territory with at least five thousand employees within the company and its direct and indirect subsidiaries and on the enterprises located on the French territory or abroad with at least ten thousand employees in its service and in its direct or indirect subsidiaries. The Law mandates companies to draft, publish and implement a due diligence plan for

the purpose of risk identification and prevention of human rights violations and environmental abuses. The failure to follow the imposed obligations will result in the reception of formal notice to comply, and in case of further non-compliance, the action to establish liability can be filed before the relevant jurisdiction. In regards to the remediation mechanism, Article 2 of the Law refers to the French Civil Code and states that in case of non-compliance, companies shall be “liable and obliged to compensate for the harm that due diligence would have permitted to avoid”. In the event when the company has not published a due diligence plan and harm has been caused by its actions, financial compensation will be sought from the person convicted.

The German Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichten gesetz*)⁷⁴ and the U.S. Uyghur Forced Labor Prevention Act (Public Law No. 117-78) (UFLPA)⁷⁵ are the two enforced legislations identified in the matrix that use only satisfaction as remediation. The German Act requires enterprises to take appropriate remedial action without delay to prevent, end or minimize the extent of violation or in cases when it is impossible to bring an immediate end, to draw up a concept with a concrete timetable for ultimately ending and minimizing the violation. Similarly, the U.S. Act calls for remediation of any forced labour conditions, or if immediate remediation is not possible, then the enterprises are required to cut their relationship with the relevant supplier.

The analysis also includes two legislations that do invoke the duty to provide remediation but do not further specify what type of actions and reliefs are to be offered. These are the EU regulation on deforestation-free commodities and the Austrian Motion for a Resolution on a Supply Chain Act. Finally, the analysis also identifies legislations that are completely lacking remediation obligations, thus weakening its over power and effectiveness. These include the Mexican Forced Labour Regulation⁷⁶, the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains⁷⁷, the Austra-

⁷¹ UNITED STATES. Senate. *S.3578 - 117th Congress (2021-2022): Slave-Free Business Certification Act of 2022*. Washington, DC, 2022.

⁷² CANADA. Government. *Fighting Against Forced Labour and Child Labour in Supply Chains Act (S.C. 2023, c. 9)*. Ottawa, 2023.

⁷³ FRANCE. National Assembly. *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*. Paris, 2017.

⁷⁴ GERMANY. Bundestag. *The Act on Corporate Due Diligence Obligations in Supply Chains (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten)*. Federal Law Gazette, Berlin, 2021. 1(46).

⁷⁵ UNITED STATES. Senate. *H.R.1155 - 117th Congress (2021-2022) - Uyghur Forced Labor Prevention Act*. Washington, DC, 2022.

⁷⁶ MEXICO. Secretariat of Labor and Social Welfare. *Forced Labor Regulation*. Mexico City, 2023.

⁷⁷ CHINNA. CCCMC. *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*. Beijing, 2015.

lian Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2022⁷⁸, the Australian Customs Amendment (Preventing Child Labour) Bill 2023⁷⁹, the Canadian Xinjiang Manufactured Goods Importation Prohibition Act⁸⁰, the Swiss Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO)⁸¹, the U.S. Fostering Overseas Rule of Law and Environmentally Sound Trade (FOREST) Act⁸², the Dutch Child Labour Due Diligence Act⁸³ and the Brazilian MTPS/MMIRDH Interministerial Ordinance No. 4 OF 05/11/2016⁸⁴.

5 Discussion

Some scholars such as Leite⁸⁵ are skeptical about the ability of human rights due diligence based approaches to empower rights-holders and victims of corporate human rights abuses. This raises the question of how effective these measures will be in providing remedy to victims of human rights abuses. Most measures are of a to recent nature to assess the impact in terms of changing corporate behavior, compliance with legal obligations, preventing unwanted outcomes and providing victims with proper compensation. Hence, the empirical evidence on their effectiveness is largely non-

-existing. Moreover, there are multiple factors that make it difficult to clearly measure and define if a specific legislative act has been effective⁸⁶. However, it is clear that the design of the different measures in relation to remedy provisions varies significantly as is shown in the above analysis. Hence it is possible to discuss the effectiveness of these measures from an institutional design perspective. Institutional design effectiveness refers to the degree to which rules within a regulatory measure facilitate the achievement of its objectives or goals. This approach towards effectiveness builds on the theoretical framework of 'institutional analysis and development' developed by Ostrom⁸⁷. It assumes that institutions, in order to produce impact, should have clear and enforceable rules on for example access to remedy. There are several studies which apply institutional design effectiveness analysis to a broad range of topics in the area of business and human rights and corporate social responsibility^{88, 89, 90}.

To discuss the institutional design effectiveness, we focus on the remediation provisions in the regulatory measures coupled with provisions on sanctioning provisions since only strong provisions on sanctioning can cease the human rights abuses from continuing in the future. It is clear that a strong, diverse remediation mechanism backed up with stringent, comprehensive sanctioning regime should increase the potential of due diligence legislation to play its role as an effective instrument for preventing and addressing human rights violations by companies. Studies have shown that to increase legal compliance, due diligence legislations should include a mix of civil, administrative, and criminal sanc-

⁷⁸ AUSTRALIA. Senate. *Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2022*. Canberra, 2022. Available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1356.

⁷⁹ AUSTRALIA. Senate. *Customs Amendment (Preventing Child Labour) Bill 2023*. Canberra, 2023. Available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1403.

⁸⁰ CANADA. Senate. *An act to amend the customs tariff (goods from xinjiang) (xinjiang manufactured goods importation prohibition act)*. Ottawa, 2021.

⁸¹ SWISS. Federal Council. *Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO)*. Bern, 2021.

⁸² UNITED STATES. Senate. *S.3371 - 118th Congress (2023-2024): FOREST Act of 2023*. Washington, DC, 2023.

⁸³ INDIA COMMITTEE OF THE NETHERLANDS. *Child Labour Due Diligence Act (Wet zorgplicht kinderarbeid)*. 2019. Available at: <https://respect.international/child-labour-due-diligence-law-wet-zorgplicht-kinderarbeid/>.

⁸⁴ BRASIL. Ministério da Justiça. Portaria Interministerial n° 4 de 11, de maio de 2016. *Diário Oficial da União*: seção, Brasília, DF, n. 90, p. 70, 12 maio 2016.

⁸⁵ LEITE, M. Beyond buzzwords: mandatory human rights due diligence and a rights-based approach to business models. *Business and Human Rights Journal*, v. 8, n. 2, p. 197-212, 2023.

⁸⁶ MCCORQUODALE, R.; NOLAN, J. The effectiveness of human rights due diligence for preventing business human rights abuses. *Netherlands International Law Review*, v. 68, n. 3, p. 455-478, 2021.

⁸⁷ OSTROM, E. *Understanding institutional diversity*. Princeton: Princeton University Press, 2005.

⁸⁸ COLLINS, B.; EVANS, A.; HUNG, M.; KATZENSTEIN, S. *The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives. Assessing the landscape of multi-stakeholder initiatives*. MSI Integrity and Kenan Institute for Ethics, Duke University, 2017.

⁸⁹ FIORINI, M.; HOEKMAN, B.; JANSEN, M.; SCHLEIFER, P.; SOLLEDER, O.; TAIMASOVA, R.; WOZNIK, J. Institutional design of voluntary sustainability standards systems: evidence from a new database. *Development Policy Review*, v. 37, n. 2, p. 193-212, 2019.

⁹⁰ GARRETT, R. D.; LEVY, S.; CARLSON, K. M.; GARDNER, T. A.; GODAR, J.; CLAPP, J.; DAUVERGNE, P.; HEILMAYR, R.; LE POLAIN DE WAROUX, Y.; AYRE, B.; BARR, R.; DØVRE, B.; GIBBS, H. K.; HALL, S.; LAKE, S.; MILDER, J. C.; RAUSCH, L. L.; RIVERO, R.; RUEDA, X.; SANSFIELD, R.; SOARES-FILHO, B.; VILLORIA, N. Criteria for effective zero-deforestation commitments. *Global Environmental Change*, v. 54, p. 135-147, 2019.

tions both for non-disclosure and non-compliance with the required obligations of human rights due diligence⁹¹. A legislative document that only creates obligations of reporting or transparency and does not include clauses of liability and enforcement is rarely effective as an instrument for changing business conduct. A strong enforcement framework plays a role both as a deterrent and an incentive of due diligence compliance for the businesses⁹². Recognising the moral harm suffered by the victim from the incurred violation can help address the insufficiency of provided relief and elevate it from bare monetary compensation to a more comprehensive remedial action. Inclusion of structural injunctions that aim to modify an organization's structure, processes, or rules may be a better way of combatting deep-rooted, persistent and repeat human rights violations⁹³.

The most comprehensive in terms of incorporating a larger variety of remediation measures are the Norwegian Transparency Act and the EU CSDDD. These two documents combine "restitution", "compensation" and "satisfaction" measures as an attempt to increase the effectiveness of remedies for the victims of human rights violations. The Norwegian legislation may be a notable step forward with its commitments to transparency, access to information, duty of directors/management and the adherence to internationally established standards for ethical business conduct, such as the UN-GPs and the OECD Guidelines, it still does not allow the victims to exercise their right to take companies to court. While the Norwegian Transparency Act does put the obligation on the company to provide a remedy for the actions that have impacted human and labour rights, due diligence requirements and good business practices, it lacks provisions on civil liability⁹⁴. Ultimately, the

lack of civil liability and the right to access the courts limits the State's capability of ensuring that victims receive court-mandated remediation for their damages. The situation is different when it comes to the EU CSDDD, as this directive puts forth the burden on states to ensure access to justice for the victims in order to exercise their right to an effective remedy. The conditions for bringing forward civil liability in courts is to be regulated by the national laws, however limitation periods for bringing civil liability claims for damages should not be hampered by national laws and is required to be "at least five years and, in any case, not lower than the limitation period laid down under general civil liability national regimes" (Point 58(d)). Additionally, the CSDDD also puts a monitoring obligation on the Member States who are required to ensure that in case the violating company fails to provide remediation, the relevant State supervisory authority issues an order addressed at the company to provide appropriate remediation. The legislative impact is further increased through the inclusion of rigorous and diverse sanctions for violating entities. The Directive establishes pecuniary penalties for non-compliance, maximum limit of which is to be not less than 5% of the net worldwide turnover of the company in the financial year preceding the fining decision. The sanctioning power also includes the "naming and shaming" policy through a publicly available statement for at least 5 years, however, in this case, this policy is to be ensured by Member States and not the Commission.

Compensation in combination with satisfaction remedies is the most frequently used remediation mechanism in current due diligence legislations. For a remedy to be effective, it should either be able to prevent the alleged violation or its continuation or provide redress when the violation that has already occurred. Simply imposing a fine on a business enterprise does not guarantee that the said enterprise will cease the human rights abuses. It also does not provide victims with effective remedy for violations they have endured. However, court mandated compensation as a form of reparation can serve the purpose of clearly establishing the wrongdoing of the company and also try to offset the sustained damages caused by the violations. On the other hand, there are multiple factors that challenge the effectiveness of remediation mechanism built on compensation, such as the enforcement of favourable decisions and the calculation of damages and respective monetary compensation in cross-border cases. There

⁹¹ AGUINAGA, S. G. Effectiveness of mandatory human rights and environmental due diligence. *Modern Slavery and Human Rights Policy*, 27 Mar. 2024. Available at: <https://www.modernslaverypec.org/resources/updated-mhredd> Access on: 31 July 2024.

⁹² MCCORQUODALE, R.; NOLAN, J. The effectiveness of human rights due diligence for preventing business human rights abuses. *Netherlands International Law Review*, v. 68, n. 3, p. 455-478, 2021.

⁹³ HALBERSTAM, D.; VAN DEN BOGAERT, S. A fresh look at judicial remedies in EU equality law and beyond: the untapped possibility of structural injunctions. *Common Market Law Review*, v. 60, n. 5, p. 1269-1312, 2023.

⁹⁴ NORWEGIAN parliament adopts the Transparency Act. *European Coalition for Corporate Justice*, Brussels, 14 June 2021. Available at: <https://corporatejustice.org/news/norway-adopts-transparency-act/#:~:text=Under%20this%20law%2C%20citizens%20will,to%20seek%20remedy%20in%20court>. Access on: 31 July 2024.

can also be difficulties in enforcing the liable company to pay the compensation to the victim. Additionally, there is criticism that people whose human rights have been violated expect more from justice than mere financial compensation, especially considering the amount of judicial barriers, time and pressure associated with claiming damages⁹⁵. These factors should be considered especially when looking at the potential effectiveness of due diligence legislations that singularly have compensation as a remediation mechanism.

This is the case for another pioneer law among the due diligence legislations, the French Vigilance Law, which compared to the Norwegian Transparency Act, has a larger, more profound capacity to force companies to include due diligence provisions in their business models and practices. The Law serves as a legitimate judicial mechanism for the affected individuals and communities, trade unions and civil society organisations to fight for their rights and demand remedies for the suffered damages⁹⁶. However, when it comes to the strength of the remediation mechanism, it only envisions a remedy in the form of a compensation. There is not much flexibility for the victims to receive a remedy from the other two remediation categories. Even more severe barrier to the enforcement of the Law is the fact that the legislation places the burden of proof on the victim, i.e. the company will only be held liable for damages if the victim provides sufficient proof that a company breached its obligations⁹⁷. Since the Law went into force in 2017, all claims submitted to the courts under the French Duty of Vigilance Law had been dismissed on procedural grounds, but recently, on 5 December 2023⁹⁸, the first decision on the merits was rendered by the Judicial Court of Paris against the French state-owned postal company. However, in this specific case, the court decision consisted of an order

to amend and supplement the company's vigilance plan and it did not provide for a timeframe of compliance or a penalty payment⁹⁹. Moreover, with the burden of proof on the victim to receive compensation, companies and plaintiffs are encouraged by the judges to utilise alternative dispute resolution mechanisms such as mediation¹⁰⁰. The weaknesses of the legislation in terms of remediation are also not counterweighed by a clear, comprehensive sanctioning mechanism. There is less clarity on the limits of sanctions, as the initially envisioned possibility to impose civil fines up to 30 million Euro was censored by the French Constitutional Council due to the imprecision of the legal terms used to create obligations. To this day, compensation as a remediation mechanism provided by the Law has not been activated, thus making it questionable whether victims can successfully receive an effective remedy through this legislation and if this legislative initiative can push companies towards fulfilling due diligence obligations.

When it comes to legislations that include satisfaction as a singular avenue for remediation, as in providing remedial actions in the form of apologies, promises to not do it again, cancelation of contracts etc., the legislative impact of these documents depends on the effectiveness of other due diligence enforcement measures included by the legislators. While a public apology to the victim acknowledging the wrongdoings and accepting the responsibility from the company's side can bring validation to the victims and help restore the emotional damage that cannot be compensated by money, these types of remedies do not guarantee that the business will actually change its operating procedures after the apology. It should also be noted that companies often hesitate to apologise publicly for fear of reputational damage, negative publicity, as well as for the concerns that doing so may be used by the victim to pursue legal claims¹⁰¹. Therefore, it is crucial for legislations that

⁹⁵ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS. *Business and human rights: access to remedy*. Luxembourg: Publications Office of the European Union, 2020.

⁹⁶ BOMMIER, S.; CHATELAIN, L.; LOYER, C. (ed.). *Duty of vigilance radar: follow up on current cases*. [S. l.]: CCFD-Terre Solidaire and Sherpa, 2021. Available at: <https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf>. Access on: 31 July 2024.

⁹⁷ SCHILLING-VACAFLOR, A. Putting the french duty of vigilance law in context: towards corporate accountability for human rights violations in the global south? *Human Rights Review*, v. 22, n. 1, p. 109-127, 2021.

⁹⁸ PARIS. Tribunal Court. *Jugement rendu le 05 Décembre 2023*. Available at: http://www.sudptt.org/IMG/pdf/sudptt_laposte_jugement_ddv_5_dec_2023.pdf. Access on: 31 July 2024.

⁹⁹ CAVICCIOLI, C.; HANNEZO, E.; JAIS, J. C. French duty of vigilance law: first decision on the merits rendered by a french court. *Linklaters*, London, 6 Dec. 2023. Available at: <https://sustainablefutures.linklaters.com/post/102iuhu/french-duty-of-vigilance-law-first-decision-on-the-merits-rendered-by-a-french-c>. Access on: 31 July 2024.

¹⁰⁰ SCEMLA, S. The french duty of vigilance law: a new litigation risk for european companies. *International Bar Association*, London, 1 Dec. 2023. Available at: <https://www.ibanet.org/The-French-Duty-of-Vigilance-Law-a-New-Litigation-Risk>. Access on: 31 July 2024.

¹⁰¹ CHICHESTER, O.; RIQUELME, M. Access to Remedy. *Business for Social Responsibility*, San Francisco, 2021. Available at: <https://www.bsr.org/reports/bsr-access-to-remedy.pdf>. Access on: 31 July

do not further mandate other stronger forms of remediation, like the U.S. Uyghur Forced Labor Prevention Act and the German Act on Corporate Due Diligence Obligations in Supply Chains, to at least have extensive and stringent sanctioning mechanisms to “punish” non-compliant companies and motivate them to incorporate due diligence measures set out in the legislation in their business operations. This is surely reflected in the U.S. Act where the sanctions are wide-ranging and rigorous. The Act pushes companies to ensure through due diligence measures that their merchandise was not mined, produced, or manufactured wholly or in part by forced labour, because otherwise they can face sanctions starting from asset blocking, visa ineligibility and revocation, and detention of merchandise, all the way to civil penalties up to €230,125 or not more than twice the amount of the violating transaction and criminal penalties with fines not more than €920,500 and/or imprisonment for up to 20 years. Likewise, the sanctioning mechanism in the German Act compensates for the relatively limited remediation mechanism, introducing periodic penalty payments of up to €50,000 and exclusion from public contracts up to 3 years, and most importantly, in case of enterprises with an annual turnover of more than €400 million, administrative fines up to €8 million or up to 2% of annual global turnover imposed on any legal persons and associations of persons.

Mere existence of policies and directives aimed at protecting human rights does not guarantee that a corporation will then provide redress for the committed violation. For this, a grievance mechanism that provides an avenue to the victim to seek and receive remediation is necessary¹⁰². The extent to which remediation is incorporated in the law is a determinant of its effectiveness. A wide range of remedies allows for the victim to receive the most appropriate remedy depending on the circumstance, including the type of violation, damage obtained, time constraints and the personal preferences of the victim. Having multiple types of remedies concurrently available to the affected persons and communities makes it more likely for the remediation mechanism to be effective in recouping the damage¹⁰³.

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¹⁰² TÜRKE, Mariana Aparecida Vilamondes. Business and Human Rights in Brazil: exploring human rights due diligence and operational-level grievance mechanisms in the case of Kinross Paracatu gold mine. *Revista de Direito Internacional*, v. 15, n. 2, p. 221-241, 2018.

¹⁰³ OHCHR. *A/72/162*: report on access to effective remedy

However, while the legislation may include a combination of more than one category of remediation in a form of “restitution”, “compensation” and “satisfaction”, there is still the factor of accessing and obtaining the remedy itself. Without strong justice provisions like civil liability and the reversal of the burden of proof on the company, the power asymmetries between business and rights holders are a significant obstacle for victims in establishing legal liability of multinational companies in courts and receiving a court mandated remedy¹⁰⁴. It is also important to embed provided remedies through an ethical framework, not only to morally right the committed violation, but to also not overshadow victim’s claims by complicated or vague corporate mechanisms that further hinder their access to justice¹⁰⁵. Furthermore, it should also be noted that the perception on whether or not a remedy was effective can change based on the victim’s expectations. The above-listed barriers, as well as the social, economic and cultural conditions can create low expectations for the rights holders, while on the other hand, it is also possible to hold unreasonably high expectations of remedies¹⁰⁶.

6 Conclusion

The article focused on 26 currently adopted or proposed legislations that introduce legal obligations of due diligence compliance on companies. An analysis was performed in order to assess which type of remediation mechanism(s), “restitution”, “compensation”, “satisfaction” were used by the legislators, and whether they were used singularly or in combination. Additionally, the paper identified the lack of remediation measures in a number of legislations. The categorisation of remedies and an observation on if and how they were

for business-related human rights abuses’. UN Working Group on the issue of human rights and transnational corporations and other business enterprises. Geneva, 2017.

¹⁰⁴ AGUINAGA, S. G. Effectiveness of mandatory human rights and environmental due diligence. *Modern Slavery and Human Rights Policy*, 27 Mar. 2024. Available at: <https://www.modernslaverypec.org/resources/updated-mhredd> Access on: 31 July 2024.

¹⁰⁵ JOS, J. Access to remedies and emerging ethical dilemmas: changing contours within the business - human rights debate. *Revista de Direito Internacional*, v. 15, n. 2, p. 115-128, 2018.

¹⁰⁶ OHCHR. *A/72/162*: report on access to effective remedy for business-related human rights abuses’. UN Working Group on the issue of human rights and transnational corporations and other business enterprises. Geneva, 2017.

supported with sanctions provides an initial analysis on the effectiveness of these initiatives to bring remediation to the victims of human rights violations.

The article finds that there is a tendency in current due diligence legislations to include encompassing remediation mechanisms. The regulatory power and impact of the legislation is further enhanced via diverse sanctioning mechanisms, including civil and criminal liability, administrative fines and “naming and shaming” approaches. However, there might still be significant challenges that undermine the effectiveness of remediation mechanisms, especially in relation to access to justice. The power imbalance between the victims and the offenders, difficulties in accessing the courts, lack of information and evidence, the burden of proof on the victim, perceptions and expectations of the rights holders etc. are among those barriers that can potentially impact the effectiveness and the impact of the legislation on safeguarding human, labour and environmental rights. Future research should analyze the degree to which due diligence measures tackle these challenges.

Finally, as this transition of due diligence obligations from “soft law” measures to “hard law” obligations is relatively recent, there has not been much evidence or time to observe how successfully these new legislative documents work in reality – whether they can incentivise compliance with the legal obligations, if they can promote change in corporate behaviour, and if they can effectively prevent unwanted outcomes or provide victims with effective remedies. Nevertheless, actively working on removing the barriers that victims face when seeking remediation can only contribute to the effectiveness of due diligence legislations.

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A participação social e a licença social para operar (LSO): análise cruzada dos conceitos jurídicos*

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Resumo

O direito internacional tradicional não explica, adequadamente, as complexidades do mundo contemporâneo pós-globalização. O papel dos atores de direito internacional deixa perspectiva coadjuvante no cenário internacional e ganha relevância significativa na sua atuação. Esses atores (ONGs e indivíduos), chamados de partes interessadas, passaram a influenciar o complexo arranjo internacional devido a sua atuação diretamente vinculadas às empresas multinacionais. Assim, surge o presente estudo, a fim de verificar a viabilidade para considerar a existência de uma interseção dos conceitos jurídicos participação social (PS) e licença social para operar (LSO). Metodologicamente, a presente pesquisa está definida na modalidade de pesquisa normativa-jurídica, do tipo exploratória, com abordagem qualitativa, utilizando-se de fontes primárias e secundárias, métodos indutivo e dedutivo, e técnica jurisprudencial, com casos concretos em nível nacional e internacional sobre o tema. Como resultados, observa-se que há uma interseção dos conceitos jurídicos que viabiliza a utilização de mecanismos comuns entre os institutos. Essa interseção existe devido à tipologia dos conceitos jurídicos de participação social e Licença Social para Operar (LSO) e, ainda devido à existência de níveis para a construção destes conceitos jurídicos.

Palavras-chave: participação social; licença social para operar; conceitos jurídicos.

Abstract

Traditional international law does not adequately explain the complexities of the contemporary post-globalization world. The role of international law actors leaves a perspective of support in the international scene and gains significant relevance in their actions. These actors (NGOs and individuals), called stakeholders, began to influence the complex international arrangement due to their actions directly linked to multinational companies. Thus, this research appears, which seeks to verify the feasibility of considering the

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existence of an intersection of the legal concepts social participation (PS) and social license to operate (LSO). Methodologically, the present research is defined in the form of normative-legal research, exploratory type, with qualitative approach, using primary and secondary sources, inductive and deductive methods and jurisprudential technique, with concrete cases at national and international level on the subject. As a result, it is observed that there is an intersection of legal concepts that allows the use of common mechanisms between institutes. This intersection exists due to the typology of the legal concepts of social participation and social license to operate (LSO) and also by the existence of levels for the construction of these legal concepts.

Keywords: social participation; social license to operate (LSO); legal concepts.

1 Introdução

Por muitos anos, o papel dos atores de direito internacional¹ era estabelecido de forma coadjuvante no cenário internacional, estando os Estados vinculados como sujeitos supremos dos poderes a serem destacados. Contudo, devido ao cenário atual de globalização, esses poderes estatais passaram a ser relativizados, denominado de transnacionalização dos poderes². Como esse processo de operacionalização, diferentes atores, em diferentes territórios, passaram a influenciar o “jogo” de poder para a organização mundial, passando a existir uma fragmentação e especificidade cada vez maior na unidade do sistema jurídico, em função da maior especialização dos subsistemas com o processo de globalização³. Em que pese a pulverização de fontes, atores e atuações, o Estado continua com um papel central no mundo globalizado⁴.

A globalização favoreceu o contexto transnacional fazendo emergir incontáveis objetos normativos não

identificados, denominados de “UNO’s” (“unidentified normative objects”), que passaram a influenciar a análise jurídica global para além da análise puramente estatal⁵. Surge, assim, o direito transnacional que estabelece uma pluralidade de conjuntos normativos, com características híbridas e dinâmicas, aplicáveis a uma comunidade de atores cada vez mais influentes no contexto global. Direito definido pelo compartilhamento de prerrogativas entre os Estados, pessoas privadas, empresas transnacionais, organizações internacionais e ONG’s⁶ ⁷.

Essa nova dinâmica internacional, proporcionada pelo direito transnacional, favorece uma reflexão importante para a compreensão do quadro normativo internacional, trazendo um papel importante dos atores de direito internacional na reorganização global⁸, principalmente a respeito da aplicabilidade do reposicionamento normativo necessário da atuação dos demais atores no campo transnacional (Teoria do Direito em Rede⁹). Essa nova configuração contribui para uma atuação mais específica de todos os atores diante dos complexos litígios com grande dificuldade em definir as responsabilidades no campo internacional após a inserção da globalização¹⁰. O que favorece um papel importante dos diversos atores, suas fontes normativas e suas atuações na definição de condições específicas de alcance global e com impacto direto em nível local.

⁵ BARBOSA, Luiza Nogueira; MOSCHEN, Valesca Raizer Borges. O direito transnacional (“global law”) e a crise de paradigma do estado-centrismo: é possível conceber uma ordem jurídica transnacional? *Revista de Direito Internacional*, Brasília, v. 13, n. 3, 2016, p. 145-158. DOI: <https://doi.org/10.5102/rdi/bjil.v13i3.4155>. Disponível em: <https://www.publicacoes.uniceub.br/rdi/article/view/4155/pdf>. Acesso em: 27 fev. 2025. p. 147.

⁶ LHUILIER, Gilles. *Le droit transnational*. Paris: Dalloz, 2016. p. 9.

⁷ Como por exemplo: Pacto Global da Organização das Nações Unidas (2000); Diretrizes da OCDE para as Empresas Multinacionais (2011); ISO 26000 (2010) e Princípios das Nações Unidas sobre Empresas e os Direitos Humanos (2011).

⁸ ANDRADE, Priscila Pereira de. A emergência do direito transnacional ambiental. *Revista de Direito Internacional*, Brasília, v. 13, n. 3, p. 17-28, 2016. DOI: <https://doi.org/10.5102/rdi/bjil.v13i3.4491>. Disponível em: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/4491>. Acesso em: 27 fev. 2025. p. 20.

⁹ OST, François; VAN DE KERCHOVE, Michel. *De la pyramide au réseau? Pour une théorie dialectique du droit*. Bruxelles: Presses universitaires Saint-Louis Bruxelles, 2010.

¹⁰ BALBINO, Michelle Lucas Cardoso. A construção da participação social como mecanismo vinculatório de proteção das vítimas de abusos de direitos humanos em processos decisórios empresariais. *Revista de Direito Internacional*, Brasília, v. 19, n. 2, p. 158-181, 2022. DOI: <https://doi.org/10.5102/rdi.v19i2.8145>. p. 172.

¹ Atores de direito internacional são “todos aqueles que participam de alguma forma das relações jurídicas e políticas internacionais”, incluindo as organizações não governamentais (ONGs), as empresas, os indivíduos e outros (VARELLA, Marcelo Dias. *Internacionalização do direito: direito internacional, globalização e complexidade*. Brasília: UniCEUB, 2013. p. 26).

² VARELLA, Marcelo Dias. *Direito internacional público*. 8. ed. São Paulo: Saraiva Educação, 2019. p. 37.

³ VARELLA, Marcelo Dias. *Internacionalização do direito: direito internacional, globalização e complexidade*. Brasília: UniCEUB, 2013. p. 17.

⁴ VARELLA, Marcelo Dias. *Internacionalização do direito: direito internacional, globalização e complexidade*. Brasília: UniCEUB, 2013. p. 27.

As empresas multinacionais (também conhecidas como transnacionais) ganharam papel significativo nessa nova ordem mundial, principalmente devido ao grande poder econômico e político que possuem no cenário internacional, exercendo até forças superiores a muitos Estados (principalmente os países em desenvolvimento)¹¹. E, ainda, devido à complexidade jurídica para definir uma responsabilidade às estas empresas, por exercerem atividades, atos e omissões que nem sempre podem ser observados pelo direito, por estarem em uma “zona cinzenta” entre o direito nacional e o direito internacional¹².

Aliado ao papel de relevância das multinacionais em âmbito internacional, outros atores passaram também a exercer significativa atuação. Esses atores (ONGs e indivíduos), chamados de partes interessadas, passaram a influenciar o complexo arranjo internacional devido à sua atuação diretamente vinculadas às empresas multinacionais e repercute na garantia, de modo reflexivo, do dever empresarial para com suas partes interessadas. A Teoria das Partes Interessadas¹³ define que se trata de indivíduo ou grupo afetado pela realização dos objetivos da empresa, ou seja, a empresa deve se concentrar em pessoas diferentes dos seus acionistas¹⁴. Diante da ampla variedade de partes interessadas, para este trabalho, realizar-se-á uma delimitação com aplicação de um filtro subjetivo, definido as comunidades como sendo as partes interessadas a serem consideradas neste contexto.

A atuação das comunidades no contexto transnacional, partes interessadas delimitadas neste trabalho, ganha discussões jurídicas que devem ser consideradas. Exemplo está na efetivação da Participação Social (PS) dessas comunidades, na Responsabilidade Social Corporativa (RSC) e na possibilidade de efetivação de uma Licença Social para Operar (LSO)¹⁵. A Participação Social (PS) trata-se de uma intervenção das partes interessadas, de forma direta ou indireta, nos processos de tomada de decisão, levando diretamente às empresas (na atuação em RSC) suas demandas, para atender aos anseios da comunidade¹⁶. Enquanto a Licença Social para Operar (LSO) trata-se de uma permissão, não permanente, concedida pela comunidade do entorno à empresa em relação às atividades que afetam a vida de seus habitantes¹⁷. Tais conceitos são similares, porém com nuances e peculiaridades importantes que merecem ser discutidas.

Assim, surge o presente trabalho que tem como questão-problema: **existe uma interseção dos conceitos jurídicos participação social (PS) e licença social para operar (LSO)?** Definindo como objetivo geral da pesquisa verificar a viabilidade para considerar a existência de uma interseção dos conceitos jurídicos Participação Social (PS) e Licença Social para Operar (LSO). E, de forma específica, definir a existência de interseção dos conceitos jurídicos de participação social e LSO definido na tipologia considerando a existência ou não de mecanismos legais de atuação e, ainda, estabelecer como a interseção dos conceitos jurídicos de participação social e LSO resulta na percepção de níveis para a construção da análise cruzada dos conceitos jurídicos.

¹¹ STIGLITZ, Joseph E. *Un autre monde: contre la fanatisme du marché*. Paris: Fayard, 2008. p. 318.

¹² VARELLA, Marcelo Dias. *Internacionalização do direito: direito internacional, globalização e complexidade*. Brasília: UniCEUB, 2013. p. 241.

¹³ FREEMAN, Edward. *Stakeholder Theory*. Cambridge: Cambridge University Press, 2010.

¹⁴ O referido grupo consiste, concretamente, nos acionistas/investidores (na percepção dos lucros/prejuízos de suas ações); nas comunidades locais (afetadas ou do entorno – quando considera a atuação da empresa no modo de vida e condições socioambientais locais); nos consumidores (quando considerados o novo perfil de consumidores responsáveis); nas vítimas de eventuais acidentes (quando verificados os prejuízos sociais e econômicos pelos impactos); nas organizações não governamentais – ONGs (quando consideradas principais articuladores para a efetivação de direitos dos vulneráveis); nos trabalhadores/empregados (no recebimento de salários e condições de trabalho e qualidade de vida); outras empresas que compõem a cadeia produtiva da multinacional (fornecedoras; parceiros, subsidiárias e controladas); sindicatos e órgãos dos Estados em que se localizam. (BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 55).

¹⁵ Tais temas já são fruto de trabalhos anteriores destas autoras como: BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021 e CAMBRAIA, Gilda Nogueira Paes. *As manifestações da Licença Social para operar no direito internacional dos investimentos*. Rio de Janeiro: Editora Processo, 2024. No prelo.

¹⁶ SIMÕES, Gabriel Lima; SIMÕES, Janaina Machado. Reflexões sobre o conceito de participação social no contexto brasileiro. *In: JORNADA INTERNACIONAL DE POLÍTICAS PÚBLICAS*, 7., 2015, São Luís. *Anais* [...]. São Luís: UFMA, 2015. p. 2; LOPEZ, Laëtitia. *L'action en justice des parties prenantes dans le cadre de la Responsabilité Sociale de l'Entreprise*. 2016. Tese (Doutorado em Direito) – Université Jean Moulin, 2016.

¹⁷ MARTIN-CHENUT, Kathia; PERRUSO, Camila; VARISON, Leandro. La difficile réparation des rapports sociaux. *In: MARTIN-CHENUT, Kathia; QUENAUDON, René de. La RSE saisie par le droit: perspectives interne et internationale*. Paris: Editions A. Pedone, 2016. p. 397-400.

A pesquisa justifica-se pela relevância em considerar os pontos de interseção dos conceitos jurídicos de participação social e LSO definidos na tipologia considerando a existência ou não de mecanismos legais de atuação do Estado e, ainda nos níveis existentes de efetivação para a construção desses conceitos, diante das similaridades e diversificações existentes entre os conceitos. Tais aspectos foram objeto de reflexão entre as autoras durante o processo de missão de pesquisa realizada no mês março de 2024 em Bogotá, Colômbia. Referida missão teve o objetivo de verificar como padrões mínimos de proteção e de deveres das empresas transnacionais estão sendo analisados, considerando os diversos agentes pesquisados ao longo da estadia. A missão fez parte do projeto de pesquisa Edital n.º 04/2021 da Fundação de Apoio à Pesquisa do Distrito Federal – FAPDF para o evento “Os padrões mínimos de proteção e de deveres das empresas transnacionais: a construção do posicionamento do Brasil em perspectiva comparada”.

Metodologicamente, a presente pesquisa está definida na modalidade de pesquisa normativa-jurídica¹⁸. A escolha da modalidade de pesquisa está pautada nas fontes utilizadas que compõem normas brasileiras; normas internacionais e normas de investimentos, além de julgados e precedentes de destaque na tema (fontes primárias). As fontes primárias permitiram a definição dos critérios de inferência utilizados para a análise dos dados, os quais permitiram uma construção dialogada com os autores do tema (fonte secundária)¹⁹. O tipo de pesquisa exploratório²⁰, por sua vez, possibilitou uma análise global do tema partindo de uma margem para a formação de teses jurídicas únicas e inovadoras a partir de um processo de análise de informações/leis disponíveis e acessíveis para compreender o tema abordado. Já a abordagem utilizou-se a qualitativa²¹, especialmente porque os aspectos quantitativos não contribuem, significativamente, para a considerar os critérios de interseção dos conceitos de participação social e licença social

para operar, sendo necessária a análise minuciosa de cada caso trazido no presente artigo.

Quanto aos métodos, adotaram-se tanto o método indutivo, que tem o desígnio de ampliar o alcance dos conhecimentos, como método dedutivo, que possibilita a construção de bases sólidas para a argumentação, afinal, tem o propósito de explicar o conteúdo das premissas²². Ademais, utilizou-se a técnica jurisprudencial²³, com casos concretos em nível nacional e internacional sobre o tema. E ainda, estudo de casos emblemáticos que destacam a relevância do tema para a construção internacional juntamente às partes interessadas, principalmente as comunidades envolvidas no aspecto transnacional.

Para os procedimentos de análise, utilizou-se a Teoria do Direito em Redes e a Teoria de Análise de Conteúdo. Enquanto a Teoria do Direito em Redes²⁴ contribui para o reposicionamento normativo para análise de controle de autorregulação para uma análise transnacional dos conceitos jurídicos desta pesquisa, a Teoria de Análise de Conteúdo agrupa em categorias os resultados coletados, possibilitando a análise por meio jurídico.²⁵

A construção acerca dos conceitos jurídicos de a participação social e a Licença Social para Operar (LSO) foi realizado por meio de uma análise dos conteúdos normativos pautados em princípios, temas centrais e diretrizes que correlacionam o tema das comunidades no contexto transnacional, partes interessadas, buscando definir o padrão de interseção dos conceitos jurídicos que viabiliza a utilização de mecanismos comuns entre os institutos. Por meio da análise dessas normas de regulação, foi possível estabelecer um padrão normativo que, mesmo indiretamente aplicável às multinacionais, direciona a condução para uma melhor efetivação dos institutos frente às partes interessadas. Importante destacar que não foram utilizados estudos empíricos, considerando casos jurisprudenciais coletados nos tribunais nacionais e internacionais.

Portanto, em uma análise cruzada dos conceitos jurídicos de Participação Social (PS) e Licença Social para

¹⁸ BITTAR, Eduardo Carlos Bianca. *Metodologia da pesquisa jurídica: teoria e prática da monografia para os cursos de direito*. 17. ed. São Paulo: Editora Saraiva, 2022. p. 65.

¹⁹ LAMY, Marcelo. *Metodologia da pesquisa jurídica: técnicas de investigação, argumentação e redação*. Rio de Janeiro: Elsevier, 2010. p. 46.

²⁰ SEVERINO, Antônio Joaquim. *Metodologia do trabalho científico*. 23. ed. São Paulo: Cortez, 2007.

²¹ MARCONI, Marina de Andrade; LAKATOS, Eva Maria. *Metodologia do trabalho científico: procedimentos básicos, pesquisa bibliográfica, projeto e relatório, publicações e trabalhos científicos*. 3. ed. São Paulo: Atlas, 2007. p. 43.

²² MARCONI, Marina de Andrade; LAKATOS, Eva Maria. *Fundamentos de metodologia científica*. 9. ed. São Paulo: Atlas, 2022. p. 105.

²³ KAUARK, Fabiana da Silva; MANHÃES, Fernanda Castro; SOUZA, Carlos Henrique Medeiros. *Metodologia da pesquisa: um guia prático*. Ibicaraí, BA: Via Litterarum, 2010. p. 28.

²⁴ OST, François; VAN DE KERCHOVE, Michel. *De la pyramide au réseau? Pour une théorie dialectique du droit*. Bruxelles: Presses universitaires Saint-Louis Bruxelles, 2010. p. 25.

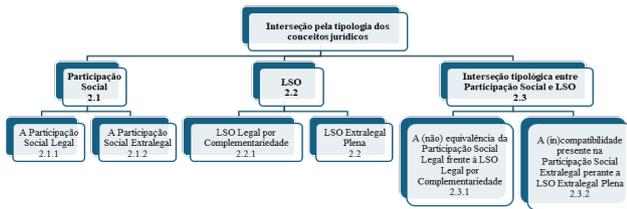
²⁵ BARDIN, Laurence. *Análise de conteúdo*. São Paulo: Edições 70, 2011. p. 46-49.

o Operar (LSO) uma interseção dos conceitos jurídicos que viabiliza a utilização de mecanismos comuns entre os institutos. Essa interseção existe devido à tipologia dos conceitos jurídicos de participação social e licença social para o operar (LSO) (2), e ainda devido à existência de níveis para a construção desses conceitos jurídicos (3).

2 A interseção pela tipologia dos conceitos jurídicos

Há uma interseção dos conceitos jurídicos de participação social e LSO definido na tipologia considerando a existência ou não de mecanismos legais de atuação do Estado.

Figura 1 – A Interseção pela tipologia dos conceitos jurídicos



Fonte: elaboração própria.

Assim, a partir da existência ou não de mecanismos legais do Estado, é importante destacar o conceito de participação social (2.1) e o conceito de Licença Social para Operar (LSO) (2.2) em suas aplicações isoladas e, ainda, na interseção tipológica existente entre os conceitos jurídicos presentes nos mecanismos legais do Estado (2.3).

2.1 O conceito de participação social a partir da existência de mecanismos legais do estado

A participação social, como já destacado na introdução deste artigo, representa um conceito complexo. Assim, o seu conceito jurídico pode ser definido tanto na presença de mecanismos legais, o que destaca o conceito de Participação Social Legal (2.1.1), como na ausência de qualquer mecanismo legal, o que possibilita a construção do conceito de Participação Social Extralegal (2.1.2).

2.1.1 A participação social na presença de mecanismos legais: a Participação Social Legal (PSL)

A participação social pode ser compreendida como um conjunto de mecanismos e processos que permitem aos cidadãos influenciarem, direta ou indiretamente, as decisões que afetam suas vidas e comunidades²⁶. No âmbito jurídico, a participação social encontra respaldo em diversos instrumentos legais que visam garantir o envolvimento da sociedade na formulação, implementação e controle de políticas públicas.

A Constituição Federal de 1988 estabelece a participação social como um Princípio Fundamental do Estado Democrático de Direito, prevendo diversos mecanismos de participação direta, como o plebiscito, o referendo e a iniciativa popular²⁷. Além disso, a legislação infraconstitucional tem avançado na criação de espaços institucionalizados de participação, como conselhos gestores, conferências e audiências públicas²⁸. Esses mecanismos legais de participação social buscam promover a transparência, a *accountability* e a legitimidade das ações estatais, permitindo que os cidadãos tenham voz ativa na definição dos rumos da sociedade. Nesse sentido, a participação social se configura como um conceito jurídico fundamental para a efetivação dos direitos humanos e o aprofundamento da democracia²⁹.

O conceito jurídico de participação social pode ser construído em uma perspectiva legal de Participação Social Legal a partir de mecanismos estatais já garantidos em leis. Tais mecanismos podem ser categorizados considerando a licença legal (licenciamento) (2.1.1.1) e outros mecanismos já estabelecidos (2.1.1.2).

²⁶ AVRITZER, Leonardo. Sociedade civil, instituições participativas e representação: da autorização à legitimidade da ação. *Dados*, [s.l.], v. 50, n. 3, p. 443-464, 2007. Disponível em: <https://www.ipea.gov.br/participacao/images/pdfs/participacao/avritzer%202007.pdf>. Acesso em: 27 fev. 2025. p. 443.

²⁷ BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília, DF: Presidência da República, [2025]. Disponível em: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 27 fev. 2025. art. 14.

²⁸ AVRITZER, Leonardo. *Participatory institutions in democratic Brazil*. Washington, DC: Woodrow Wilson Center Press, 2009. p. 49.

²⁹ BOBBIO, Norberto. *O futuro da democracia: uma defesa das regras do jogo*. Rio de Janeiro: Paz e Terra, 1987. p. 42.

2.1.1.1 A participação social presente na Licença Legal Ambiental

O Licenciamento Ambiental é um processo administrativo, conduzido pelo Estado para avaliar e autorizar a implantação e operação de empreendimentos e atividades que possam causar impactos ambientais e sociais significativos³⁰. Esse processo de licenciamento gera um documento oficial emitido por uma autoridade competente, geralmente um órgão ambiental governamental, que autoriza a localização, instalação, ampliação e operação de empreendimentos e atividades utilizadoras de recursos ambientais, consideradas efetiva ou potencialmente poluidoras, ou aquelas que possam causar degradação ambiental³¹, que neste trabalho será amplamente denominado licença legal. Nesse processo, a participação social desempenha um papel fundamental, garantindo que as comunidades afetadas tenham voz ativa na tomada de decisões.

A legislação brasileira prevê diversos mecanismos de participação social na esfera do Licenciamento. A Resolução CONAMA n.º 001/1986 estabelece a obrigatoriedade da realização de audiências públicas para a discussão do Estudo de Impacto Ambiental e seu respectivo Relatório de Impacto Ambiental (EIA/RIMA)³². Essas audiências têm como objetivo informar a sociedade sobre o empreendimento proposto e seus impactos, bem como colher críticas e sugestões para subsidiar a análise da viabilidade socioambiental do projeto.

Além das audiências públicas, a participação social no licenciamento pode ocorrer por meio de outros instrumentos, como consultas públicas, reuniões técnicas e a disponibilização de canais de comunicação para o recebimento de contribuições da sociedade³³. Esses me-

canismos visam ampliar a transparência do processo e permitir que as preocupações e expectativas das comunidades sejam consideradas na tomada de decisões.

No caso de empreendimentos que afetem povos indígenas e comunidades tradicionais, a legislação brasileira, em consonância com a Convenção n.º 169 da Organização Internacional do Trabalho (OIT), determina a realização de consulta prévia, livre e informada³⁴. Esse processo de consulta deve ser conduzido de boa-fé, com o objetivo de chegar a um acordo ou consentimento sobre as medidas propostas, respeitando as especificidades culturais e os processos decisórios próprios desses grupos.

A importância dessa participação social restou evidente no caso Ministério Público *versus* Chapleau Exploração Mineral Ltda, que tramitou perante o Tribunal Regional Federal da 1ª Região, nos autos do processo n. 0001592-34.2017.4.01.3908, em que houve a anulação de autorizações obtidas para exploração mineral em terras indígenas, em razão da não realização da consulta prévia, livre e informada das comunidades indígenas afetadas.³⁵

Na jurisprudência citada, a apelação do Ministério Público Federal (MPF) foi provida, reformando a sentença recorrida e julgando procedente o pedido inicial, para que a empresa CHAPLEAU EXPLORAÇÃO MINERAL LTDA fosse condenada a realizar um competente e prévio Estudo de Impacto Ambiental (EIA) e Relatório Prévio de Impacto Ambiental (RIMA) das atividades relacionadas ao Projeto Coringa, localizado no Projeto de Desenvolvimento Sustentável PDS Terra Nossa, no Município de Novo Progresso/PA. Além disso, foi determinado que o Estado do Pará e a Agência Nacional de Mineração (ANM) se abstenham de conceder qualquer licença ou autorização até que haja uma demonstração inequívoca de ausência de impactos sobre a Terra Indígena Baú. Assim, a realização de con-

9, p. 54-90, 2011. Disponível em: <http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/56>. Acesso em: 27 fev. 2025.

³⁴ BRASIL. Decreto n.º 5.051, de 19 de abril de 2004. Promulga a Convenção n.º 169 da Organização Internacional do Trabalho - OIT sobre Povos Indígenas e Tribais. Brasília, DF: Presidência da República, [2025]. Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5051.htm. Acesso em: 27 fev. 2025. art. 6.

³⁵ BRASIL. Tribunal Regional Federal da 1ª Região (5. Turma). Ação Civil Pública n.º 0001592-34.2017.4.01.3908. Juiz: Marcelo Garcia Vieira. Desembargador Federal: Souza Prudente.

³⁰ FARIAS, Talden. *Licenciamento ambiental: aspectos teóricos e práticos*. 6. ed. Belo Horizonte: Fórum, 2017. p. 142.

³¹ CONAMA. Resolução n.º 001, de 23 de janeiro de 1986. Dispõe sobre critérios básicos e diretrizes gerais para a avaliação de impacto ambiental. Brasília, DF: Conselho Nacional do Meio Ambiente, 1986. Disponível em: <https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-230186.PDF>. Acesso em: 28 fev. 2025. art. 2.

³² CONAMA. Resolução n.º 001, de 23 de janeiro de 1986. Dispõe sobre critérios básicos e diretrizes gerais para a avaliação de impacto ambiental. Brasília, DF: Conselho Nacional do Meio Ambiente, 1986. Disponível em: <https://www.ibama.gov.br/sophia/cnia/legislacao/MMA/RE0001-230186.PDF>. Acesso em: 28 fev. 2025. art. 5.

³³ CHRISTMANN, Landerdahl L. Audiência pública ambiental: um instrumento democrático para a gestão compartilhada do risco ambiental. *Revista de Direitos Fundamentais e Democracia*, [s. l.], v. 9, n.

sulta prévia, livre e informada, mostra-se como requisito essencial para implementação de projetos que afetem povos indígenas e comunidades tradicionais.

Ademais, a participação social no licenciamento não se esgota na fase de avaliação de impactos e concessão das licenças. Durante a implantação e operação dos empreendimentos, a legislação prevê a continuidade dos processos participativos, por meio de mecanismos como os programas de comunicação social e os comitês de acompanhamento³⁶. Esses instrumentos permitem que as comunidades afetadas monitorem o cumprimento das condicionantes estabelecidas nas licenças e participem da gestão adaptativa dos impactos ao longo do tempo.

Essa continuidade dos processos participativos foi evidenciada no caso do projeto do TEPOR – Terminal Portuário de Macaé, em que além da realização de Audiências Públicas, contou com uma forte intervenção da AMDA – Associação Macaense de Defesa Ambiental, entidade que teve atuação decisiva na elevação da consciência ambiental no município, mantendo uma postura combativa.³⁷

Destaca-se, entre as campanhas do movimento ambientalista macaense, o movimento “Xô Monoboia”. Esse movimento foi uma resposta contra a instalação de um ancoradouro flutuante de grandes dimensões, localizado a apenas 3 km do Arquipélago de Sant’Anna, que permitia aos petroleiros efetuarem a transferência de óleo para a Estação de Cabiúnas. A mobilização envolveu diversos setores da sociedade, incluindo trabalhadores da Petrobras (SINDIPETRO-NF e AEPET), jornais como “O Debate”, pescadores, surfistas, sindicalistas, associações de moradores, entre outros. A campanha foi vitoriosa, a obra embargada, e a Petrobras passou a adotar o sistema de dutos terrestres para transportar o óleo extraído.³⁸

³⁶ CHRISTMANN, Landerdahl L. Audiência pública ambiental: um instrumento democrático para a gestão compartilhada do risco ambiental. *Revista de Direitos Fundamentais e Democracia*, [s. l.], v. 9, n. 9, p. 54-90, 2011. Disponível em: <http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/56>. Acesso em: 27 fev. 2025.

³⁷ TAVARES, Fernando Marcelo Manhães. Impactos locais: a experiência de Macaé. Lições para o pré-sal. In: HERCULANO, Selene (org.). *Impactos sociais, ambientais e urbanos das atividades petrolíferas: o caso de Macaé (RJ)*. Niterói, RJ: UFF, 2011. Disponível em: http://www.uff.br/macaepacto/OFICINAMACAE/pdf/AZ_OficinaImpactosMacaéTodosTextos.pdf. p. 263.

³⁸ TERRA, Denise; RESSIGUIER, José Henrique. Mudanças no espaço urbano de Macaé: 1970-2010. In: HERCULANO, Selene

A presença constante da AMDA e de outros grupos ambientalistas em conselhos, bem como suas campanhas contra a especulação imobiliária e pela criação de áreas de proteção ambiental, demonstra como a participação social contínua pode influenciar positivamente a gestão ambiental e social.

Dessa forma, a participação social está presente na Licença Legal (licenciamento) e se configura como um elemento essencial para a legitimidade e a efetividade desse instrumento de gestão ambiental e social. Ao garantir o envolvimento das comunidades afetadas na tomada de decisões, o Estado não apenas cumpre seu dever de promover a democracia participativa, mas também contribui para a construção de um modelo de desenvolvimento mais justo, transparente e sustentável.

2.1.1.2 A participação social estabelecida em outros mecanismos legais

Além dos mecanismos de participação social previstos em relação ao Licenciamento Ambiental, a legislação brasileira estabelece outros instrumentos que visam garantir o envolvimento da sociedade nos processos decisórios relacionados a questões socioambientais e ao desenvolvimento sustentável. São eles: Avaliação Ambiental Estratégica (AAE); Avaliação de Impacto Social (AIS); o Sistema Nacional de Gerenciamento de Recursos Hídricos (SINGREH), e a gestão democrática das cidades, por meio do Estatuto da Cidade. O recorte trazido neste artigo considerou os mecanismos legais vinculados ao licenciamento ambiental, que são fundamentais para assegurar que as comunidades locais tenham uma voz ativa no processo de decisão, refletindo suas reais necessidades e preocupações. Isso é crucial para garantir que os impactos ambientais e sociais de novos empreendimentos sejam devidamente considerados e mitigados.

Um dos mecanismos citados acima é a Avaliação Ambiental Estratégica (AAE), um instrumento de planejamento que busca integrar considerações ambientais e sociais na formulação de políticas, planos e programas governamentais³⁹. A AAE prevê a participação da sociedade civil em diferentes etapas do processo, desde a

(org.). *Impactos sociais, ambientais e urbanos das atividades petrolíferas: o caso de Macaé (RJ)*. Niterói, RJ: UFF, 2011. Disponível em: http://www.uff.br/macaepacto/OFICINAMACAE/pdf/AZ_OficinaImpactosMacaéTodosTextos.pdf. p. 152.

³⁹ SÁNCHEZ, Luis Enrique. *Avaliação de impacto ambiental: conceitos e métodos*. 3. ed. São Paulo: Oficina de Textos, 2017.

definição do escopo até a avaliação dos resultados, por meio de consultas públicas, workshops e outros espaços de diálogo⁴⁰.

Apesar de a AAE ainda ser um instrumento em construção no país, algumas experiências práticas demonstram tentativas da inserção da temática ambiental nas políticas setoriais.⁴¹ Um exemplo prático é a construção do Gasoduto Bolívia-Brasil, no início da década de 1990, em que o Banco Inter-Americano de Desenvolvimento (BID) exigiu uma AAE como condição para a concessão do empréstimo, com o objetivo de proporcionar às instituições financiadoras e executoras do projeto uma visão mais ampla dos benefícios, impactos e riscos associados à obra. O estudo foi realizado após o governo brasileiro ter emitido sua licença ambiental preliminar e foi isolado de qualquer processo de planejamento setorial ou regional que pudesse, eventualmente, incorporar seus resultados e recomendações.⁴² Nesse caso, a realização da AAE para o Gasoduto tinha a intenção de incorporar, na análise do empreendimento, as implicações socioeconômicas e ambientais das transformações induzidas nos setores boliviano e brasileiro, e a sinergia com outros projetos, destacando, assim, sua característica de AIA de mega projeto.⁴³

Outro instrumento relevante é a Avaliação de Impacto Social (AIS), que tem como objetivo identificar, analisar e gerenciar os impactos sociais decorrentes de projetos, programas e políticas⁴⁴. A AIS deve ser conduzida com a participação ativa das comunidades afetadas, garantindo que suas percepções, preocupações e aspirações sejam consideradas ao longo do processo. Essa participação pode ocorrer por meio de entrevistas,

grupos focais, reuniões comunitárias e outros métodos participativos⁴⁵.

Um exemplo concreto de AIS foi realizado no projeto de construção da Usina Hidrelétrica de Belo Monte, no Brasil. Durante esse processo, a AIS foi conduzida com a participação ativa das comunidades indígenas e ribeirinhas afetadas pela obra, garantindo que suas percepções, preocupações e aspirações fossem consideradas ao longo do processo.⁴⁶ A participação dessas comunidades ocorreu por meio de entrevistas, grupos focais, reuniões comunitárias e outros métodos participativos.⁴⁷ Esse envolvimento permitiu identificar os impactos sociais da obra, como a relocação de famílias e mudanças nos modos de vida tradicionais, e propor medidas mitigadoras para minimizar esses efeitos adversos.

No contexto da gestão de recursos hídricos, a Lei n.º 9.433/1997 instituiu a Política Nacional de Recursos Hídricos e criou o Sistema Nacional de Gerenciamento de Recursos Hídricos (SINGREH)⁴⁸. Um dos fundamentos dessa política é a gestão descentralizada e participativa, que prevê o envolvimento dos usuários, da sociedade civil e do poder público nos processos decisórios. Nesse sentido, os Comitês de Bacia Hidrográfica se destacam como espaços de participação social, reunindo representantes dos diferentes setores para deliberar sobre o planejamento e a gestão dos recursos hídricos em sua área de atuação⁴⁹.

⁴⁰ BRASIL. Ministério do Meio Ambiente. *Avaliação ambiental estratégica*. Brasília: Ministério do Meio Ambiente, 2002.

⁴¹ PELLIN, Angela *et al.* Avaliação ambiental estratégica no Brasil: considerações a respeito do papel das agências multilaterais de desenvolvimento. *Eng. Sanit. Ambient.*, [s. l.], v. 16, n. 1, p. 27-36, mar. 2011. DOI: <https://doi.org/10.1590/S1413-41522011000100006>.

⁴² TEIXEIRA, Izabella Mônica Vieira. *O uso da Avaliação Ambiental Estratégica no planejamento da oferta de blocos para exploração e produção de petróleo e gás natural no Brasil: uma proposta*. 2008. 308 f. Tese (Doutorado em Ciências em Planejamento Energético) – Universidade Federal do Rio de Janeiro, Rio de Janeiro, 2008.

⁴³ BATMANIAN, G. Avaliação Ambiental Estratégica em instituições financeiras multilaterais. In: SEMINÁRIO LATINO-AMERICANO DE AVALIAÇÃO AMBIENTAL ESTRATÉGICA, 2006. *Anais [...]*. [S. l.: s. n.], 2006. Disponível em: www.mma.gov.br. Acesso em: 3 fev. 2025.

⁴⁴ VANCLAY, Frank. International principles for social impact assessment. *Impact Assessment and Project Appraisal*, [s. l.], v. 21, n. 1, p. 5-12, 2003.

⁴⁵ ESTEVES, Andrea Maculano; FRANKS, Daniel; VANCLAY, Frank. Social impact assessment: the state of the art. *Impact Assessment and Project Appraisal*, [s. l.], v. 30, n. 1, p. 34-42, 2012. DOI: <https://doi.org/10.1080/14615517.2012.660356>.

⁴⁶ SOUZA, Douglas Pereira de. *Avaliação de impacto à saúde: estudo da usina hidrelétrica de Belo Monte e uma análise sobre a violência em Altamira-PA*. 2018. 132 f. Dissertação (Mestrado) – Universidade Federal do ABC, Santo André, SP, 2018.

⁴⁷ QUEIROZ, Adriana Renata Sathler de. *Análise dos impactos sociais de grandes empreendimentos hidrelétricos: o caso do AHE Belo Monte*. 2011. 74 f. Dissertação (Mestrado em Saúde Pública) – Escola Nacional de Saúde Pública Sergio Arouca, Fundação Oswaldo Cruz, Rio de Janeiro, 2011.

⁴⁸ BRASIL. *Lei nº 9.433, de 8 de janeiro de 1997*. Institui a Política Nacional de Recursos Hídricos, cria o Sistema Nacional de Gerenciamento de Recursos Hídricos, regulamenta o inciso XIX do art. 21 da Constituição Federal, e altera o art. 1º da Lei nº 8.001, de 13 de março de 1990, que modificou a Lei nº 7.990, de 28 de dezembro de 1989. Brasília, DF: Presidência da República, [2025]. Disponível em: https://www.planalto.gov.br/ccivil_03/leis/19433.htm. Acesso em: 27 fev. 2025.

⁴⁹ AGÊNCIA NACIONAL DE ÁGUAS E SANEAMENTO BÁSICO (Brasil). *O Comitê de Bacia Hidrográfica: o que é e o que faz?* Brasília, DF: Agência Nacional de Águas, 2011.

Um exemplo prático dessa política pode ser observado na atuação do Comitê da Bacia Hidrográfica do Rio São Francisco. Esse comitê é composto por representantes dos governos federal, estaduais e municipais, além de membros da sociedade civil organizada, como associações de usuários de água, ONGs e comunidades locais.⁵⁰ Juntos, esses representantes participam, ativamente, das discussões e deliberações sobre a gestão dos recursos hídricos da bacia, abordando questões como a distribuição de água, a preservação ambiental e o desenvolvimento sustentável da região.⁵¹ Por meio de reuniões periódicas e consultas públicas, o comitê garante que as decisões sejam tomadas de forma democrática e que as vozes de todos os setores envolvidos sejam ouvidas e consideradas.⁵²

Esse tipo de participação promove uma gestão mais eficiente e equitativa dos recursos hídricos, alinhada com os princípios estabelecidos pela Política Nacional de Recursos Hídricos.

Na esfera da política urbana, o Estatuto da Cidade (Lei n.º 10.257/2001) estabelece diretrizes para a promoção da gestão democrática das cidades, por meio da participação da população na formulação, execução e acompanhamento de planos, programas e projetos de desenvolvimento urbano⁵³. Instrumentos como os conselhos gestores, as conferências municipais e o orçamento participativo são previstos como mecanismos de participação social na gestão urbana⁵⁴.

⁵⁰ Comitê da Bacia Hidrográfica do São Francisco. CHBSF. Plano de Recursos Hídricos da Bacia Hidrográfica do rio São Francisco. Módulo 1: Resumo executivo. Proposta para apreciação do Plenário do CBHSF. Salvador, 28 de junho 2004.

⁵¹ AGÊNCIA NACIONAL DE ÁGUAS. *Conjuntura dos recursos hídricos no Brasil: regiões hidrográficas brasileiras*. Brasília: ANA, 2015. Disponível em: <http://www.snirh.gov.br/portal/snirh/centrais-de-conteudos/conjuntura-dos-recursos-hidricos/regioeshidrograficas2014.pdf>. Acesso em: 22 jan. 2021.

⁵² COMITÊ DA BACIA HIDROGRÁFICA DO SÃO FRANCISCO. CBH, [2021?]. Disponível em: <https://cbhsaofrancisco.org.br/>. Acesso em: 31 jan. 2025.

⁵³ BRASIL. *Lei nº 10.257, de 10 de julho de 2001*. Regulamenta os arts. 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências. Brasília, DF: Presidência da República, [2025]. Disponível em: https://www.planalto.gov.br/ccivil_03/leis/leis_2001/10257.htm. Acesso em: 27 fev. 2025. art. 2º, inciso II.

⁵⁴ AVRITZER, Leonardo. Sociedade civil, instituições participativas e representação: da autorização à legitimidade da ação. *Dados*, [s. l.], v. 50, n. 3, p. 443-464, 2007. Disponível em: <https://www.ipea.gov.br/participacao/images/pdfs/participacao/avritzer%202007.pdf>. Acesso em: 27 fev. 2025. p. 51.

Esses exemplos evidenciam que a participação social permeia diversos mecanismos legais para além do Licenciamento Ambiental, abrangendo diferentes escalas e setores da gestão pública. Essa abordagem participativa reflete o reconhecimento da importância do envolvimento da sociedade nos processos decisórios que afetam suas vidas e seu ambiente, contribuindo para a construção de políticas mais legítimas, eficazes e alinhadas com as necessidades e aspirações das comunidades. No entanto, a participação social não se limita apenas aos mecanismos formais previstos na legislação, de forma que também há a Participação Social Extralegal, que se mostra um efetivo mecanismo para as comunidades.

2.1.2 A participação social na ausência de qualquer mecanismo legal: a Participação Social Extralegal

Embora a legislação brasileira preveja diversos mecanismos de participação social, como demonstrado nos subtópicos anteriores, há situações em que a sociedade se mobiliza e se engaja em processos participativos, mesmo na ausência de um respaldo legal específico. Essa forma de participação, denominada de Participação Social Extralegal, ocorre quando as comunidades afetadas e outros atores sociais buscam influenciar as decisões e ações que impactam suas vidas e seus territórios, utilizando estratégias e canais de participação que vão além dos espaços institucionalizados pelo Estado.

A Participação Social Extralegal pode se manifestar de diferentes formas, como protestos, campanhas, abaixo-assinados, ocupações, boicotes e outras ações coletivas⁵⁵. Essas mobilizações, geralmente, surgem em resposta a situações de conflito, injustiça ou ameaça percebida pelas comunidades, quando os mecanismos legais de participação são considerados insuficientes, ineficazes ou inacessíveis.

Um exemplo emblemático de Participação Social Extralegal é o movimento de resistência das comunidades afetadas por grandes projetos de infraestrutura, como hidrelétricas, mineração e rodovias. Nesses casos, mesmo quando os empreendedores cumprem as exigências legais de participação no âmbito do Licenciamento Ambiental, as comunidades podem se articular

⁵⁵ SCHERER-WARREN, Ilse. Manifestações de rua no Brasil 2013: encontros e desencontros na política. *Caderno CRH*, [s. l.], v. 27, n. 71, p. 417-429, 2014.

para contestar a legitimidade do processo, denunciar violações de direitos e propor alternativas ao modelo de desenvolvimento imposto⁵⁶.

Assim, a Participação Social Extralegal destaca a capacidade das comunidades de se organizarem e influenciarem decisões, mesmo na ausência de mecanismos legais formais. Essa forma de engajamento é crucial para garantir que as preocupações locais sejam ouvidas e consideradas, especialmente quando os processos formais de licenciamento podem não capturar totalmente as necessidades e aspirações das populações afetadas.

Essa dinâmica de participação social, seja ela formal ou extralegal, está intimamente ligada ao conceito de Licença Social para Operar (LSO), que se refere à aceitação contínua e à aprovação de um empreendimento por parte das comunidades locais e das partes interessadas, além das exigências legais do Estado.

2.2 O conceito de licença social para operar (LSO) a partir da existência de mecanismos legais do Estado

A Licença Social para Operar (LSO), como já destacado na introdução deste artigo, representa um conceito complexo destacado na existência ou não de mecanismos legais definidos pelo Estado. Assim, a LSO pode ter o seu conceito jurídico estabelecido pela complementaridade atribuída pela presença de mecanismos nas normas estatais (2.2.1) e, ainda, na atuação extralegal plena devido à ausência de qualquer mecanismo legal (2.2.2).

2.2.1 O conceito de LSO na presença de mecanismos legais: a LSO Legal por Complementaridade

A Licença Social para Operar consiste na concessão pelas comunidades locais de uma licença de operação às atividades das empresas que se instalam em sua região, de forma que confere às comunidades tanto poder quanto os Estados na concessão de licenças⁵⁷. A LSO é,

portanto, uma licença tácita, é intangível, contínua, decorre da comunidade local e deve ser buscada e obtida pelo investidor e não pode ser concedida pelo governo ou uma autoridade⁵⁸.

A LSO nasce do entendimento de que um empreendimento somente pode ser instalado se a comunidade local aceitar, minimamente, sua instalação, considerando os impactos relevantes que a atividade empresarial representa nas comunidades nas quais estão inseridos. Além disso, as próprias empresas, principalmente aquelas de empreendimentos de grande impacto, já consideram que a aceitação da comunidade local é elemento necessário para o sucesso do investimento⁵⁹.

Nesse sentido, um investidor pode ter todas as licenças legais e políticas exigidas pelo Estado e, mesmo assim, não ser exitoso na instalação do seu investimento, por falta de uma licença social para operar conferida pela comunidade local afetada que confere legitimidade ao investimento. A LSO confere poder às comunidades locais de inserirem seus anseios nas atividades corporativas que irão lhes afetar, criando uma obrigação direta ao investidor de considerá-los no curso de seu investimento. Apresentam-se, a seguir, alguns casos julgados por tribunais arbitrais de investimentos que ilustram a influência que a aceitação das comunidades locais representa no desenvolvimento e sucesso dos investimentos estrangeiros.

Exemplo importante refere-se ao caso arbitral entre a empresa mineradora *Bear Creek* contra o Peru, julgado pelo Centro Internacional para Resolução de Controvérsias sobre Investimentos (CIRDI) em 2018. O embate entre a comunidade local e o investidor mostrou-se causa de extinção do investimento⁶⁰. Nesse caso, o tribunal arbitral lidou, diretamente, com a questão de uma obrigação de obtenção da Licença Social para Operar. A controvérsia se desenrolou, pois, não obstante a empresa ter obtido as licenças legais e políticas requeridas, não obteve a aprovação de todas as comunidades locais

⁵⁶ ZHOURI, Andréa. Desenvolvimento e conflitos ambientais: um novo campo de investigação. In: ZHOURI, Andréa; LASCHEFSKI, Klemens. (org.). *Desenvolvimento e conflitos ambientais*. Belo Horizonte: Editora UFMG, 2011. p. 11-34.

⁵⁷ PARSONS, Richard.; LACEY, Justine; MOFFAT, Kieren. Maintaining legitimacy of a contested practice: how the minerals industry understands its 'social licence to operate'. *Resources Policy*, [s. l.], v. 41, p. 83-90, set. 2014. p. 84.

⁵⁸ FRANKS, Daniel M.; COHEN, Tamar. Social Licence in design: constructive technology assessment within a mineral research and development institution. *Technological Forecasting and Social Change*, [s. l.], v. 79, n. 7, p. 1229-1240, 2012. DOI: <https://doi.org/10.1016/j.techfore.2012.03.001>. p. 1230.

⁵⁹ NELSEN, Jacqueline; SCOBLE, Malcolm. *Social licence to operate mines: issues of situational analysis and process*. [S. l.: s. n.], 2006. p. 18.

⁶⁰ BANCO MUNDIAL. Centro Internacional para a Resolução de Disputas sobre Investimentos. *Bear Creek c. Peru*, ICSID, Case No ARB14/21, Sentença (30 nov 2017).

envolvidas na empreitada, de modo que a relação com esses interessados se deteriorou ao ponto de perderem o investimento por meio de decreto governamental. A preocupação das comunidades locais nesse caso estava diretamente ligada aos impactos que a mina teria na sua terra e recursos hídricos, e a sua atuação na relação entre o investidor e o Estado mostrou-se crucial para a implantação do projeto.

O caso corrobora a ideia de que as comunidades locais são essenciais para o sucesso dos investimentos ao demonstrar que a pressão social, ligada à aceitação e percepção da comunidade sobre o projeto, pode, efetivamente, inviabilizar a implantação do projeto. Além disso, evidencia que os investidores carecem de mecanismos eficientes e seguros para, propriamente, garantir a obtenção da LSO e mantê-la durante todo o curso do investimento.

De forma semelhante, no caso *Copper Mesa* contra o Equador, julgado pelo Tribunal Permanente de Arbitragem (PCA), a empresa mineradora não teve sua licença de operação prorrogada por força da grande insatisfação social gerada pelo seu investimento. O Tribunal, nesse caso, entendeu que não obstante o Estado devesse auxiliar o investidor na consulta das comunidades, o investidor teria responsabilidade concorrente na expropriação pela sua posição de negligência frente ao descontentamento social, inclusive fomentando a violência entre aqueles pró e contra o projeto, também sendo considerado culpado da perda de seu investimento⁶¹.

Ocorre que o conceito de Licença Social para Operar insere-se no âmbito das responsabilidades das empresas privadas que pretendem instalar-se em determinado território. Elas devem buscar a LSO, obtê-la e mantê-la durante todo o curso do investimento. Diferencia-se, nesse aspecto, de outros mecanismos de participação social citados anteriormente como o Consentimento Livre, Prévio e Informado, que é de obrigação do Estado obter⁶².

Os Estados, entretanto, apresentam um papel importante para a constituição da LSO como obrigação para os investidores estrangeiros que desejam instalar-se no país, na medida que seus mecanismos internos

podem fomentar a busca pela LSO. Assim, Estados que possuem legislações que contêm uma maior preocupação com o respeito aos direitos humanos no âmbito empresarial, que incluem de cláusulas de Responsabilidade Social Corporativa nos seus modelos de tratados de investimentos, que referenciam os documentos produzidos pelas Nações Unidas e OCDE relativos aos deveres de empresas de respeito aos direitos humanos, como os “Princípios Orientadores sobre Negócios e Direitos Humanos: Implementando os Parâmetros da ONU para proteger, respeitar e reparar” e as “Diretrizes da OCDE para Empresas Multinacionais” complementam a existência da LSO. A LSO, em sua plenitude conceitual, não depende de qualquer determinação legal do Estado ao investidor, pela sua própria natureza de licença tácita⁶³.

Nesse contexto, a Licença Social para Operar, quando aplicada no território de Estados que possuem mecanismos que exigem dos investidores a participação social e a inclusão das comunidades locais nos seus processos decisórios, atua, de forma complementar, para garantir a aceitação social de um investimento. A LSO Legal por Complementaridade, portanto, pode ser definida como a licença social para operar obtida pelo investidor estrangeiro que se instala em Estados que possuem mecanismos legais de participação da comunidade local, de modo que a concessão da licença está inserida nessas ferramentas e, apenas, a complementar.

Seria o caso, por exemplo, da implementação da LSO em países como a Colômbia, que tem um arcabouço institucional consolidado de participação social, por meio de legislações próprias e, inclusive, referência constitucional, garantindo um protagonismo da sociedade civil em diversos setores e a aproximação das comunidades locais com as decisões governamentais⁶⁴. Nessa jurisdição, que já garante, em tese, o acesso da população aos processos decisórios, inclusive relativos à atividade corporativa, a LSO atuaria de forma complementar.

⁶¹ PERMANENT COURT OF ARBITRATION. *Copper Mesa Mining Corporation c. República do Equador*, PCA Case No 2012-2, Sentença (15 mar 2016). para. 6.100.

⁶² FREDERICKS, Carla F. Operationalizing free, prior, and informed consent. *Albany Law Review*, [s. l.], v. 80, p. 429-482, 2016.

⁶³ BARNES, Mihaela-Maria. “Social License to Operate”: an emerging concept in the practice of international investment tribunals. *Journal of International Dispute Settlement*, [s. l.], v. 10, n. 2, p. 328-360, 2019.

⁶⁴ DELGADO-GALLEGO, María E.; VÁZQUEZ-NAVARRETE, Luisa. Barreras y oportunidades para la participación social en salud en Colombia: percepciones de los actores principales. *Revista de Salud Pública*, [s. l.], v. 8, p. 128-140, 2006.

Nesse cenário, a LSO encontra uma particularidade e foge da sua plenitude, confundindo-se com outros mecanismos internos. Ressalta-se que não obstante essa modalidade de LSO, para fins conceituais, não seja considerada plena, pela não aplicação pura de seu conceito, ela atinge os mesmos objetivos e pode garantir os mesmos resultados se aplicada de forma eficiente pela empresa. O objetivo deve ser, primordialmente, incluir os anseios das comunidades locais afetadas pelos investimentos e transferir às empresas a obrigação de respeitar os direitos humanos da população do entorno e contribuir para o seu desenvolvimento.

Entretanto, em sistemas legais que não possuem mecanismos de inclusão das comunidades locais na atividade empresarial, a LSO tem diferentes repercussões, podendo ser considerada plena em termos conceituais.

2.2.2 O conceito de LSO na ausência de qualquer mecanismo legal: a LSO Extralegal Plena

A Licença Social para Operar, conforme argumentado, foi construída justamente como uma licença voltada às comunidades locais e dirigida ao investidor, diferenciando-se de licenças legais emitidas pelos Estados. Não obstante a falta de obrigação legal vinculante para a obtenção da LSO, os investidores, notadamente em indústrias de grande impacto, como a mineração, entendem que a aceitação da comunidade local, consubstanciada na LSO, é elemento essencial para o sucesso do investimento⁶⁵.

A comunidade local, baseada na construção de uma relação de confiança depositada na empresa, concede a LSO considerando sua percepção e aceitação de um determinado investimento em seu território⁶⁶. Dessa forma, a licença social para operar funciona como uma ferramenta para incorporar as preocupações e interesses das partes interessadas locais nas relações entre investidores e o Estado, ao mesmo tempo que aumenta a legitimidade e a aceitação das atividades comerciais pelas comunidades locais⁶⁷.

⁶⁵ GUNNINGHAM, Neil A.; KAGAN, Robert A.; THORNTON, Dorothy. Social license and environmental protection: why businesses go beyond compliance. *Law & Social Inquiry*, [s. l.], v. 29, n. 2, p. 307-341, 2004. p. 310.

⁶⁶ HOWARD GRENVILLE, Jennifer; NASH, Jennifer; COGLIANESE, Cary. Constructing the license to operate: internal factors and their influence on corporate environmental decisions. *Law & Policy*, v. 30, n. 1, 2008, p. 77.

⁶⁷ HOWARD GRENVILLE, Jennifer; NASH, Jennifer;

Nesse sentido, em Estados onde não há qualquer mecanismo de participação social para comunidades afetadas por atividades empresariais, a LSO atua como ferramenta disponível às comunidades para garantir a inclusão de seus anseios e respeito aos seus direitos humanos diante do empreendimento. De fato, a LSO não depende da existência de mecanismos legais internos, de modo que, no caso de sua inexistência, ela será aplicada de forma plena pelas comunidades e pelos investidores.

A LSO Extralegal Plena consiste na aplicação do conceito independente da intervenção do Estado por meio de seus dispositivos legais internos. É a LSO aplicada em sua plenitude conceitual, na qual a comunidade e apenas ela atua direta e juntamente aos investidores para pleitear seus anseios em busca da concessão de sua licença de operação, baseada na aceitação mínima do investimento.

No Brasil, por exemplo, considerando que a política pública de participação social foi revogada⁶⁸ e que não há mecanismos consolidados e adequados para acesso das comunidades locais aos processos decisórios governamentais e empresariais, com exceção das audiências públicas, a LSO seria Extralegal Plena.

Considerando a ausência de um arcabouço institucional no Brasil que permita o acesso das comunidades locais aos processos decisórios de empreendimentos que buscam se estabelecer em seu entorno, a plena aplicação da LSO dependeria da complementação normativa por parte do Estado.

Nesse contexto, os investidores buscam a LSO não pela exigência ou facilitação estatal, mas pelo entendimento que a sua ausência implica em altos riscos sociais⁶⁹, que podem levar à sua desinstalação no país ou região. Os critérios para sua concessão são completamente definidos pela comunidade local envolvida e são seguidos pela empresa, que visa à mitigação de riscos e responsabilizações⁷⁰.

COGLIANESE, Cary. Constructing the license to operate: internal factors and their influence on corporate environmental decisions. *Law & Policy*, [s. l.], v. 30, n. 1, p. 1-50, 2008. p. 748.

⁶⁸ BRASIL. *Decreto nº 9.759, de 11 de abril de 2019*. Extingue e estabelece diretrizes, regras e limitações para colegiados da administração pública federal. Brasília, DF: Presidência da República, [2025]. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Decreto/D9759.htm. Acesso em: 27 fev. 2025.

⁶⁹ BRIDGE, Gavin. Contested terrain: mining and the environment. *Annual Review Environment Resources*, [s. l.], v. 29, p. 205-259, 2004. DOI: <https://doi.org/10.1146/annurev.energy.28.011503.163434>.

⁷⁰ NELSEN, Jacqueline; SCOBLE, Malcolm. *Social license to operate*

Esse conceito de LSO Extralegal Plena pretende classificar, de forma teórica, a LSO, sem, contudo, limitar a sua aplicação, reconhecendo que os níveis de engajamento estatal nas relações de investidores e comunidades locais pode afetar na maneira que a LSO é obtida, mas sem retirar a sua importância e eficácia na proteção das comunidades do entorno.

2.3 A interseção tipológica entre os conceitos jurídicos de Participação Social e LSO: da complementaridade à independência de atuação perante os mecanismos legais do Estado

Os mecanismos legais de um Estado definem aspectos importantes para a diferenciação dos conceitos jurídicos de participação social e LSO. Tais aspectos geram uma interseção tipológica entre os conceitos, definindo uma não equivalência dos conceitos, mas um aspecto complementar da LSO em buscar um complemento à licença legal já presente (i). E, ainda, uma compatibilidade presente na Participação Social Extralegal perante a LSO Extralegal Plena (ii) considerando a necessária aceitação contínua das comunidades locais para a aprovação de um empreendimento, além das exigências legais do Estado.

A Participação Social Legal (PSL), como já destacado, é construída com base em mecanismos estatais estabelecidos pelas normas dos Estados, podendo ser observadas tanto na concepção de licença legal (licenciamento), como também por meio de outros mecanismos estatais. Tal questão também é observada na LSO Legal por Complementaridade, afinal, o investidor estrangeiro que se instala em Estados busca, por meio dos mecanismos legais de participação da comunidade local, a complementação dos mecanismos internos já presentes na PSL, ou seja, trata-se de um complemento à licença legal já presente. Assim, a **não equivalência dos institutos (i)** está definida no aspecto complementar da LSO, afinal, a Licença Social para Operar, quando aplicada no território de Estados, não busca contraria os aspectos legais já existentes e presentes na Participação Social Legal (PSL). O que se propõe é uma atuação de forma complementar para garantir a aceitação social de um investimento⁷¹.

mines: issues of situational analysis and process. [S. l.: s. n.], 2006. p. 10.

⁷¹ NELSEN, Jacqueline; SCOBLE, Malcolm. *Social license to operate*

Quando se trata de mecanismos já destacados pelos Estados, a LSO Legal por Complementaridade atua de modo a auxiliar os mecanismos estatais já aplicados na participação da comunidade local. Trata-se de uma sistemática de revalidação contínua e permanente do aceite da comunidade, o qual garantirá que os resultados sejam aplicados de forma eficiente pela empresa.

Essa atuação complementar da LSO Legal por Complementaridade destaca o principal aspecto que não retira a sua equivalência para a Participação Social Legal (PSL), qual seja, incluir os anseios das comunidades locais afetadas pelos investimentos, os quais podem ser alterados continuamente. Assim, LSO Legal por Complementaridade garante que essa atuação da empresa seja realidade de forma permanente, garantindo uma adequação diária das empresas a obrigação de respeitar os direitos humanos da comunidade do entorno, pois será um complemento à obrigação legal já definida. Observe que, a LSO Legal por Complementaridade torna-se um mecanismo essencial para a perpetuidade da licença legal efetivada pelo Estado, podendo ser utilizada como um instrumento de adequação periódica às necessidades da comunidade para sua manutenção e seu desenvolvimento.

Já quando se destaca a ausência de instrumentos legais do Estado para efetivar a participação social, observa-se a **compatibilidade dos conceitos jurídicos (ii)** de Participação Social Extralegal e da LSO Extralegal Plena, afinal, ocorrem além dos espaços institucionalizados pelo Estado. Nesse sentido, a Participação Social Extralegal se manifesta de diversas maneiras em resposta a situações de conflito, injustiça ou ameaça percebida pelas comunidades, como protestos, campanhas, abaixo-assinados, ocupações, boicotes e outras ações coletivas⁷².

Essa atuação das comunidades, na modalidade extralegal da participação social, ressalta a capacidade de organização e influência nas decisões, embora de maneira pontual e menos eficaz do que se estivessem amparadas pelos mecanismos legais formais. Essa atuação contínua da comunidade presente na Participação Social Extralegal possui compatibilidade com a LSO Extralegal

mines: issues of situational analysis and process. [S. l.: s. n.], 2006. p. 18.

⁷² SCHERER-WARREN, Ilse. Manifestações de rua no Brasil 2013: encontros e desencontros na política. *Caderno CRH*, [s. l.], v. 27, n. 71, p. 417-429, 2014.

gal Plena que também destaca a aceitação contínua e a aprovação de um empreendimento por parte das comunidades locais e das partes interessadas.

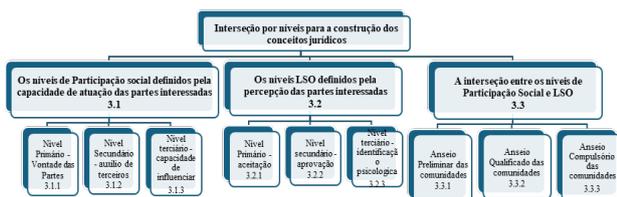
A distinção dos institutos está na mola motriz de atuação, afinal, enquanto a Participação Social Extralegal destaca a atuação contínua e permanente da própria comunidade na busca de uma participação social frente ao empreendimento, a LSO Extralegal Plena destaca a atuação da empresa de forma a garantir uma aceitação/aprovação contínua e permanente da comunidade. Tais aspectos tornam os conceitos jurídicos compatíveis entre si, representando conceitos que unem em prol de uma finalidade comum: a garantia de inclusão dos anseios da comunidade do entorno, com respeito aos seus direitos humanos diante do empreendimento.

Portanto, observa-se a existência de uma interseção tipológica entre os conceitos jurídicos de participação social e LSO definida na complementaridade dos institutos quando destacados os mecanismos legais já definidos pelo Estado e uma independência de atuação dos institutos em efetivar uma atuação ativa da empresa na proteção dos direitos das comunidades, efetivando as normas empresas e Direitos Humanos, mesmo que não existem mecanismos legais definido pelo Estado. Essa interseção tipológica leva a construção de níveis de atuação dos institutos, é o que se passa a destacar.

3 Interseção por níveis para a construção dos conceitos jurídicos

A construção dos conceitos jurídicos de Participação Social (PS) e Licença Social para Operar (LSO) possui uma interseção devido aos níveis de atuação dos conceitos.

Figura 2 – A interseção pela tipologia dos conceitos jurídicos



Fonte: elaboração própria.

Assim, a interseção, devido aos níveis, está definida em uma análise isolada de cada um dos níveis de partici-

pação social (PS) (3.1) e licença social para operar (LSO) (3.2) e, ainda, na interseção construída pela inclusão dos anseios das partes interessadas pelas empresas (3.3).

3.1 Os níveis de Participação Social definidos pela capacidade de atuação das partes interessadas

A capacidade de atuação das partes interessadas está definida em níveis de participação social que buscam a construção de um método vinculatório dessa participação, para que, em sua análise isolada (3.1), possa impactar na interseção construída com os anseios das partes interessadas pelas empresas (3.3). O presente argumento já foi devidamente testado na tese de doutorado: “A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais”⁷³ e publicada em 2021. No presente trabalho, os mesmos níveis de participação social agora buscam uma articulação para além da redefinição do conceito jurídico de RSC para a prevenção de impactos socioambientais, mas também para a definição do impacto dessa participação social junto aos anseios das partes interessadas frente às empresas.

Assim, a construção do conceito de participação social será possível diante da existência de níveis de sua atuação. Esses níveis representam uma nova trilogia de atuação das partes interessadas que são condicionados a implementação da vontade, conhecimento e poder⁷⁴, que resultou na criação dos três níveis de participação. O nível primário está definido na existência da vontade das partes interessadas (3.1.1), enquanto, o nível secundário está estabelecido no auxílio científico e técnico de terceiros (3.1.2) e, por fim, o nível terciário, construído em sua capacidade de vinculação, está definido na capacidade das partes interessadas de influenciar nos processos decisórios empresariais (3.1.3).

⁷³ BALBINO, Michelle Lucas Cardoso. A construção da participação social como mecanismo vinculatório de proteção das vítimas de abusos de direitos humanos em processos decisórios empresariais. *Revista de Direito Internacional*, Brasília, v. 19, n. 2, p. 158-181, 2022. DOI: <https://doi.org/10.5102/rdi.v19i2.8145>. p. 333 e seguintes.

⁷⁴ DELMAS-MARTY, Mirelle. *Aux quatre vents du monde: petit guide de navigation sur l’océan de la mondialisation*. Paris: Seuil, 2016. p. 121.

3.1.1 O nível primário da participação social definido na vontade das partes interessadas frente às atividades empresariais

O primeiro passo para que se possa realmente efetivar o processo de participação social nas atividades empresariais está definido na capacidade de prover a vontade dessas das partes interessadas. A capacidade de externalizar essa VONTADE das partes interessadas somente é possível se houver a atuação voluntária, livre e esclarecida⁷⁵. O nível primário, portanto, somente será satisfatório se houver consolidado o conhecimento dos direitos inerentes às partes interessadas (*i*); bem como houver a consolidação dos mecanismos jurídicos que garantam a atuação dessas partes interessadas (*ii*) e, por fim, a existência de meios empresariais que garantam a atuação das partes interessadas (*iii*).

O conhecimento dos **direitos inerentes às partes interessadas (i)** é o primeiro ponto para a definição do nível primário de participação social, afinal, sem conhecer os seus direitos, as partes interessadas não conseguem nem ao menos externalizar quais são realmente suas vontades. Portanto, para que haja vontade, o conhecimento dos direitos é o principal aspecto, incluindo o direito de acesso à informação das partes interessadas.

O direito de acesso à informação das partes interessadas (*i*), eixo do “guarda-chuva” normativo da participação social, representa condição *sine qua non* para a efetivação da participação social⁷⁶. Esse direito está associado à necessidade de ações de transparência (dever de transparência) e de controle social (dever de controle) dos Estados e das empresas, com vinculação direta e indireta, a respeito da viabilização da efetivação da participação social. Assim, a transparência e o controle representam deveres reflexivos que garantem a efetivação do direito de acesso à informação. O dever de transparência é efetivado como um reflexo do direito de acesso à informação presente tanto na garantia de uma consciência pública, por meio do processo educativo, quanto

na necessidade de um acesso adequado às informações. Já o dever de controle está ligado ao padrão triangular de ações presente no processo de decisão, na resposta e responsabilização do direito de acesso à informação⁷⁷.

A garantia do direito de acesso à informação das partes interessadas —supramencionada— somente será possível se houver a superação de problemas vinculados à externalização dessa vontade das partes interessadas. Especialmente porque a externalização da vontade representa o processo de manifestação de visibilidade da vontade, e não a própria vontade⁷⁸. A vontade deixa a esfera interna das partes interessadas e passa a ser critério no processo de participação social⁷⁹.

Assim, se faz necessária a **consolidação dos mecanismos jurídicos que garantam a atuação dessas partes interessadas (ii)**. Os mecanismos capazes de viabilizar a externalização da vontade das partes interessada e viabilizar a efetivação do nível primário de participação social são: os instrumentos de consulta às partes interessadas, direito de opinar, (*a*) (instrumentos públicos ou privados); o processo de incorporação do diálogo com as partes interessadas (*b*) para caracterização de suas vontades, e a proteção contra perseguições dos líderes (*c*) (sociais/defensores).

A consulta às partes interessadas (*a*) tem como instrumentos (públicos e privados) audiências públicas, reuniões abertas, bilaterais ou multilaterais, reuniões de trabalho, consultas, canais de comunicação disponíveis pelos Estados e pelas empresas (Ouvidoria; Compliance; Disque Denúncias e Relatórios de Sustentabilidade). Esses instrumentos definem deveres aos Estados (nacional e internacional) e compromissos para as empresas, considerando as normas de empresas e direitos humanos. Tais instrumentos buscam efetivar a externalização da vontade das partes interessadas como uma obrigação direta dos Estados, definida por suas normas e, por via indireta, o compromisso das empresas na execução desses procedimentos de consulta⁸⁰.

⁷⁵ BRASIL. Decreto nº 7.030, de 14 de dezembro de 2009. Promulga a Convenção de Viena sobre o Direito dos Tratados, concluída em 23 de maio de 1969, com reserva aos Artigos 25 e 66. Brasília, DF: Presidência da República, [2025]. Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d7030.htm. Acesso em: 28 fev. 2025. art. 26 e 53.

⁷⁶ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 81.

⁷⁷ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 83.

⁷⁸ SCHOPENHAUER, Arthur. *O mundo como vontade e representação*. Rio de Janeiro: Contraponto, 2001. p. 116.

⁷⁹ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 334.

⁸⁰ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 336.

Já o processo de incorporação do diálogo com as partes interessadas (b) representa a capacidade de troca de ideias, informações; conhecimentos e manifestações (externalização das vontades) entre as partes interessadas e as empresas, no recebimento e no repasse das informações⁸¹. O diálogo é compreendido como um processo de fortalecimento e articulação dos mecanismos e instâncias democráticas, estando presente nas relações das empresas com suas partes interessadas (governos, sindicatos, comunidades do entorno, consumidores, fornecedores e outros). A empresa deve estabelecer e manter um diálogo franco com as partes interessadas, além de produzir e divulgar informações confiáveis⁸². O diálogo é um mecanismo não judicial de abordagem e solução de denúncias⁸³ que permite o recebimento e o repasse de informações entre as partes envolvidas. Representando um elo limitado entre os benefícios já demonstrados da consulta e a capacidade de diálogo para a promoção do nível primário de participação social.

E, por fim, a proteção contra perseguições dos líderes (c) também representa ponto essencial para a consolidação da participação das partes interessadas. Afinal, os defensores, pessoas que, individualmente ou em associação (organizações ou comunidades)⁸⁴, agem para promover e proteger os direitos humanos de maneira pacífica⁸⁵ sofrem perseguições que afetam não apenas a pessoa do defensor (individualmente), mas também a proteção dos direitos das comunidades do entorno. Dessa forma, os defensores dos direitos humanos têm

um papel relevante para a promoção de mecanismos de pressão social para endurecer os deveres das empresas (principalmente no caráter transnacional), uma vez que atuam em diversas frentes, como em audiências públicas, em protestos nas ruas e/ou nas redes sociais, apresentando relatórios a órgãos protetores de direitos.

Ademais, a atuação empresarial também representa fator importante nesse processo, principalmente pela existência de definição de **meios empresariais que garantam a atuação das partes interessadas (iii)**, com a superação de previsões genéricas (cláusulas genéricas) acerca da garantia do diálogo, consulta e divulgação de informações a todas as partes interessadas.

Para tanto, faz-se necessária uma articulação direta do setor de *compliance* para a prevenção de danos às empresas por meio da incorporação da participação social aos documentos empresariais. Em filigranas, o objetivo é definir estratégias de aperfeiçoamento empresarial por meio da aplicação da participação social nos documentos empresariais efetivando a Responsabilidade Social Corporativa (RSC). Assim, na tese de doutorado, já destacada, há a proposta de um Guia de Aperfeiçoamento da RSC: a participação social nos Códigos de Ética e Conduta⁸⁶ para que cada empresa possa definir os seus padrões de participação social das partes interessadas. Essa atuação da empresa busca superar a atuação meramente regulatória do setor de *compliance* e insere sua análise nos parâmetros de prevenção de danos à empresa.

Tais aspectos propõem a definição de meios empresariais que garantam a atuação das partes interessadas no aperfeiçoamento normativo empresarial e a elaboração de cláusulas de efetivação da participação social na atividade empresarial, viabilizando a prevenção de impactos à empresa. A referida Guia é composto por um *Checklist* dos Padrões de Participação Social das Partes Interessadas (Parte I); Diretrizes de aperfeiçoamento normativo de participação social das partes interessadas em ambiente empresarial (Parte II) e Propostas de Cláusulas de efetivação da participação social das partes interessadas em ambiente empresarial (Parte III).

A Parte I, *Checklist* Padrões de Participação Social das Partes Interessadas, está baseado na aplicação da Teoria da Investigação de Mário Augusto Bunge⁸⁷, mais

⁸¹ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 339.

⁸² MARTIN-CHENUT, Kathia; PERRUSO, Camila; VARISON, Leandro. La difficile réparation des rapports sociaux. In: MARTIN-CHENUT, Kathia; QUENAUDON, René de. *La RSE saisie par le droit: perspectives interne et internationale*. Paris: Editions A. Pedone, 2016. p. 397-400.

⁸³ ONU. *Guiding principles on business and human rights: implementing the United Nations “protect, respect and remedy” framework*. Genebra: ONU, 2011. Disponível em: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Acesso em: 28 fev. 2025. (Princípio 31, H).

⁸⁴ UN MEDIO AMBIENTE. *Promover la mejora de la protección de los defensores del medio ambiente*. política. Nairobi: UN Medio Ambiente, 2018. Disponível em: https://wedocs.unep.org/bitstream/handle/20.500.11822/22769/Environmental_Defenders_Policy_2018_SP.pdf?sequence=6&isAllowed=y. Acesso em: 28 fev. 2025. p. 2.

⁸⁵ HUMAN rights defenders & whistle-blowers. *National Action Plans on Business and Human Rights*, [2024?]. Disponível em: <https://globalnaps.org/issue/human-rights-defenders-whistle-blowers/>. Acesso em: 7 mar. 2025.

⁸⁶ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 453.

⁸⁷ BUNGE, Mario Augusto. *Treatise on basic philosophy*. Dordrecht:

especificamente a efetivação da Etapa 9 que define a correção das hipóteses, teorias, procedimentos ou dados empregados, facilitando sua implementação da participação social pela própria empresa. Para o nível primário da participação social, ora discutido, que busca definir como incorporar a vontade das partes interessadas às atividades empresariais, o *Checklist* propõe a incorporação de questionamentos sobre os seguintes pontos: I. o acesso à informação das partes interessadas (direito de informação); II. a consulta às partes interessadas (direito de opinar) e III. o diálogo com as partes interessadas.

Na Parte II, são definidas diretrizes para o aperfeiçoamento normativo da participação social na empresa, com destaque para os mesmos temas: direito de informação; direito de opinar e efetivação do diálogo com as partes interessadas. E, por fim, na Parte III, destacam-se propostas de cláusulas para efetivação desse nível primário de participação nos documentos empresariais vinculados aos direitos de informação; de opinar e efetivação do diálogo, para a devida superação das cláusulas genéricas.

Portanto, a vontade das partes interessadas representa o primeiro passo para a efetivação do processo de participação social nas atividades empresariais. Já existem mecanismos estatais e empresariais que proporcionam a superação das falhas existentes na real constatação da vontade das partes interessadas. Deve-se analisar, em relação ao próximo passo, portanto, a viabilidade do nível secundário.

3.1.2 O auxílio de terceiros por conhecimento técnico/científico no estabelecimento do nível secundário de participação social em atividades empresariais

O nível secundário de participação social em atividades empresariais somente será aplicável se houver uma superação da insuficiência de recursos técnicos, científicos e financeiros das partes interessadas. Essa intensificação somente será possível se houver o fortalecimento do conhecimento das partes acerca dos fatores inerentes à sua participação, galgando mais um nível rumo à participação social vinculatória, o que será possível através do auxílio de terceiros.

O auxílio de terceiros facilita o fluxo de informações e a proteção necessária para assegurar o acesso e a com-

preensão dessas informações pelas partes interessadas em relação às atividades empresariais. Os conhecimentos técnico-científicos não possuem uma aplicação isolada dos conhecimentos tradicionais. Quando se realiza a associação dessas duas formas de conhecimento, observa-se a formação de ferramenta viável para auxiliar o processo decisório e efetivar a participação social.

Há uma adequação normativa estatal, mesmo que não vinculatória, para efetivar o apoio de terceiros no embasamento técnico científico, tanto na esfera internacional⁸⁸ como no Brasil⁸⁹. A tendência, em longo prazo,

⁸⁸ UNEP. *Basel convention on the control of transboundary movements of hazardous wastes and their disposal: protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal: texts and annexes*. Geneva: ONU, 2014. Disponível em: <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>. Acesso em: 28 fev. 2025.; ONU. *Agenda 21*. Rio de Janeiro: ONU, 1992. Disponível em: <http://www.onu.org.br/rio20/img/2012/01/agenda21.pdf>. art. 3.8; 6.34 e 7.26); BRASIL. *Decreto Legislativo nº 2, de 1994*. Aprova o texto do Convenção sobre Diversidade Biológica, assinada durante a Conferência das Nações Unidas sobre Meio Ambiente e Desenvolvimento, realizada na Cidade do Rio de Janeiro, no período de 5 a 14 de junho de 1992. Brasília, DF: Presidência da República, [2025]. Disponível em: <https://www2.camara.leg.br/legin/fed/decleg/1994/decretolegislativo-2-3-fevereiro-1994-358280-publicacaooriginal-1-pl.html>. Acesso em: 28 fev. 2025.; ONU. *Convenção-Quadro das Nações Unidas sobre Mudanças Climáticas*. Rio de Janeiro: ONU, 1992. Disponível em: http://www.onu.org.br/rio20/img/2012/01/convencao_clima.pdf.

⁸⁹ BRASIL. *Lei nº 6.938, de 31 de agosto de 1981*. Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências. Brasília, DF: Presidência da República, [2025]. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/L6938.htm. Acesso em: 27 fev. 2025. art. 13; BRASIL. *Decreto nº 4.297, de 10 de julho de 2002*. Regulamenta o art. 9º, inciso II, da Lei nº 6.938, de 31 de agosto de 1981, estabelecendo critérios para o Zoneamento Ecológico-Econômico do Brasil - ZEE, e dá outras providências. Brasília, DF: Presidência da República, [2025]. Disponível em: https://www.planalto.gov.br/ccivil_03/decreto/2002/d4297.htm. Acesso em: 27 fev. 2002. art. 4, inciso III; BRASIL. *Lei nº 12.651, de 25 de maio de 2012*. Dispõe sobre a proteção da vegetação nativa; altera as Leis nºs 6.938, de 31 de agosto de 1981, 9.393, de 19 de dezembro de 1996, e 11.428, de 22 de dezembro de 2006; revoga as Leis nºs 4.771, de 15 de setembro de 1965, e 7.754, de 14 de abril de 1989, e a Medida Provisória nº 2.166-67, de 24 de agosto de 2001; e dá outras providências. Brasília, DF: Presidência da República, [2025]. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12651.htm. Acesso em: 27 fev. 2025. art. 1-A, inciso V); BRASIL. *Lei nº 13.123, de 20 de maio de 2015*. Regulamenta o inciso II do § 1º e o § 4º do art. 225 da Constituição Federal, o Artigo 1, a alínea j do Artigo 8, a alínea c do Artigo 10, o Artigo 15 e os §§ 3º e 4º do Artigo 16 da Convenção sobre Diversidade Biológica, promulgada pelo Decreto nº 2.519, de 16 de março de 1998; dispõe sobre o acesso ao patrimônio genético, sobre a proteção e o acesso ao conhecimento tradicional associado e sobre a repartição de benefícios para conservação e uso sustentável da biodiversidade; revoga a Medida Provisória nº 2.186-16, de 23 de

é que as empresas passem a integrar, em seus documentos internos, os fundamentos que norteiam a proteção. Afinal, sem o pleno conhecimento dos fatores que afetam a atividade empresarial, é impossível estabelecer uma opinião coerente que realmente integre o processo de decisão⁹⁰.

Dessa forma, o auxílio de terceiros, quando reconhecido pelas empresas, contribui para que as informações sejam disponibilizadas de forma mais clara e fiel à realidade, permitindo que as partes interessadas possam ter acesso ao conhecimento de forma a permitir que a sua participação seja incorporada nos processos decisórios. Assim, o reconhecimento da importância desse apoio de terceiros também existe no campo empresarial. Esse apoio está presente no envolvimento da empresa com o desenvolvimento da comunidade, indo além de identificar e engajar partes interessadas em relação aos efeitos das atividades da empresa, mas também no apoio, construção e reconhecimento do valor da comunidade para o processo produtivo⁹¹.

Esses fatores justificam o método de participação social vinculatória defendido na tese doutoral já mencionada, incorporando o auxílio de terceiros na referida Guia de Aperfeiçoamento da RSC: a participação social nos Códigos de Ética e Conduta⁹², em suas 03 (três) partes, incluída no item que articula o processo de efetivação da participação social das partes interessadas.

Portanto, a vinculação da participação social somente será possível se o segundo nível de conhecimento for implementado, superando a limitação de recursos (técnicos, científicos e financeiros) das partes interessadas por meio do apoio técnicos e científicos para viabilizar opiniões livres e válidas. Passa-se ao terceiro nível para

a efetivação da participação social, a capacidade de influenciar nos processos decisórios.

3.1.3 A capacidade de influenciar nos processos decisórios empresariais definido pela garantia do direito de veto das partes interessadas: o terceiro nível de participação social

Como mencionado, os níveis de participação social têm seu fundamento na trilogia de atuação das partes interessadas: vontade, conhecimento e poder⁹³, e o terceiro nível está definido na capacidade das partes interessadas de influenciar nos processos decisórios empresariais. Para muitos, uma utopia, porém estruturada no método vinculatório que traz o direito de veto nos processos decisórios empresariais a partir da autorregulação imposta definida pela Teoria da Regulação Responsiva⁹⁴.

A regulação responsiva trata-se de uma atuação tripartida entre empresas, Estado e indivíduos para a regulação, destacando os limites da regulação entre o Estado e as empresas. Já a autorregulação imposta prevista na Teoria da Regulação Responsiva representa a consolidação do processo de negociação entre o Estado, empresas e indivíduos para estabelecer regulações específicas definindo padrões regulatórios próprios para cada empresa. Ou seja, é a capacidade das próprias empresas de regular suas atividades, consolidando, para tanto, o processo de negociação entre o Estado, empresas e indivíduos para definir seus próprios regulamentos. Nesse modelo, há a possibilidade de “subcontratação” de funções regulatórias para atores privados: as empresas e indivíduos, atribuindo função à participação social das partes interessadas na definição de estratégias regulatórias empresariais⁹⁵. Contudo, a aplicação da autorregulação imposta apenas considerando a Teoria da Regulação Responsiva poderia ensejar a possibilidade de não efetivação da participação social das partes interessadas.

agosto de 2001; e dá outras providências. Brasília, DF: Presidência da República, [2025]. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13123.htm. Acesso em: 27 fev. 2025. art. 8 caput e §1; BRASIL. *Lei nº 9.394, de 20 de dezembro de 1996*. Estabelece as diretrizes e bases da educação nacional. Brasília, DF: Presidência da República, [2025]. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l9394.htm. Acesso em: 27 fev. 2025. art. 43, inciso VII.

⁹⁰ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 345.

⁹¹ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 344.

⁹² BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 453.

⁹³ DELMAS-MARTY, Mirelle. *Aux quatre vents du monde: petit guide de navigation sur l'océan de la mondialisation*. Paris: Seuil, 2016. p. 121.

⁹⁴ AYRES, Ian; BRAITHWAITE, John. *Responsive Regulation: transcending the deregulation debate*. New York: Oxford University Press, 1992.

⁹⁵ AYRES, Ian; BRAITHWAITE, John. *Responsive Regulation: transcending the deregulation debate*. New York: Oxford University Press, 1992. p. 112.

Assim, torna-se essencial a vinculação do direito de veto às partes interessadas para essa efetivação.

Assim, o direito de veto representa uma extensão e individualização presente na autorregulação imposta para a Teoria da Regulação Responsiva⁹⁶ ao incorporar a participação social como critério para efetivação do poder de influenciar nos processos decisórios empresariais. A extensão existe ao incorporar o veto como elemento essencial para tornar a autorregulação componente essencial para que ela realmente efetive a participação social. Já a individualização existe no exercício do direito de veto (o poder de atuar) em cada sistema corporativo no qual está inserida⁹⁷. Assim, o direito de veto representa a forma de vincular a participação social como meio de efetivar a capacidade das partes interessadas de influenciar nos processos decisórios empresariais.

A efetivação desse direito de veto às partes interessadas gera um compartilhamento de responsabilidades entre a empresa e as partes interessadas, operacionalizando o que se pode chamar de Licença Social para Operar (LSO). A licença social para operar, como já destacado na Introdução deste trabalho, é vista como uma permissão institucionalizada concedida pela comunidade do entorno à empresa em relação às atividades que afetam a vida de seus habitantes. Trata-se de uma permissão não permanente que está intimamente relacionada às responsabilidades das empresas para com os direitos humanos.

No caso *Bear Creek vs Peru*⁹⁸, Philippe Sands destaca a figura da LSO como instrumento de pacificação dos conflitos com a comunidade, porém, aponta essa licença em sua modalidade não compulsória. Tal questão apresenta uma oportunidade para o processo de participação social, porém, por atribuir o voluntarismo da empresa⁹⁹, tal aspecto ensejou um afastamento da participação social como método vinculatório da capacidade

das partes interessadas de influenciar nos processos decisórios empresariais. Assim, o direito ao veto representa a ferramenta necessária para a efetivação do processo de autorregulação imposta, que combina a versatilidade, a rapidez nas mudanças e a flexibilidade da autorregulação voluntária, mas evita muitas fraquezas inerentes ao voluntarismo¹⁰⁰. O direito de veto, portanto, representa ferramenta importante para efetivar o método de participação social vinculatório defendido, incorporando o PODER (a capacidade) de capacidade das partes interessadas de influenciar nos processos decisórios empresariais.

Para tanto, a Guia de Aperfeiçoamento da RSC, que aborda a participação social nos Códigos de Ética e Conduta¹⁰¹, e o *Checklist* dos Padrões de Participação Social das Partes Interessadas (Parte I) destacam a articulação vinculatória da capacidade de influenciar das partes interessadas, bem como a previsão de um retorno (*feedback*) do impacto da participação social nas decisões às partes interessadas. Além de destacar, nas diretrizes de aperfeiçoamento normativo da participação social das partes interessadas em ambiente empresarial (Parte II), e nas propostas de cláusulas para a efetivação dessa participação (Parte III), mecanismos que aumentem o impacto da participação social nas políticas internas empresariais, com a definição da capacidade de veto das partes interessadas sobre procedimentos decisórios, as diretrizes também visam superar as normas existentes, desconsiderando o caráter genérico das cláusulas nos documentos empresariais e realmente efetivando a RSC, para além da mera adequação legislativa.

Portanto, o terceiro nível de participação social somente será viável se houver a implementação do direito ao veto às partes interessadas, por meio do processo de autorregulação imposta.

3.2 Os níveis LSO definidos pela percepção das partes interessadas

A Licença Social para Operar apresenta-se em níveis de acordo com a percepção das partes interessadas sobre o investimento. O mais baixo nível configura-se na

⁹⁶ AYRES, Ian; BRAITHWAITE, John. *Responsive Regulation: transcending the deregulation debate*. New York: Oxford University Press, 1992. p. 117.

⁹⁷ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 357.

⁹⁸ ICSID. *ICSID Case No. ARB/14/21, 30 november 2017*. Bear Creek Mining Corporation v. Republic of Perú. Disponível em: <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>. Acesso em: 28 fev. 2025.

⁹⁹ ICSID. *ICSID Case No. ARB/14/21, 30 november 2017*. Bear Creek Mining Corporation v. Republic of Perú. Disponível em: <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>. Acesso em: 28 fev. 2025. p. 2.

¹⁰⁰ AYRES, Ian; BRAITHWAITE, John. *Responsive Regulation: transcending the deregulation debate*. New York: Oxford University Press, 1992. p. 117.

¹⁰¹ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 383.

perda do investimento e o mais alto nível consiste em uma identificação da comunidade local com esse investimento¹⁰². Há também um grau de LSO que reflete uma aceitação da comunidade local e outro que reflete, mais fortemente, uma aprovação. A determinação do nível de Licença Social — para Operar a partir da percepção das partes interessadas — relaciona-se com o risco do investimento¹⁰³. A LSO conta, ainda, com três elementos: a legitimidade, a credibilidade e a confiança¹⁰⁴, que constituem a barreira de divisão entre cada nível. Esse processo de mudança entre eles resulta, diretamente, do capital social do investidor e de sua habilidade em estabelecer um relacionamento com as partes envolvidas.

Figura 3 – Níveis de LSO¹⁰⁵



Assim, é possível considerar que o nível primário é aquele em que há a aceitação das comunidades, sendo a LSO por legitimidade (3.2.1). O nível secundário reflete a aprovação das atividades da empresa pelas partes interessadas, sendo a LSO por credibilidade (3.2.2). O terceiro e mais alto nível de LSO é aquele em que há uma identificação psicológica da comunidade com as atividades da empresa, sendo a LSO por confiança (3.2.3).

3.2.1 A aceitação das atividades da empresa pelas partes interessadas: a LSO por legitimidade na definição do nível primário

A forma de obtenção da LSO, embora não propriamente definida e carente de critérios objetivos¹⁰⁶, está relacionada com a percepção da comunidade local sobre o investimento e da capacidade do investidor de se engajar com as partes interessadas. Para isso, a empresa deve possuir mecanismos internos que permitam a participação social, a comunicação com a comunidade e a escuta ativa de seus anseios. A forma de engajamento e o nível de comprometimento da empresa com a comunidade define o nível de licença social para operar obtido pelo investidor.

O nível primário é o nível da aceitação e contém como elemento a legitimidade, isso significa que a comunidade local aceita a atividade da empresa por considerar sua atividade legítima. Nesse nível, a fronteira da legitimidade foi ultrapassada de modo que o investidor não mais corre um risco iminente de perda do investimento pela perda de recursos essenciais como mão de obra, financiamentos ou até licenças legais¹⁰⁷. A aceitação é a forma mais comum de LSO, a comunidade local aceita o investimento por entender que é legítimo.

A legitimidade de um investimento está ligada a um aspecto de justiça, na consideração de que sua instalação foi realizada de maneira justa e se há uma distribuição de benefícios igualmente justa.

O nível primário, chamado de LSO por legitimidade, portanto, significa que a empresa ultrapassou a fronteira da legitimidade com a comunidade de seu entorno. A legitimidade pode ser alcançada por uma postura da empresa de compensar, de maneira justa, a comunidade afetada por desalojamentos ou mudanças na sua rotina, concessão de benefícios para a comunidade, como geração de emprego, infraestrutura, programas de capacitação¹⁰⁸. Ademais, uma atuação empresarial considerada

¹⁰² THOMSON, Ian; BOUTILIER, Robert G. Social license to operate. In: DARLING, Peter (ed.). *SME mining engineering handbook*. 3. ed. Englewood: SME, 2011. v. 1. cap. 17.2, p. 1779-1796. p. 1779-1796.

¹⁰³ BOUTILIER, Robert G.; THOMSON, Ian. Modelling and measuring the social license to operate: fruits of a dialogue between theory and practice. *Social Licence*, v. 1, p. 1-6, 2011.

¹⁰⁴ THOMSON, Ian; BOUTILIER, Robert G. Social license to operate. In: DARLING, Peter (ed.). *SME mining engineering handbook*. 3. ed. Englewood: SME, 2011. v. 1. cap. 17.2, p. 1779-1796.

¹⁰⁵ CAMBRAIA, Gilda Nogueira Paes. *As manifestações da Licença Social para operar no direito internacional dos investimentos*. Rio de Janeiro: Editora Processo, 2024. No prelo. p. 112.

¹⁰⁶ BICE, Sara. What gives you a social licence? An exploration of the social licence to operate in the Australian mining industry. *Resources*, v. 3, n. 1, p. 62-80, 2014. DOI: <https://doi.org/10.3390/resources3010062>. p. 63.

¹⁰⁷ BOUTILIER, Robert G.; THOMSON, Ian. Modelling and measuring the social license to operate: fruits of a dialogue between theory and practice. *Social Licence*, v. 1, p. 1-6, 2011.

¹⁰⁸ JIJELAVA, David; VANCLAY, Frank. Legitimacy, credibility and trust as the key components of a social licence to operate: an analysis of BP's projects in Georgia. *Journal of Cleaner Production*, [s. l.], v. 140, pt. 3, p. 1077-1086, 2017. p. 1078.

legítima é aquela que considera minimamente a comunidade, tratando-a com respeito, respeitando direitos humanos básicos, não se envolvendo em corrupção e atuando para prevenir e reparar danos ambientais¹⁰⁹.

Com um maior engajamento da empresa juntamente à comunidade, é possível que o nível primário seja ultrapassado, indo além da legitimidade e chegando em uma percepção de credibilidade.

3.2.2 A aprovação das atividades da empresa pelas partes interessadas: o nível secundário presente na LSO por credibilidade

A LSO por credibilidade é o segundo nível de licença social para operar obtido pelo investidor, onde está presente o elemento da credibilidade. Nesse nível, a comunidade considera o investimento não meramente legítimo, mas o entende credível. O aumento da legitimidade para a credibilidade decorre do esforço do investidor em estreitar seu relacionamento com a comunidade de forma mais completa; seja pela necessidade criada pela complexidade do empreendimento, seja pela minimização dos riscos sociais e políticos.

A credibilidade pode ser alcançada pela capacidade de convencimento do investidor, medida pelo fato de se a comunidade consegue acreditar na honestidade da empresa no exercício de suas atividades¹¹⁰. Para alcançar um nível elevado de credibilidade, o investidor deve focar em fornecer informações claras e consistentes para a comunidade e cumprir os compromissos assumidos. Além disso, é essencial que a comunidade perceba que a empresa possui uma alta capacidade técnica, com programas eficazes de monitoramento e mitigação, uma governança sólida e transparência em suas ações¹¹¹. A

empresa também deve ter um canal de comunicação e engajamento eficiente com a comunidade¹¹².

É um exemplo a empresa Natura S.A, que mantém uma relação com suas partes interessadas consolidada em mecanismos de transparência e comunicação assertiva¹¹³, conferindo credibilidade na sua atuação e uma imagem de empresa sustentável¹¹⁴.

Por meio da credibilidade, a empresa pode obter, além da aceitação, a aprovação da comunidade para com o investimento. A aprovação da comunidade, sendo um nível mais alto de LSO, garante mais segurança para o investidor, diminui riscos sociais e evita possibilidades de perdas por pressão negativa da comunidade. Assim, a LSO por credibilidade é uma evidência mais forte de que o investidor obteve a licença social da comunidade afetada por seu investimento e pode sustentá-la e mantê-la enquanto exerce as suas atividades.

Além da credibilidade, uma relação ainda mais próxima com a comunidade pode construir um laço de confiança, criando uma identificação psicológica da comunidade com o investimento. Nesse caso, encontra-se o nível mais alto de LSO, sendo a LSO por confiança.

3.2.3 A identificação psicológica das atividades da empresa pelas partes interessadas: no estabelecimento do nível terciário para construção da LSO por confiança

O nível terciário é o mais alto nível de LSO obtido pela empresa, que encontrou um caminho de engajamento e envolvimento com a comunidade de forma muito clara e consolidada, estando além da aprovação ou aceitação, configurando uma identificação psicológica entre a comunidade e as atividades da empresa.

A LSO, pautada pela confiança, é uma forma mais forte de licença social, na qual há uma crença da comunidade de que a empresa tomará decisões considerando seus interesses¹¹⁵. Nesse nível, não há risco de perda do

¹⁰⁹ KEMP, Deanna; VANCLAY, Frank. Human rights and impact assessment: clarifying the connections in practice. *Impact Assessment and Project Appraisal*, [s. l.], v. 31, n. 2, p. 86-96, 2013.

¹¹⁰ BOUTILIER, Robert G.; THOMSON, Ian. Modelling and measuring the social licence to operate: fruits of a dialogue between theory and practice. *Social Licence*, v. 1, p. 1-6, 2011; JIJELAVA, David; VANCLAY, Frank. Legitimacy, credibility and trust as the key components of a social licence to operate: an analysis of BP's projects in Georgia. *Journal of Cleaner Production*, [s. l.], v. 140, pt. 3, p. 1077-1086, 2017. p. 1078.

¹¹¹ JIJELAVA, David; VANCLAY, Frank. Legitimacy, credibility and trust as the key components of a social licence to operate: an analysis of BP's projects in Georgia. *Journal of Cleaner Production*, [s. l.], v. 140, pt. 3, p. 1077-1086, 2017. p. 1079.

¹¹² DARE, Melanie; SCHIRMER, Jacki; VANCLAY, Frank. Community engagement and social licence to operate. *Impact Assessment and Project Appraisal*, [s. l.], v. 32, n. 3, p. 188-197, 2014.

¹¹³ SERRA, Fernando A. Ribeiro; ALBERNAZ, André; FERREIRA, Manuel Portugal. A responsabilidade social como fator na estratégia internacional: o estudo do caso natura. *REAd: Revista Eletrônica de Administração*, [s. l.], v. 13, n. 4, p. 17-39, 2007.

¹¹⁴ SILVA, Bruno Fernandes da et al. *Logística sustentável: um estudo de caso na Empresa Natura*. 2022.

¹¹⁵ BOUTILIER, Robert G.; THOMSON, Ian. Modelling and

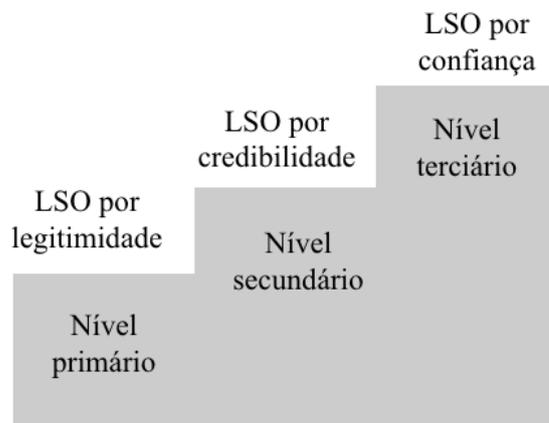
investimento pela pressão social, ao contrário, a comunidade pode atuar como parceira em busca dos interesses comuns da empresa e do seu sucesso, uma vez que entende que afeta positivamente o seu entorno.

A confiança depositada na empresa pela comunidade pode ser interacional ou institucionalizada. A comunidade que confia na empresa de forma interacional entende que esta os escuta, engaja em um diálogo efetivo, cumpre suas promessas e interage de maneira respeitosa. A confiança institucionalizada leva a uma preocupação mútua pelos interesses um do outro, em uma relação de parceria¹¹⁶. Nesse cenário, as comunidades se envolvem com o projeto, se orgulham e se identificam como parte dele¹¹⁷.

Quando há uma LSO por confiança, a empresa atua de forma a estabelecer uma escuta, diálogo mútuo e reciprocidade nas interações com a comunidade, visando ao reconhecimento dos interesses das comunidades locais de forma efetiva e a atuação em parceria com as comunidades locais em projetos da empresa. Com esse alto nível de LSO, verifica-se, de forma clara, que a empresa não está apenas se utilizando da comunidade para alcançar seus anseios econômicos, mas há, de fato, uma estrutura de governança empresarial que considera a comunidade para parte interveniente da tomada de decisão.

Na Figura 04, exprimem-se os níveis de LSO que podem ser alcançados pela empresa, acima explicados, e o tipo de licença concedida em cada nível:

Figura 4 – Tipos de LSO e seus níveis



Fonte: Elaboração própria.

Assim, é possível afirmar que a aplicação da LSO será efetiva nesse nível de LSO, pautada na confiança, em que a empresa garantiu a participação social plena, pelo acesso à informação, o direito de consulta e a garantia de direito de veto para as partes interessadas nos processos decisórios das empresas.

Nesse sentido, argumenta-se que apenas com um profundo envolvimento das comunidades locais é possível garantir que a busca pela LSO pelas empresas não seja apenas uma estratégia superficial para aparentar responsabilidade social perante o mercado.¹¹⁸ A LSO por confiança, portanto, reflete a interação genuína da empresa com a comunidade e é capaz de criar laços que se sustentam com o passar do tempo, sendo mais consolidada e hábil a se manter durante um longo período.

3.3 A interseção entre os níveis de Participação Social e LSO construída pela inclusão dos anseios das partes interessadas pelas empresas

A interseção entre os níveis de Participação Social e a Licença Social para Operar (LSO) representa um ponto crucial na construção de processos decisórios empresariais mais inclusivos e responsáveis. Essa relação se estabelece, principalmente, por meio da incorporação dos anseios das partes interessadas pelas empresas,

measuring the social license to operate: fruits of a dialogue between theory and practice. *Social Licence*, v. 1, p. 1-6, 2011; JIJELAVA, David; VANCLAY, Frank. Legitimacy, credibility and trust as the key components of a social licence to operate: an analysis of BP's projects in Georgia. *Journal of Cleaner Production*, [s. l.], v. 140, pt. 3, p. 1077-1086, 2017. p. 1078.

¹¹⁶ KOIVUROVA, Timo *et al.* 'Social license to operate': a relevant term in Northern European mining? *Polar Geography*, [s. l.], v. 38, n. 3, p. 194-227, 2015.

¹¹⁷ JIJELAVA, David; VANCLAY, Frank. Legitimacy, credibility and trust as the key components of a social licence to operate: an analysis of BP's projects in Georgia. *Journal of Cleaner Production*, [s. l.], v. 140, pt. 3, p. 1077-1086, 2017. p. 1079.

¹¹⁸ BALBINO, Michelle Lucas Cardoso Balbino. *A articulação entre a participação social e a responsabilidade social corporativa (RSC) na prevenção de impactos socioambientais*. Londrina, PR: Thoth, 2021. p. 177-179.

criando um elo entre a legitimidade social e a operação empresarial.¹¹⁹

A interseção entre participação social e LSO se manifesta em diferentes aspectos da relação empresa-sociedade, cada um contribuindo para a construção de um diálogo mais efetivo e uma operação empresarial mais alinhada com as expectativas sociais.

A interseção entre os níveis de Participação Social e a Licença Social para Operar (LSO) se manifesta de maneiras diversas e complexas, refletindo a dinâmica multifacetada da relação empresa-sociedade.¹²⁰ Essa interação se desdobra em 03 (três) aspectos fundamentais que merecem uma análise aprofundada. Primeiramente, será examinado como a inclusão dos anseios das partes interessadas pelas empresas constrói uma ponte entre participação social e LSO. Em seguida, será abordada a equivalência da vontade das partes interessadas na participação social frente à aceitação das atividades empresariais, com foco especial no anseio preliminar das comunidades. Por fim, a análise da compatibilidade entre o auxílio de terceiros na participação social e a aprovação das atividades empresariais pelas partes interessadas.

Esses aspectos, detalhados a seguir, ilustram como a participação social e a LSO se entrelaçam na prática, formando um tecido complexo de interações e expectativas mútuas entre empresas e sociedade.

3.3.1 A equivalência da vontade das partes interessadas na Participação Social frente à aceitação das atividades da empresa pelas partes interessadas: o anseio preliminar das comunidades

A equivalência entre a vontade das partes interessadas na participação social e a aceitação das atividades empresariais representa um aspecto fundamental na construção da Licença Social para Operar (LSO). Essa relação se baseia no princípio de que a legitimidade das operações empresariais está intrinsecamente ligada à ca-

pacidade de atender e incorporar os anseios preliminares das comunidades afetadas.¹²¹

A LSO é fundamentada na percepção das comunidades locais sobre a aceitabilidade de uma empresa e suas operações, e essa percepção é fortemente influenciada pelo grau de participação social efetiva no processo decisório.¹²²

A participação social, quando genuína e efetiva, serve como um mecanismo de alinhamento entre os interesses empresariais e comunitários. Ela permite que as comunidades expressem suas expectativas, preocupações e demandas antes e durante a implementação de projetos empresariais. Essa expressão prévia dos anseios comunitários serve como base para o estabelecimento de um diálogo construtivo entre empresa e sociedade, fundamental para a obtenção e manutenção da LSO.¹²³ Esse alinhamento é essencial para a obtenção e a manutenção da LSO, pois permite que as empresas compreendam e respondam, adequadamente, às expectativas e preocupações das comunidades afetadas.¹²⁴

A equivalência mencionada se manifesta quando as empresas não apenas ouvem, mas efetivamente incorporam as contribuições das partes interessadas em seus processos decisórios. Isto implica uma abordagem proativa por parte das organizações, que devem buscar compreender e alinhar suas atividades às expectativas sociais desde as fases iniciais de planejamento.¹²⁵

Um exemplo prático disso refere-se à implementação de projetos de infraestrutura por grandes empresas

¹²¹ SANTIAGO, Ana Lúcia Frezzatti; DEMAJOROVIC, Jacques. Licença social para operar: um estudo de caso a partir de uma indústria brasileira de mineração. *In: ENCONTRO INTERNACIONAL SOBRE GESTÃO EMPRESARIAL E MEIO AMBIENTE - ENGEMA*, 16., 2020. São Paulo. *Anais* [...]. São Paulo: USP, 2020.

¹²² GUNNINGHAM, Neil A.; KAGAN, Robert A.; THORNTON, Dorothy. Social license and environmental protection: why businesses go beyond compliance. *Law & Social Inquiry*, [s. l.], v. 29, n. 2, p. 307-341, 2004. p. 326.

¹²³ DELMANTO, Roberto. Sua empresa tem licença social para operar? *Amanhã*, 8 out. 2013. Disponível em: http://www.amanha.com.br/index.php?option=com_content&view=article&id=5522:sua-empresa-tem-licenca-social-para-operar&catid=-50:gestao-1&Itemid=86.

¹²⁴ PRNO, Jason; SLOCOMBE, D. Scott. Exploring the origins of 'social license to operate' in the mining sector: perspectives from governance and sustainability theories. *Resources Policy*, [s. l.], v. 37, n. 3, p. 346-357, set. 2012. p. 352.

¹²⁵ ROWE, James. K. Corporate social responsibility as business strategy. *In: LIPSCHUTZ, Ronnie; ROWE, James K. Globalization, governmentality and global politics regulation for the rest of us?* Londres: Routledge, 2005. cap. 6.

¹¹⁹ MOFFAT, Kieren; ZHANG, Airong. The paths to social licence to operate: an integrative model explaining community acceptance of mining. *Resources Policy*, [s. l.], v. 39, p. 61-70, 2014.

¹²⁰ BALBINO, Michelle Lucas Cardoso. A construção da participação social como mecanismo vinculatório de proteção das vítimas de abusos de direitos humanos em processos decisórios empresariais. *Revista de Direito Internacional*, Brasília, v. 19, n. 2, p. 158-181, 2022. DOI: <https://doi.org/10.5102/rdi.v19i2.8145>. p. 167.

de energia. Por exemplo, a empresa de energia Enel, ao planejar a construção de uma nova usina solar em uma região rural, organizou uma série de consultas públicas e encontros com a comunidade local. Durante esses encontros, os moradores puderam expressar suas preocupações sobre os possíveis impactos do projeto, como a alteração do uso da terra, a conservação ambiental e a geração de empregos.

A Enel, de maneira proativa, incorporou essas contribuições em seus processos decisórios, ajustando o projeto para minimizar os impactos negativos e maximizar os benefícios para a comunidade. Isso incluiu a implementação de programas de formação profissional para capacitar os moradores locais a trabalharem na usina solar, a criação de zonas de proteção ambiental ao redor do local do projeto e a garantia de que uma parte significativa da energia gerada fosse destinada à comunidade local a preços reduzidos.

Esse exemplo demonstra como uma abordagem proativa e participativa pode alinhar as atividades de uma empresa com as expectativas sociais desde as fases iniciais de planejamento, promovendo um desenvolvimento mais sustentável e harmonioso.

Estudos recentes indicam que empresas que priorizam a compreensão e incorporação dos anseios preliminares das comunidades em seus processos de tomada de decisão tendem a enfrentar menos conflitos sociais e a manter operações mais estáveis em longo prazo.¹²⁶ Essa abordagem não apenas fortalece a LSO, mas também contribui para o desenvolvimento sustentável das regiões onde as empresas operam.

A equivalência entre participação social e aceitação das atividades empresariais, portanto, não se limita a um exercício de relações públicas, mas constitui um elemento estratégico na gestão empresarial contemporânea. Ela reflete uma mudança paradigmática na forma como as organizações se relacionam com seus *stakeholders*, reconhecendo que a sustentabilidade de suas operações está diretamente ligada à sua capacidade de atender às expectativas sociais e ambientais das comunidades que as acolhem.¹²⁷

¹²⁶ RODRIGUES, Denis. *Impactos da incorporação de anseios comunitários na estabilidade operacional de grandes empreendimentos*. Tese (Doutorado em Administração) – Faculdade de Economia, Administração e Contabilidade, Universidade de São Paulo, São Paulo, 2023.

¹²⁷ ACSELRAD, Henri; BEZERRA, Gustavo Das Neves. Desregulação, deslocalização e conflito ambiental: considerações sobre o controle das demandas sociais. In: ALMEIDA, A. et al. (org.). *Capital-*

Como exposto, a equivalência da vontade das partes interessadas na participação social e a aceitação das atividades empresariais pela comunidade formam a base para uma relação construtiva entre empresa e sociedade. No entanto, esse processo nem sempre é simples ou direto, podendo requerer intervenções adicionais para garantir sua eficácia. Nesse contexto, emerge a questão da compatibilidade entre o auxílio de terceiros na participação social e a aprovação das atividades empresariais pelas partes interessadas, tema que será explorado a seguir.

3.3.2 A compatibilidade entre o auxílio de terceiros na participação social diante da aprovação das atividades da empresa pelas partes interessadas: o anseio qualificado das comunidades

A participação social efetiva, frequentemente, requer o auxílio de terceiros, especialmente quando se trata de questões técnicas complexas relacionadas às atividades empresariais. Esse apoio especializado é fundamental para garantir que as comunidades e outras partes interessadas possam tomar decisões informadas e participar, de maneira significativa, nos processos de aprovação e monitoramento das atividades empresariais.

Nesse contexto, a Licença Social para Operar (LSO) depende não apenas da aceitação direta da comunidade, mas também da percepção de legitimidade construída através de processos transparentes e bem-informados. Assim, o papel de especialistas independentes torna-se crucial para traduzir informações técnicas complexas em formatos acessíveis às partes interessadas.¹²⁸ Esse apoio técnico pode ajudar a equilibrar as assimetrias de poder e informação, contribuindo para uma participação social mais equitativa.¹²⁹

Além disso, o envolvimento de terceiros especializados também pode contribuir para a credibilidade do processo participativo. A presença de facilitadores

ismo globalizado e recursos territoriais: fronteiras da acumulação no Brasil contemporâneo. Rio de Janeiro: Lamparina, 2010. p. 179-209.

¹²⁸ GUNNINGHAM, Neil A.; KAGAN, Robert A.; THORNTON, Dorothy. Social license and environmental protection: why businesses go beyond compliance. *Law & Social Inquiry*, [s. l.], v. 29, n. 2, p. 307-341, 2004.

¹²⁹ PRNO, Jason; SLOCOMBE, D. Scott. Exploring the origins of 'social license to operate' in the mining sector: perspectives from governance and sustainability theories. *Resources Policy*, [s. l.], v. 37, n. 3, p. 346-357, set. 2012. p. 348-352.

neutros e especialistas técnicos independentes pode aumentar a confiança das partes interessadas no processo de engajamento e na validade das informações comparilhadas.¹³⁰

A Coca Cola, por exemplo, estabelece, em sua política aplicável a toda sua cadeia de valor¹³¹, que podem ser consultados terceiros independentes para avaliar a conformidade de sua atuação com os princípios da empresa, que envolvem respeito aos direitos humanos, ao meio ambiente, aos direitos trabalhistas e às normas éticas da empresa, sendo uma evidência de devida diligência empresarial.

No entanto, o papel desses terceiros deve ser cuidadosamente definido e gerenciado. A dependência excessiva de especialistas externos pode, em alguns casos, minar a autonomia e o empoderamento das comunidades locais. Portanto, o ideal é que o auxílio de terceiros seja visto como um complemento, e não um substituto, para o engajamento direto e a capacitação das partes interessadas.¹³²

Em suma, a compatibilidade entre o auxílio de terceiros na participação social e a aprovação das atividades empresariais pelas partes interessadas depende de um equilíbrio delicado. Quando bem implementado, esse apoio pode enriquecer o processo participativo, fornecendo às comunidades as ferramentas e conhecimentos necessários para uma tomada de decisão informada e uma participação efetiva na construção e manutenção da licença social para operar.

Como exposto, a análise da compatibilidade entre o auxílio de terceiros na participação social e a aprovação das atividades empresariais por especialistas na LSO revela a importância de uma abordagem multifacetada na construção do diálogo entre empresas e comunidades. Essa perspectiva se estende, naturalmente, para a consideração dos níveis de participação social e sua relação

com os estágios de desenvolvimento da LSO, tema que será explorado a seguir.

A compreensão dessa correlação é fundamental para avaliar como o engajamento progressivo das partes interessadas pode influenciar a aceitação e legitimidade das operações empresariais ao longo do tempo.

3.3.3 A atuação análoga ao direito de veto na participação social perante a identificação psicológica das atividades da empresa pelas partes interessadas: o anseio compulsório das comunidades

A participação social nas atividades empresariais tem se mostrado um elemento crucial para a construção de uma relação simbiótica entre as organizações e as comunidades afetadas por suas operações. Nesse contexto, emerge um fenômeno singular: a atuação análoga ao direito de veto, fundamentada para a identificação psicológica das atividades da empresa pelas partes interessadas, com destaque para o anseio compulsório das comunidades.¹³³

Esse mecanismo de participação social, que se assemelha ao direito de veto tradicionalmente observado em esferas políticas e corporativas, manifesta-se de maneira peculiar no âmbito da interação empresa-comunidade. A base desse fenômeno reside na profunda conexão psicológica que as partes interessadas, especialmente as comunidades locais, desenvolvem em relação às atividades empresariais que impactam, diretamente, seu cotidiano e seu futuro.¹³⁴

A identificação psicológica desempenha um papel fundamental na forma como as partes interessadas percebem e reagem às atividades empresariais. Essa percepção, por sua vez, influencia, significativamente, o nível de engajamento e a natureza da participação social.¹³⁵ Nesse contexto, a atuação análoga ao direito de veto surge como uma manifestação concreta desse engajamento, refletindo o desejo das comunidades de

¹³⁰ DARE, Melanie; SCHIRMER, Jacki; VANCLAY, Frank. Community engagement and social licence to operate. *Impact Assessment and Project Appraisal*, [s. l.], v. 32, n. 3, p. 188-197, 2014. p. 192.

¹³¹ THE COCA-COLA COMPANY. *Princípios de conduta para o fornecedor*. Atlanta: The Coca-Cola Company, 2011. Disponível em: <https://www.coca-colacompany.com/content/dam/company/us/en/policies/pdf/human-workplace-rights/supplier-guiding-principles/sgp-brochure-pt.pdf>. Acesso em: 28 fev. 2025. p. 2.

¹³² PARSONS, Richard; LACEY, Justine; MOFFAT, Kieren. Maintaining legitimacy of a contested practice: how the minerals industry understands its 'social licence to operate'. *Resources Policy*, [s. l.], v. 41, p. 83-90, set. 2014.

¹³³ JIJELAVA, David; VANCLAY, Frank. Legitimacy, credibility and trust as the key components of a social licence to operate: an analysis of BP's projects in Georgia. *Journal of Cleaner Production*, [s. l.], v. 140, pt. 3, p. 1077-1086, 2017.

¹³⁴ DARE, Melanie; SCHIRMER, Jacki; VANCLAY, Frank. Community engagement and social licence to operate. *Impact Assessment and Project Appraisal*, [s. l.], v. 32, n. 3, p. 188-197, 2014.

¹³⁵ MOFFAT, Kieren; ZHANG, Airong. The paths to social licence to operate: an integrative model explaining community acceptance of mining. *Resources Policy*, [s. l.], v. 39, p. 61-70, 2014.

exercer um controle mais direto sobre as decisões que impactam seu ambiente e modo de vida.

O conceito de LSO está intrinsecamente ligado à aceitação e aprovação contínua de um projeto ou presença corporativa por parte da comunidade local e outras partes interessadas.¹³⁶ A inclusão dos anseios dessas partes no processo decisório, por meio de mecanismos que se assemelham ao direito de veto, contribui para a construção e a manutenção dessa licença social, promovendo uma relação mais equilibrada e mutuamente benéfica entre empresa e comunidade.

No entanto, a implementação efetiva desse modelo de participação enfrenta desafios significativos. As empresas podem resistir à ideia de conceder um poder tão substancial às comunidades, temendo perda de controle ou atrasos em seus projetos. Por outro lado, as comunidades podem carecer da expertise técnica necessária para avaliar plenamente os impactos de certas decisões.¹³⁷ Superar esses obstáculos requer um compromisso mútuo com o diálogo, a transparência e a construção de capacidades.

A experiência internacional, particularmente em países como Canadá e Austrália, onde o conceito de LSO tem sido amplamente discutido e aplicado, oferece *insights* valiosos sobre como equilibrar os interesses corporativos com as necessidades e expectativas comunitárias.¹³⁸ Essas experiências sugerem que, quando bem implementada, a participação social empoderada pode levar a resultados mais sustentáveis e mutuamente benéficos.

Em conclusão, a atuação análoga ao direito de veto na participação social, fundamentada na identificação psicológica das atividades empresariais pelas partes interessadas, representa um avanço significativo na busca por uma relação mais equitativa entre empresas e comunidades.¹³⁹

¹³⁶ MOFFAT, Kieren; ZHANG, Airong. The paths to social licence to operate: an integrative model explaining community acceptance of mining. *Resources Policy*, [s. l.], v. 39, p. 61-70, 2014.

¹³⁷ THOMSON, Ian; BOUTILIER, Robert G. Social license to operate. In: DARLING, Peter (ed.). *SME mining engineering handbook*. 3. ed. Englewood: SME, 2011. v. 1. cap. 17.2, p. 1779-1796.

¹³⁸ PRNO, Jason; SLOCOMBE, D. Scott. Exploring the origins of 'social license to operate' in the mining sector: perspectives from governance and sustainability theories. *Resources Policy*, [s. l.], v. 37, n. 3, p. 346-357, set. 2012.

¹³⁹ PARSONS, Richard; LACEY, Justine; MOFFAT, Kieren. Maintaining legitimacy of a contested practice: how the minerals industry understands its 'social licence to operate'. *Resources Policy*, v. 41, p. 83-90, 2014.

Esse modelo de participação, ao atender ao anseio compulsório das comunidades por uma voz mais ativa nos processos decisórios, não apenas fortalece a LSO, mas também contribui para o desenvolvimento de projetos mais alinhados com as necessidades e valores locais, promovendo, assim, uma forma mais sustentável e socialmente responsável de conduzir negócios.

4 Considerações finais

O presente trabalho teve o objetivo de verificar a viabilidade para considerar a existência de uma interseção dos conceitos jurídicos Participação Social (PS) e Licença Social para Operar (LSO).

No primeiro objetivo deste trabalho, buscou-se analisar a existência de interseção entre os conceitos jurídicos de participação social e LSO, conforme definido na tipologia, considerando a presença ou ausência de mecanismos legais de atuação. Esse resultado pode ser verificado nos itens 2 deste artigo, que destaca a interseção tipológica entre os conceitos jurídicos de participação social e LSO definida na complementaridade dos institutos e na independência de atuação dos institutos. Afinal, enquanto a Participação Social Extralegal destaca a atuação contínua e permanente da própria comunidade na busca de uma participação social frente ao empreendimento, a LSO Extralegal Plena destaca a atuação da empresa de forma a garantir uma aceitação/aprovação contínua e permanente da comunidade. Assim, os conceitos jurídicos são compatíveis entre si, representando conceitos que unem em prol de uma finalidade comum: a garantia de inclusão dos anseios da comunidade do entorno, com respeito aos seus direitos humanos diante do empreendimento.

No segundo objetivo, buscou-se estabelecer como a interseção dos conceitos jurídicos de participação social e LSO resulta na percepção de níveis para a construção da análise cruzada dos conceitos jurídicos. Esse resultado pode ser verificado no item 3, que estabelece a interseção dos conceitos jurídicos de participação social e LSO resulta na percepção de níveis para a construção da análise cruzada dos conceitos jurídicos.

Nesse item, demonstra-se como a interação desses dois conceitos cria um *framework* multidimensional para avaliar a legitimidade e aceitação das atividades empresariais pelas comunidades afetadas. A análise revela que

essa interseção não é meramente teórica, mas tem implicações práticas significativas na forma como as empresas se relacionam com seus stakeholders e como as comunidades exercem sua influência. O estudo identifica níveis distintos de engajamento e aceitação social, que vão desde a mera tolerância até a plena identificação e apoio ativo da comunidade às atividades empresariais. Cada nível é caracterizado por diferentes graus de participação social e cumprimento dos critérios de LSO, fornecendo um espectro analítico que permite uma avaliação mais nuançada e precisa das relações empresa-comunidade.

Além disso, o item 3 explora como esses níveis se manifestam em diferentes contextos legais e culturais, destacando a natureza dinâmica e contextual da participação social e da LSO. São apresentados casos concretos que ilustram como empresas e comunidades navegam por esses níveis, adaptando suas estratégias e expectativas de acordo com as circunstâncias específicas de cada situação. A análise também aborda os desafios e oportunidades associados a cada nível de interseção entre participação social e LSO. Isso inclui a discussão sobre como as empresas podem progredir de um nível para outro, as barreiras comumente enfrentadas nesse processo, e as estratégias bem-sucedidas para superar esses obstáculos.

Por fim, no item 3, propõe-se um modelo integrado que sintetiza os achados da análise cruzada, oferecendo uma ferramenta prática para avaliar e melhorar as relações entre empresas e comunidades. Esse modelo não apenas serve como um instrumento de diagnóstico, mas também como um guia para o desenvolvimento de políticas e práticas que promovam uma participação social mais efetiva e uma LSO mais robusta. Assim, o item 3 não apenas cumpre o objetivo proposto, mas também fornece uma base sólida para futuras pesquisas e aplicações práticas no campo da responsabilidade social corporativa e do engajamento comunitário.

De forma prática, a pesquisa contribui para a compreensão da LSO como mecanismo jurídico, ampliando o debate sobre governança participativa, destacando os pontos de convergência com o instituto da participação social. Além de apontar os contornos necessários para a inclusão desses institutos no dia a dia da atuação empresarial em nível internacional, principalmente quando se considera a integração entre a empresa e as comunidades (partes interessadas).

Portanto, há uma interseção dos conceitos jurídicos de Participação Social (PS) e Licença Social para Operar (LSO), destacada pela tipologia dos conceitos jurídicos de participação social e Licença Social para Operar (LSO), e, ainda, devido à existência de níveis para a construção desses conceitos jurídicos. Para uma continuidade deste trabalho, propõe-se uma pesquisa com o objetivo de analisar a existência ou não de um retrocesso na definição normativa da política pública de empresas e direitos humanos no Brasil, considerando, principalmente, a falta de efetivação de mecanismos legais, como os destacados neste artigo.

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A participação social e a licença social para operar (LSO): análise cruzada dos conceitos jurídicos

The social participation and the social license to operate (LSO): cross-analysis of legal concepts

Michelle Lucas Cardoso Balbino

Gilda Nogueira Paes Cambraia

Nayara Lima Rocha da Cruz

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INTERDISCIPLINARY APPROACHES TO BUSINESS &
HUMAN RIGHTS: AN ASSESSMENT OF THE FIELD 10+
YEARS FROM THE UNGPs

Evaluación ambiental, pueblos, comunidades indígenas y tradicionales, una propuesta hermenéutica argumentativa “en red”: estudio comparado Brasil-Chile*

Environmental evaluation, peoples, indigenous and traditional communities dialogical, argumentative hermeneutic proposal: comparative study Brazil-Chile

Juan Jorge Faundes **

Patricia Perrone Campos Mello ***

Resumen

Realizamos un estudio comparado Chile y Brasil, en relación a los derechos humanos a la identidad cultural y al medio ambiente sano, reconocidos por el Derecho Internacional, universal y regional americano. Se focaliza en la legislación doméstica y las sentencias nacionales de competencia constitucional-ambiental, especialmente, focalizadas en pueblos indígenas y tradicionales. A partir de la interconexión entre el Derecho Internacional y la normativa doméstica, nos preguntamos, comparadamente (Brasil y Chile), cuál es núcleo normativo que gobierna la protección del medio ambiente, en especial cuando se ven afectados pueblos indígenas y tradicionales. Conforme los resultados, se postula, en especial, que el derecho humano a la identidad cultural y el derecho humano al medio ambiente sano constituyen la base internacional de un marco normativo vinculante (de nivel internacional, regional y doméstico comparado) para los estados, que delimitan las medidas y proyectos, públicos y privados, con efectos en pueblos y comunidades indígenas o tradicionales. Para Chile y Brasil en particular. Se usa revisión bibliográfica, método sistémico para la revisión de las fuentes internacionales Y metodología comparada para el estudio de legislación y jurisprudencia doméstica. Más, un enfoque hermenéutico cautelar de los derechos humanos, como base para un análisis crítico de las fuentes domésticas y de las respectivas decisiones de nivel constitucional. Para desarrollar la propuesta, este trabajo se divide en: i) marco normativo internacional, propuesta hermenéutica y respectivos estándares; (ii) revisión comparada de fuentes domésticas de Brasil y Chile; iii) análisis comparado crítico de decisiones destacadas de Brasil y Chile. Seguido por conclusiones.

Palabras clave: propuesta hermenéutica argumentativa; evaluación ambiental; pueblos comunidades indígenas tradicionales; Brasil; Chile.

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Abstract

We conducted a comparative study of Chile and Brazil focusing on human rights related to cultural identity and a healthy environment, as recognized by both universal and regional international law in the Americas. This study examines domestic legislation and national constitutional-environmental court rulings, with particular attention to those affecting indigenous and traditional peoples. By exploring the interplay between international law and domestic regulations, we aim to identify the core legal framework that governs environmental protection in Brazil and Chile, especially in contexts impacting indigenous and traditional communities. Our findings suggest that the human rights to cultural identity and a healthy environment form the international foundation of a binding legal framework. This framework operates at international, regional, and national levels, guiding both public and private initiatives that affect indigenous or traditional peoples and communities, with a particular focus on Chile and Brazil. The study employs a literature review and a systemic approach to examining international sources, alongside a comparative analysis of domestic legislation and jurisprudence. A precautionary hermeneutic approach to human rights underpins the critical analysis of domestic sources and constitutional-level decisions. The work is structured as follows: i) an exploration of the international legal framework, including a hermeneutic proposal and applicable standards; ii) a comparative review of domestic sources from Brazil and Chile; iii) a critical comparative analysis of significant decisions from both countries, followed by conclusions.

Keywords: argumentative hermeneutic proposal; environmental evaluation; traditional indigenous communities; Brazil; Chile.

1 Introducción

Este trabajo realiza un estudio comparado Chile y Brasil en relación con el derecho humano a la identidad cultural y el derecho humano al medio ambiente sano, reconocidos por las fuentes del Derecho Internacional, tanto en su nivel universal, como en el regional americano. Se centra en la normativa interna y las sentencias domésticas respectivas, de competencia constitucional-

-ambiental, especialmente, las que dialogan con la jurisprudencia de la Corte Interamericana de Derechos Humanos (Corte IDH). Todo, focalizado en pueblos indígenas y tradicionales, como sujetos individuales y colectivos de estos derechos¹.

La Corte IDH ha dicho que el derecho a la identidad cultural es un marco de “interpretación transversal para concebir, respetar y garantizar el goce y ejercicio de los derechos humanos de los pueblos y comunidades indígenas protegidos por la Convención y por los ordenamientos jurídicos internos”². Asimismo, en relación al derecho humano al medio ambiente sano, plantea que “[e]n materia ambiental, la obligación de garantía incluye un deber especial de prevención, que implica tomar todas las medidas al alcance para evitar que las actividades que se lleven a cabo bajo su jurisdicción causen “daños significativos” al medio ambiente.

Así, a la luz de la jurisprudencia Interamericana, las decisiones nacionales, cuando aborden cuestiones ambientales, deben identificar, considerar y proteger de forma efectiva los elementos constitutivos de la identidad cultural de los pueblos indígenas y sus comunidades. En particular, aquellos conocidos como “intangibles culturales”, componentes de carácter cosmogónico, religioso o espiritual, propios de los modos de vida indígena y tradicional.

En este marco, el problema planteado indaga cuál es el núcleo normativo, cuáles son los principios basales, y respectivos estándares, que gobiernan la protección del medio ambiente, en especial cuando se ven afectados pueblos indígenas y tradicionales, sus comunidades e integrantes, de los países que componen el Sistema Interamericano de Derechos Humanos (SIDH), en nuestro caso Brasil y Chile³.

¹ FAUNDES, Juan Jorge. Los Pueblos Indígenas como sujetos de Derecho Internacional y ante los estados nacionales. *Revista Brasileira de Políticas Públicas*, Brasília, v. 12, n. 3. p. 617-644, 2022.

² AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*. Costa Rica, Juzgado en 12 jun. 2012. párr. 213.

³ Se sigue la idea de un diálogo judicial entre tribunales internacionales de derechos humanos y cortes nacionales, sobre la base de un núcleo normativo, un consenso mínimo, común y vinculante, de diversos niveles y alcances, en materia de derechos humanos. FAUNDES, Juan Jorge. Diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos en torno al derecho humano a la identidad cultural. *Revista de Direito Internacional*, v. 17, n. 3, p. 222-255, 2020c, p. 230. FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tri-*

Conforme el estudio, postula que el derecho humano a la identidad cultural y el derecho humano al medio ambiente sano configuran un marco normativo vinculante, de base internacional y alcance doméstico, que sintetizamos como: *principio hermenéutico precautorio e intercultural*. Así, se afirma que este marco normativo delimita la protección del medio ambiente, en particular, para pueblos y comunidades indígenas o tradicionales, para Chile y Brasil en particular.

Para la selección de sentencias, el criterio general utilizado consideró, respectivamente, solo fallos de nivel superior y competencia constitucional-ambiental, de ‘carácter emblemático’ o *leading case*, que, por una parte, abordan los mandatos constitucionales y, por otra, permiten mostrar diversos aspectos en debate. En el caso de Brasil, son 4 decisiones del Supremo Tribunal Federal (STF) y respecto de Chile son 4 decisiones de la Corte Suprema⁴. Como parámetros, en términos de contenido, se considera el derecho a las tierras indígenas, enlazado con la protección del medio ambiente. Para la priorización y elección en sí, consideramos: en el caso de Brasil, los criterios de las sistematizaciones que el mismo STF y el Conselho Nacional de Justicia (CNJ) han planteado, relevando las decisiones respectivas en la materia⁵. En Chile seguimos la selección de casos relevantes de dos estudios que han revisado la jurisprudencia superior bajo los criterios antes indicados: (i) 2009 a 2015 sobre la jurisprudencia más relevante

en materia de tierras indígenas⁶; (ii) 2009 a 2023, sobre la jurisprudencia de competencia ambiental aplicable a pueblos indígenas⁷.

Metodológicamente, se utiliza revisión bibliográfica, se estudian las fuentes internacionales en los niveles universal y regional interamericano. Se emplea metodología de derecho comparado en un sentido horizontal y nivel nacional, para el estudio de legislación y jurisprudencia doméstica. Más, un enfoque hermenéutico cautelar de los derechos humanos, como base para un análisis crítico de las fuentes domésticas y de las respectivas decisiones de nivel constitucional, adecuado a la protección de las formas de vida tradicionales e indígenas⁸. Al efecto, se sigue la propuesta hermenéutica argumentativa que se denomina: *constitucionalismo en red*. Ella se basa en la interacción del Derecho Internacional de los Derechos Humanos (internacional y regional interamericano), en relación con decisiones comparadas regionales de alcance constitucional, formulando estándares vinculantes a nivel doméstico, focalizados en el amparo de derechos fundamentales de grupos vulnerables⁹.

bunal europeo de derechos humanos. Valencia: Tirant lo Blanch. 2023, p. 94-95. FERRER MAC-GREGOR, Eduardo. Control de convencionalidad y buenas prácticas: sobre el diálogo judicial entre la Corte Interamericana de Derechos Humanos y los tribunales nacionales. In: UGARTEMENDIA, Juan Ignacio; SAIZ, Alejandro. *La jurisdicción constitucional en la tutela de los Derechos Fundamentales de la UE*. Oñati: IVAP, MPI, 2017. p. 155-174. PIZZOLO, Calogero. *Comunidad de intérpretes finales: relación entre tribunales supranacionales, constitucionales y supremos: el diálogo judicial*. Buenos Aires: ASTREA, 2017.

⁴ La primera decisión estudiada (3.1.1), “*Linconao con Palermo*” (2009), solo fue confirmada por la Corte Suprema, pero el texto examinado corresponde a la Corte de Apelaciones de Temuco. Se escogió este fallo porque fue el primero en Chile que aplicó el Convenio N°169 de la OIT y, en especial, lo aplicó constitucionalmente.

⁵ CONSELHO NACIONAL DE JUSTIÇA. *Cadernos de Jurisprudência do Supremo Tribunal Federal: Concretizando Direitos Humanos. Direitos dos Povos Indígenas*. Brasília: CNJ, 2023. p. 57-66. Disponible: https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/Cadernos_STF_Povos_Indigenas_digital.pdf. BRASIL. Supremo Tribunal Federal. *Direito ambiental*. Brasília: Secretaria de Altos Estudos, Pesquisas e Gestão da Informação: 2023. <https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/DireitoAmbiental.pdf>

⁶ Universidad Autónoma de Chile, Corte Suprema de Chile (2013). FAUNDES PEÑAFIEL, Juan Jorge; MELLO, Patricia Perrone Campos. Avaliação Ambiental e Proteção Cultural dos Povos Indígenas no Chile, à luz do Direito Internacional dos Direitos Humanos. *Revista de Estudos e Pesquisas sobre as Américas*, v. 16, n. 2, p. 60-93, 2024. DOI: 10.21057/10.21057/repamv16n2.2022.48817.

⁷ Proyecto Fondecyt Regular, N° 1170505: “Justicia e interculturalidad en la Macroregión sur de Chile. Un estudio de las transformaciones del campo jurídico y de la cultura jurídica chilena ante la emergencia del derecho a la identidad cultural”. Universidad Autónoma de Chile, Agencia Nacional de Investigación y Desarrollo (2021-2025). FAUNDES, Juan Jorge, MELLO, Patricia Perrone Campos. Propuesta hermenéutica, precautoria-ambiental-intercultural, en la evaluación ambiental de proyectos de inversión y comunidades indígenas en Chile. *Revista Chilena de Derecho y Ciencia Política*, v. 15, n. 1. p. 1-32, 2024.

⁸ Este enfoque metodológico, sin abandonar criterios propios de derecho comparado (definición de fuentes nacionales de una misma jerarquía constitucional, cortes con competencias constitucionales asimilables y respectivas sentencias de contenido materiales equivalentes), se encuadra en lo que SIEMS denomina “*other forms of comparative law*”. Indica que este enfoque “es epistemológicamente más abierto” y está asociado con estudios culturales, “bajo la prevalencia de narrativas locales”, con un énfasis en la pluralidad, intersubjetividad, experiencia, conocimiento situado, en la hermenéutica e hibridación” (traducción propia). SIEMS, Mathias. *Comparative Law (Law in context)*. 2. ed. Cambridge: Cambridge University Press, 2018. p. 113-115. FAUNDES, Juan Jorge; BONNIEC, Fabien Le. Comparando la cultura jurídica desde el derecho a la identidad cultural en Brasil y Chile. *Revista de Direito Internacional*, v. 17, n. 1, p. 144-179, 2020, p. 151-152.

⁹ FAUNDES, Juan Jorge; MELLO, Patricia. Constitucionalismo en red: un método hermenéutico para la protección de los derechos fundamentales de grupos vulnerables y comunidades locales frente a

Con los fines indicados, este trabajo se desarrolla en cuatro partes: i) marco normativo internacional en sus niveles universal y regional americano para el derecho humano a la identidad cultural y el derecho humano al medio ambiente sano, incluyendo la jurisprudencia interamericana respectiva, más una propuesta hermenéutica y respectivos estándares que lo sistematizan, para la aplicación de dicho marco internacional en el ámbito doméstico; ii) revisión comparada de fuentes domésticas de Brasil y Chile en la materia; iii) estudio comparado crítico de decisiones destacadas seleccionadas de Brasil y Chile. Más un apartado de conclusiones.

2 El derecho humano a la identidad cultural y el derecho humano al medio ambiente sano en el Derecho Internacional

2.1 El derecho humano a la identidad cultural

El derecho humano a la identidad cultural ha sido reconocido a los pueblos indígenas y a los pueblos tradicionales afrodescendientes, aunque con alcances distintos asociados a los respectivos contextos regionales y nacionales. En el nivel universal, se basa en instrumentos internacionales como la Declaración Universal de Derechos Humanos (artículo 22), el Pacto de Derechos Civiles y Políticos (artículo 27), la **Convención para la salvaguardia del patrimonio cultural inmaterial (2003)** y la Declaración Universal de la UNESCO sobre la Identidad Cultural (2001). Respecto de instrumentos especializados, el Convenio N°169 de la OIT sobre pueblos indígenas y tribales en países independientes de 1989 (Convenio 169), en particular, reconoce el derecho de estos pueblos y sus integrantes al respeto y promoción de su cultura, sus valores espirituales y prácticas culturales, “costumbres”, “derecho consuetudinario”, “instituciones propias” y características socioculturales (arts. 2, 4, 5, 8 y 9)¹⁰.

proyectos de inversión. In: CÁNDANO, Mabel; DÍAZ, Regina (ed.). *Igualdad y no discriminación: Protección jurídica de minorías y grupos sujetos a vulnerabilidad*. Valencia: Tirant lo Blanch, 2022. p. 168-200. p. 1-2;8

¹⁰ FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia:

En el contexto regional, la Corte Interamericana de Derechos Humanos (Corte IDH) ha reconocido y desarrollado evolutivamente este derecho en su jurisprudencia¹¹. Afirmo que para la protección de los modos de vida de los pueblos indígenas “los Estados deben tomar en consideración las características propias que diferencian a los miembros de los pueblos indígenas de la población en general y que conforman su identidad cultural”¹². Destaca la “significación especial [que tiene] la propiedad comunal de las tierras ancestrales para los pueblos indígenas, inclusive para preservar su identidad cultural y transmitirla a las generaciones futuras”¹³. Por ello, que al vulnerarse los derechos ancestrales de los pueblos indígenas sobre sus territorios “se podría estar afectando otros derechos básicos, como el derecho a la identidad cultural y la supervivencia misma de las comunidades indígenas y sus miembros”; luego, para la Corte “toda denegación al goce o ejercicio de los derechos territoriales acarrea... el peligro de perder o sufrir daños irreparables en su vida e identidad y en el patrimonio cultural...”¹⁴.

La Corte IDH, entiende el derecho humano a la identidad cultural como un derecho de todas las personas y grupos, conforme el derecho a participar en la vida cultural, contenido en el artículo 26 de la Convención

Tirant lo Blanch, 2023. p. 24, 55-92.

¹¹ Entre otros v.: Corte IDH, *Comunidad (Sumo) Avas Tigni Vs. Nicaragua*, 31.8.2001; Corte IDH, *Caso Comunidad Indígena Yakye Axa vs. Paraguay*, 17.6.2005 (Fondo) y Corte IDH, *Caso Comunidad Indígena Yakye Axa vs. Paraguay*, 6.2.2006 (Interpretación); Corte IDH, *Pueblo indígena Kichwa de Sarayaku vs. Ecuador*, 27.6.2012; Corte IDH, *Caso Norin Catrimán y otros (dirigentes, miembros y activista del pueblo indígena mapuche) vs. Chile*, 29.5.2014; Corte IDH, *Caso Pueblo Indígena Xucuru y sus miembros vs. Brasil* 5.2.2018; Corte IDH, *Caso comunidades indígenas miembros de la Asociación Lhaka Honhat (nuestra tierra) vs. Argentina*, 6.2.2020. Para una revisión detallada de las sentencias de la Corte IDH sobre el derecho humano a la identidad cultural, FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia: Tirant lo Blanch, 2023. p. 193-243.

¹² AMÉRICAS. Corte Interamericana de Derechos Humanos. (Fondo). *Comunidad indígena Yakye Axa vs. Paraguay*. Costa Rica, juzgado en 17 jun. 2005. párr. 51.

¹³ AMÉRICAS. Corte Interamericana de Derechos Humanos. (Interpretación). *Comunidad indígena Yakye Axa vs. Paraguay*. Costa Rica, juzgado en 6 fev. 2006. párr. 124, supra párr. 51.

¹⁴ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Comunidad indígena Yakye Axa vs. Paraguay*. Costa Rica, juzgado en 17 jun. 2005. párr. 51.

AMÉRICAS. Corte Interamericana de Derechos Humanos. (Interpretación). *Comunidad indígena Yakye Axa vs. Paraguay*. Costa Rica, juzgado en 6 fev. 2006. párr. 147, 222.

Americana de Derechos Humanos de 1969 (CADH)¹⁵. Y, en especial, lo afirma como un derecho individual y colectivo, de que gozan: pueblos y comunidades indígenas; pueblos y comunidades tradicionales (como los afrodescendientes); y sus respectivos integrantes¹⁶.

Procesalmente, la CADH (artículos 8 y 25) y el Convenio 169 (artículo 12), aseguran el derecho de “acceso a la justicia” y la protección judicial, mediante un “procedimiento rápido, sencillo, y eficaz”, en cualquier ámbito de conocimiento judicial¹⁷. Se trata de un estándar de “efectividad” (resultado) que implica: remediar en concreto la situación de vulneración sometida a conocimiento de la autoridad (en especial la judicial)¹⁸; que solo son “efectivos” los recursos que logran adecuarse a las circunstancias particulares del caso con potenciales efectos en comunidades indígenas (de lo contrario resultarían “ilusorios”)¹⁹; que no basta el acceso formal al órgano o tribunal, sino que se requiere “ser oído”, poder presentar la defensa o acción con todos sus elementos, incluido el contexto cultural propio. Entonces, poder acceder a todas las herramientas procesales y probatorias culturalmente pertinentes al caso (uso lenguas indígenas en cualquier gestión judicial y a disponer de intérpretes u otros medios adecuados al efecto, junto a pericias antropológicas o socio culturales)²⁰.

¹⁵ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso comunidades indígenas miembros de la asociación Lhaka Honhat (nuestra tierra) vs. Argentina*. Costa Rica, juzgado en 6 feb. 2020, párr. 231 (Nota 233).

¹⁶ FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia: Tirant lo Blanch, 2023. p. 76. AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*. Costa Rica, juzgado en 27 jun. 2012. par. 213.

¹⁷ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Claude Reyes y otros vs. Chile*. Costa Rica, juzgado en 19 set. 2006. párr. 116; AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Tribunal Constitucional vs. Perú*. Costa Rica, juzgado en 31 jan. 2001. párr. 69. CA Temuco, Rol 1773-2008, 16.9.2009 y CS, Rol 7287-2009, 30.11.2009. AMÉRICAS. Corte Interamericana de Derechos Humanos. *OC-9/87, Garantías judiciales en estados de emergencia (arts. 27.2, 25 y 8 CADH)*. Costa Rica, juzgado en 6 out. 1987. párr. 28.

¹⁸ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Bámaca Velásquez vs. Guatemala*. Costa Rica, juzgado en 25 nov. 2000. párr. 191.

¹⁹ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso “Cinco Pensionistas” vs. Perú*. Costa Rica, juzgado en 28 feb. 2003. párr. 126.

²⁰ FAUNDES, Juan Jorge; MELLO, Patricia Perrone Campos; ARAYA, Valentina. Peritaje antropológico, evaluación ambiental y pueblos indígenas. *CUHSO*, v. 33, n. 1, 2024. AMÉRICAS. Corte Interamericana de Derechos Humanos. *El hábeas corpus bajo suspensión de garantías (arts. 27.2, 25.1 y 7.6 CADH)*. Costa Rica, juzgado en 1987.

2.2 El derecho humano al medio ambiente sano y los pueblos indígenas, fuentes y alcances normativos

El derecho a un medio ambiente sano responde al desarrollo progresivo de diversos instrumentos de Derecho Internacional, tales como: la Declaración de Estocolmo sobre el Medio Ambiente Humano (1972), la Carta de la Naturaleza (1982), la Declaración de Río sobre Medio Ambiente y Desarrollo (1992), el Convenio sobre la Diversidad Biológica (1992), la Declaración de Johannesburgo sobre el Desarrollo (2002); el Plan para la Implementación de las Decisiones de la Cumbre Mundial sobre el Desarrollo (2002) y la Agenda 2030 para el Desarrollo Sostenible: Transformar Nuestro Mundo (2015). También son relevantes los instrumentos de la Organización de las Naciones Unidas que buscan enfrentar los desafíos derivados del cambio climático: la Convención Marco sobre el Cambio Climático (1992), el Protocolo de Kioto (1997) y el Acuerdo de París (2015).

La Asamblea General de la ONU, reconoció el derecho humano a un medio ambiente sano el 26 de julio de 2022 por resolución adoptada por unanimidad. Regionalmente, el Protocolo de San Salvador (1988) afirma el derecho de toda persona a vivir en un ambiente sano (artículo 11), en armonía con la CADH que obliga a los estados a implementar progresivamente los derechos sociales, económicos y culturales (artículo 26) y la Carta de la Organización de los Estados Americanos (arts. 30, 31, 33 y 34).

El Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe –*Acuerdo de Escazú*²¹, busca contribuir “a la protección del derecho de cada persona, de las generaciones presentes y futuras, a vivir en un medio ambiente sano y al desarrollo sostenible”. Para ello, entre otros, establece derechos de acceso y participación (artículos 1 y 4), que deben considerar las necesidades propias de los diferentes grupos, tales como los pueblos indígenas y comunidades tribales²².

párr. 32. AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Barbani Duarte y otros vs. Uruguay*. Costa Rica, juzgado en 13 out. 2011. párr. 203.

²¹ Adoptado en Escazú, Costa Rica, el 4 de marzo de 2018. Entró en vigencia el 22 de abril de 2021. Chile es Estado parte desde el 13 de junio de 2022.

²² BARROSO, Luis; MELLO, Patricia Perrone. Los efectos transformadores del Acuerdo de Escazú. Comentario al Acuerdo de

Regionalmente, la Corte IDH, en un proceso evolutivo más reciente, ha avanzado en el desarrollo progresivo del derecho humano al medio ambiente sano: primero lo declara y desarrolla sus estándares en la Opinión Consultiva 23/17, luego en *Lhaka Honbat vs. Argentina* (2020) lo reconoce por primera vez de forma vinculante; con *Baraona Bray vs. Chile* (2022) lo reafirma y vincula a los derechos de acceso del Acuerdo de Escazú y en *Habitantes de la Oroya vs. Perú* (2023) avanza en los estándares, inclusivos de los principios ambientales preventivo y precautorio, dando valor vinculante a los Principios Rectores en materia de derechos humanos y empresas de la ONU²³. La Corte IDH lo funda en el deber de supervisión y debida diligencia del Estado, en este caso reforzado por los principios preventivo y precautorio ambiental que lo obligan a adoptar medidas efectivas (oportunas), jurídicas, políticas o administrativas, para prevenir, investigar y, eventualmente, sancionar violaciones al derecho, cometidas por estas entidades²⁴.

Por último, para la Corte, también se vincula el derecho humano al medio ambiente sano con la Naturaleza

Escazú. In: JIMÉNEZ, Henry, ÁVILA, Luisa, FERRER, Eduardo (ed.). *Sobre derechos ambientales en América Latina y el Caribe*. Berlín-Bogotá: Konrad-Adenauer-Stiftung, 2023. p. 3-26.

²³ AMÉRICAS. Corte Interamericana de Derechos Humanos. “Caso Habitantes de la Oroya Vs. Perú. Costa Rica, juzgado en 27 nov. 2023. párrs. 119, 136-138. En doctrina, AGUILAR, Gonzalo. El derecho humano a un medio ambiente sano, el acceso a la información ambiental y el ius commune. In: JIMÉNEZ, Henry; LUNA, Marisol (coord.). *Crisis climática, transición energética y derechos humanos*. Bogotá: Fundación Heinrich Böll; Heidelberg Center para América Latina, 2020. p. 69-95. BENZ, Eleanor; KAHL Verena. El caso Lhaka Honhat: la extensión de la justiciabilidad directa de los DESCA y la esperanza incumplida de la concreción del derecho a un medioambiente sano. In: FERRER MAC-GREGOR, Eduardo; MORALES, Mariela; FLORES, Rogelio (coord.). *El caso Lhaka Honbat vs. Argentina y las tendencias de su interamericanización*. México: Instituto Max Planck de Derecho Público Comparado y Derecho Internacional Público; Instituto de Estudios Constitucionales del Estado de Querétaro Instituto de Investigaciones Jurídicas; Universidad Nacional Autónoma de México, 2021. p. 237-273. La decisión, asimismo, aborda interdependientemente otros derechos como el derecho a la alimentación adecuada, FEITOSA, Maria Luiza Pereira de Alencar Mayer; VENTURA, Victor A. M. F.; CORRÊA, Eduardo Pitrez de Aguiar. A dimensão internacional do Direito Humano à Alimentação Adequada e a possibilidade de responsabilização do Estado brasileiro: o retorno do Brasil ao mapa mundial da fome. *Revista de Direito Internacional*, v. 21, n. 2, p. 70-95, 2024.

²⁴ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Habitantes de la Oroya Vs. Perú. Costa Rica, juzgado en 27 nov. 2023. párrs. 1090 1260 155-156*. Para otros enfoques convergentes en la justificación de los deberes de las empresas transnacionales, GONÇALVES, Luísa Cortat Simonetti; PEDRA, Adriano Sant’Ana. Deveres internacionais e obrigações socioambientais para empresas multi e transnacionais. *Revista de Direito Internacional*, v. 17, n. 3, p. 519-537, 2020.

como sujeto de derechos. En tanto la considera, no sólo por su “utilidad” o por los efectos ambientales sobre los seres humanos, sino “por su importancia para otros organismos vivos”, como “bienes en sí mismos”, por su valor intrínseco, y no porque sean instrumentales a la protección de los intereses humanos.

2.3 Propuesta normativa hermenéutica precautoria ambiental intercultural para la evaluación ambiental

Hemos anunciado la formulación de una propuesta normativa hermenéutica *precautoria-ambiental-intercultural* para la evaluación ambiental. Para ello, en primer término, se emplea un método hermenéutico argumentativo que llamamos *constitucionalismo en red*²⁵. Se basa en la interacción Derecho Internacional de los Derechos Humanos (internacional y regional interamericano), en relación con decisiones comparadas regionales de alcance constitucional. Se trata de una estrategia hermenéutica de defensa de comunidades locales, en especial indígenas y tradicionales, frente a proyectos de inversión en América Latina.

Este método busca que las cortes domésticas con competencia constitucional alcancen un entendimiento hermenéutico compartido sobre derechos y problemas también comunes, enfrentados por los estados latinoamericanos. Esta comprensión interpretativa, contempla que el alcance del significado de los derechos fundamentales sea construido dialógicamente, tanto con las fuentes del Derecho Internacional de los derechos humanos, como con las decisiones de los tribunales internacionales y de las cortes de competencia constitucional de la Región. Se trata de avanzar en la integración de las decisiones domésticas de alcance constitucional, a la luz –recíprocamente– de los avances constitucionales de otros tribunales con competencia constitucional, con los que se comparte la obligación de respetar unas mismas fuentes internacionales de derechos humanos, valores y principios constitucionales.

²⁵ FAUNDES, Juan Jorge; MELLO, Patricia. Constitucionalismo en red: un método hermenéutico para la protección de los derechos fundamentales de grupos vulnerables y comunidades locales frente a proyectos de inversión. In: CÁNDANO, Mabel; DÍAZ, Regina (ed.). *Igualdad y no discriminación*. Protección jurídica de minorías y grupos sujetos a vulnerabilidad. Valencia: Tirant lo Blanch, 2022. p. 168-200. p. 1-2, 8

Así, en base a este enfoque se articulan las fuentes internacionales, regionales y constitucionales domésticas, para formular estándares vinculantes para los estados, focalizados en la protección de los derechos fundamentales de los grupos y comunidades indicados.

En segundo lugar, a la luz de las fuentes estudiadas en el epígrafe precedente, se plantean los siguientes estándares que dotan de contenido a la propuesta hermenéutica indicada.

2.3.1 El derecho humano a la identidad cultural²⁶

Tiene un contenido espiritual, inmaterial y religioso que es la base de la continuidad de su cosmovisión propia, ligado a los modos de vida tradicional²⁷;

I Posee una dimensión colectiva, vinculada al derecho a la vida de estos pueblos, por ello la protección de sus tierras, territorios y recursos naturales, se afirma como esencial para asegurar su supervivencia física y cultural²⁸;

II El Estado debe asegurar la participación efectiva de los pueblos indígenas en la decisión sobre los planes de desarrollo, inversión, exploración o extracción llevados a cabo en su respectivo territorio, mediante consultas con los pueblos interesados²⁹;

²⁶ AMÉRICAS. Corte Interamericana de Derechos Humanos. Bases del derecho en las obligaciones de respeto de los derechos y adecuación normativa, respectivamente, contenidas en los artículos 1.1. 2 de la CADH, que interpreta evolutivamente (artículo 29.b CADH), todo, en relación con los derechos: a la vida (artículo 4.1 CADH), a la integridad personal (artículo 5), a la propiedad, a los territorios, a la subsistencia (artículo 21 CADH), a la igualdad y no discriminación (artículo 24 CADH) y los DESC (artículo 26 CADH). FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia: Tirant lo Blanch, 2023. p. 76-77. FAUNDES, Juan Jorge; CARMONA, Cristóbal; SILVA, Pedro Pablo. La Corte Interamericana de Derechos Humanos. Hermenéutica del derecho al medio ambiente sano, a la identidad cultural y a la consulta, a la luz de la sentencia “Lhaka Honhat (nuestra tierra) vs. Argentina (2020)”. *Revista Brasileira de Políticas Públicas*, v. 10, n. 2, p. 643-674, 2020.

²⁷ AMÉRICAS. Corte Interamericana de Derechos Humanos. (Fondo). *Comunidad indígena Yakey Axá vs. Paraguay. Costa Rica, juzgado en* 17 jun. 2005. párr.135.

²⁸ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*. Costa Rica, juzgado en 27 jun. 2012. párr. 40.

²⁹ FAUNDES, Juan Jorge; CARMONA, Cristóbal; SILVA, Pedro Pablo. La Corte Interamericana de Derechos Humanos. Hermenéutica del derecho al medio ambiente sano, a la identidad cultural y a la consulta, a la luz de la sentencia “Lhaka Honhat (nuestra tierra) vs. Argentina (2020)”. *Revista Brasileira de Políticas Públicas*, v. 10, n. 2, 2020, p. 643-674. p. 649; CARMONA, Cristóbal. La aplicación del derecho a consulta del Convenio 169 de la OIT en Chile: hacia una

III El Estado tiene un deber de diligencia reforzado que lo obliga a salvaguardar la supervivencia de tales pueblos mediante medidas efectivas para proteger el derecho humano a la identidad cultural, en todas sus dimensiones³⁰;

IV. El Estado debe realizar estudios de impacto socioambiental, previos a la implementación de los proyectos de inversión que pueden afectarlos, incluyendo la evaluación de los efectos de carácter cultural o intangible³¹.

V. Los derechos de los pueblos indígenas deben ser entendidos a la luz de la cosmovisión indígena, de sus costumbres y culturas, especialmente en su dimensión intangible o inmaterial³². Luego, los órganos administrativos y judiciales incorporar un enfoque interpretativo que nosotros denominamos *filtro hermenéutico intercultural*³³.

definición de su contenido sustantivo: afectación e instituciones representativas. In: MIRANDA, Ricardo; CARMONA, Cristóbal (ed.). *Testis de maestría sobre Pueblos Indígenas*. Buenos Aires: U. Nacional de San Martín, CIEP, 2013. v. 3. p. 15-139, p. 301-334. AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso comunidades indígenas miembros de la Asociación Lhaka Honhat (nuestra tierra) vs. Argentina*. Costa Rica, juzgado en 6 feb. 2020. p. 169-185; AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Pueblo Saramaka vs. Surinam*. Costa Rica, juzgado en 28 nov. 2007. párrs. 121;122;133.

³⁰ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Pueblo indígena Xucuru y sus miembros vs. Brasil*. Costa Rica. párrs. 188, 93-194.

³¹ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Pueblo Saramaka vs. Surinam*. Costa Rica, juzgado en 28 nov, 2007. párrs. 129; AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*. Costa Rica, juzgado en 27 jun. 2012. par. 176.

³² En este sentido, sostiene la Corte que el derecho a la identidad cultural “[es] vía de interpretación transversal para concebir, respetar y garantizar el goce y ejercicio de los derechos humanos de los pueblos y comunidades indígenas protegidos por la Convención y por los ordenamientos jurídicos internos”. AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso del Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*. Costa Rica, juzgado en 27 jun 2012. párr. 213; también v.: AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Norín Catrimán y otros (dirigentes, miembros y activista del pueblo indígena mapuche) vs. Chile*. Costa Rica, juzgado en 29 may 2014. párr. 357.

³³ FAUNDES, Juan Jorge. El derecho fundamental a la identidad cultural de los pueblos indígenas: un derecho matriz y filtro hermenéutico para las constituciones de América Latina: la justificación. *Revista Brasileira Políticas Públicas*, v. 9, n. 2, 2019, p. 513-535. FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia: Tirant lo Blanch, 2023. p. 228-234; MELLO, P. P. C.; FAUNDES, J. J. Constitucionalismo em rede: o direito à identidade cultural dos povos indígenas como filtro hermenéutico para tutela da tradicionalidade da ocupação da terra. In: ROSSITO, F. D. et al. (coord.). *Quilombolas e outros povos tradicionais*. Curitiba: Centro de Pesquisa e Extensão em Direito Socioambiental (CEPEDIS), 2019. p. 317-339. MELLO, Patrícia Perrone Campos; ACCIOLY, Clara Lacerda. El derecho fundamental a la identidad cultural y el constitucionalismo en red en la jurisprudencia del Supremo Tribunal Federal de Brasil. In: FAUNDES, Juan Jorge; RAMÍREZ, Silvina (ed.). *Derecho funda-*

2.3.2 El derecho humano a un medioambiente sano

- Es un derecho que se desprende del derecho a la vida y a la integridad personal;
- Constituye un derecho autónomo a otros derechos conforme el artículo 11 del Protocolo de San Salvador (porque su protección afecta a todos los elementos que componen el medio ambiente, “tales como bosques, mares, ríos y otros, como bienes jurídicos en sí mismos, aunque no se tenga certeza o evidencia de riesgo para las personas individuales”³⁴).
- Se encuentra interconectado con los derechos humanos: al agua y saneamiento, a la alimentación adecuada, a la identidad cultural, a la vida (como vida colectiva y a la vida digna) y a la integridad personal. Lo cual es más relevante aún en el caso de ciertos grupos especialmente vulnerables al daño ambiental, como los pueblos indígenas y tradicionales³⁵.
- Contiene el Principio de prevención, como deber de diligencia que impone acciones efectivas para evitar actividades que causen “daños significativos” al medioambiente³⁶, tales como: (i) requerir y aprobar estudios de impacto ambiental; (ii) regular, supervisar y fiscalizar actividades capaces de producir este daño; (iii) establecer planes de contingencia y mitigación, si ocurriere³⁷.
- Contiene el Principio de prevención, a su vez, involucra el Principio de equidad intergeneracional que exige generar políticas ambientales para asegurar “condiciones de estabilidad ambiental que permitan a las generaciones venideras similares [...]

mental a la identidad cultural, abordajes plurales desde América Latina. Santiago: RIL, Universidad Autónoma de Chile, 2020. p. 197-230.

³⁴ AMÉRICAS. Corte Interamericana de Derechos Humanos. OC-23/17, *Opinión Consultiva OC-23/17*. Solicitada por la República de Colombia sobre medio ambiente y derechos humanos. Costa Rica, juzgado en 15 nov. 2017. p. 62-63.

³⁵ AMÉRICAS. Corte Interamericana de Derechos Humanos. OC-23/17, *Opinión Consultiva OC-23/17*. Solicitada por la República de Colombia sobre medio ambiente y derechos humanos. Costa Rica, juzgado en 15 nov. 2017. p. 64; AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso comunidades indígenas miembros de la Asociación Lhaka Honhat (nuestra tierra) vs. Argentina*. Costa Rica, juzgado en 6 feb. 2020. párr. 209;244;245;251;252. AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Habitantes de la Oroya Vs. Perú*. Costa Rica, juzgado en 27 nov. 2023. párrs. 113, 119, 136-138. FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia: Tirant lo Blanch, 2023. p. 225-229.

³⁶ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Habitantes de la Oroya Vs. Perú*. Costa Rica, juzgado en 27 nov. 2023. párr. 126.

³⁷ AMÉRICAS. Corte Interamericana de Derechos Humanos. OC-23/17, p. 62-63.

oportunidades de desarrollo y de viabilidad de la vida humana”³⁸.

– Comprende el Principio precautorio, que obliga a adoptar todas las medidas de prevención de los efectos ambientales, dado su solo riesgo, más allá de que pueda no existir certeza científica de su ocurrencia³⁹;

– Supone un deber general de respeto que alcanza las empresas, públicas y privadas, resultando responsables frente a su violación⁴⁰.

– Dispone de los derechos procesales de: (i) acceso a la información; (ii) participación en los procesos ambientales; (iii) acceso a la justicia mediante recursos y acciones judiciales sencillas y eficaces⁴¹.

En síntesis, dichos estándares se sostienen, por una parte, en una matriz normativa dada por el principio *precautorio* ambiental. Por otra, respecto de los pueblos indígenas, en especial relación a los componentes intangibles culturales de sus formas de vida, como mandato interpretativo que obliga a los órganos del Estado (administrativos y judiciales) a interpretar las normas, conducir los procesos y, en especial, realizar la evaluación ambiental en relación a comunidades indígenas, incorporando los referentes culturales de los pueblos indígenas.

En consecuencia, el marco normativo descrito configura un imperativo que denominamos *principio precautorio ambiental intercultural*, en favor del resguardo de la naturaleza, en armonía con los derechos de los pueblos indígenas, sus comunidades e integrantes, cuando demandan la protección de sus modos de vida tradicionales.

Respecto de la evaluación ambiental y la consulta indígena, este principio exige una comprensión de la *susceptibilidad de afectación*, como un requisito precautorio de efectos probables, que no exige acreditaciones previas y ciertas. Como presupuesto en favor de los pueblos indígenas, para que den lugar a la consulta indígena y por medio de ese proceso se exponga, por los poten-

³⁸ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Habitantes de la Oroya Vs. Perú*. Costa Rica, juzgado en 27 nov. 2023. párr. 127.

³⁹ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Habitantes de la Oroya Vs. Perú*. Costa Rica, juzgado en 27 nov. 2023. párr. 127.

⁴⁰ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso Habitantes de la Oroya Vs. Perú*. Costa Rica, juzgado en 27 nov. 2023. párrs. 1090;1260, p. 155-156.

⁴¹ AMÉRICAS. Corte Interamericana de Derechos Humanos. *Caso comunidades indígenas miembros de la Asociación Lhaka Honhat (nuestra tierra) vs. Argentina*. Costa Rica, juzgado en 6 feb. 2020. párrs. 208, 209.

cialmente afectados, cómo sus formas de vida, culturas, religiosidad, etc. se verían afectados, ante los proyectos sometidos a evaluación ambiental.

Este *principio precautorio ambiental intercultural* obliga en los procesos de evaluación ambiental relativos a proyectos de inversión con efectos en comunidades indígenas:

(i) **preventivamente, si fuere del caso, a optar por la medida de menor impacto en el medio ambiente, incluidas las formas de vida de los grupos indígenas o tradicionales potencialmente afectados;** (ii) **precautoriamente, frente a un riesgo grave e irreversible de daño ambiental, aún a falta de evidencia o certeza técnico-científica, a evitar tal afectación, asegurando, mediante medidas efectivas, las formas de vida tradicionales: sus intangibles culturales.**

3 Revisión comparada de fuentes domésticas Brasil y Chile

3.1 Ordenamiento jurídico Brasileño

El artículo 5, §2, de la Constitución de la República Federativa de Brasil de 1988 (CF) introduce al ordenamiento jurídico brasileño, con rango supralegal e infra constitucional, las normas previstas en los tratados internacionales de derechos humanos de que Brasil es parte⁴².

Asimismo, incluyó una amplia gama de normas para la protección de los Pueblos Indígenas, tanto en perspectiva sustantiva, como en perspectiva procesal e institucional. Desde una *perspectiva sustantiva*, aseguró a los indígenas la protección de “su organización social, costumbres, idiomas, creencias y tradiciones, y los derechos originales sobre las tierras que ocupan tradicionalmente” (artículo 231, CF). Determinó que su derecho a la tierra se extiende a las áreas “usadas en sus actividades productivas, a las indispensables para la preservación de los recursos ambientales necesarios para su bienestar y

a las necesidades para su reproducción física y cultural, según sus usos, costumbres y tradiciones” (artículo 231, §1, CF). La Constitución también protegió, como patrimonio cultural brasileño, las formas de expresión y las formas de crear, hacer y vivir de los Pueblos Indígenas (artículos 215 y 216, I y II, CF).

La Constitución de 1988 mantuvo la propiedad de las tierras indígenas bajo el dominio de la Unión (Estado Federal), se reconoce el derecho de los pueblos indígenas a las tierras (derecho originario preestatal), garantizándoles a los indígenas el usufructo perpetuo, para que eventuales ataques a sus territorios también sean defendidos por el poder público y sus instituciones, conforme el artículo 231, CF⁴³.

En cuanto a la *perspectiva procedimental*, la Carta determinó que el uso de los recursos hídricos, incluyendo el potencial energético, la investigación y la explotación de la riqueza mineral en tierras indígenas, puede realizarse únicamente con autorización del Congreso Nacional, escuchadas las comunidades afectadas (artículo 231, CF). Y aseguró a los indígenas, a sus comunidades y organizaciones, la legitimidad para presentar demandas judiciales en defensa de sus intereses (artículo 232, CF).

Estableció, además, acciones judiciales directas que forman parte del control concentrado de constitucionalidad, la acción civil pública y la acción popular como instrumentos para la protección de los derechos fundamentales y/o del patrimonio histórico y cultural, que, por lo tanto, pueden ser utilizados en la defensa de los Pueblos Indígenas (artículo 5, LXXIII; artículo 102.a y §1: artículo 129, III)⁴⁴. Finalmente, en cuanto a la perspectiva institucional, la Constitución de 1988 se ocupó de prever instituciones destinadas a la protección de los derechos de estos pueblos. En ese sentido, asignó a la Fiscalía Pública y a la Defensoría Pública la defensa de sus intereses (artículos 129, V, 232 y 234, CF).

Tal institucionalidad se complementa, en el ámbito infra constitucional, por la Fundación Nacional del In-

⁴² VOLPINI, Carla Ribeiro; WANDERLEY, Silva Bruno. A responsabilidade internacional do Brasil em face do controle de convencionalidade em sede de direitos humanos: conflito de interpretação entre a jurisdição da Corte Interamericana de Direitos Humanos e o Supremo Tribunal Federal quanto a Lei de anistia. *Brazilian Journal of International Law*, v. 12, n. 2, p. 611-629, 2015.

⁴³ TÓFFOLI, José. Os direitos dos povos indígenas no Brasil e a ADFP N°709. In: OSORIO, Aline; MELLO, Patrícia Perrone Campos; BARROSO, Luna Van Brussel (coord.). *Direitos e Democracia: 10 anos do Ministro Luis Roberto Barroso no STF*. Belo Horizonte: FORUM, 2024, p. 62

⁴⁴ Las acciones populares pueden presentarse por cualquier ciudadano brasileño y las acciones civiles públicas por entidades gubernamentales y de la sociedad civil. Tienen la capacidad de paralizar proyectos dañinos para el medioambiente.

dígena – FUNAI⁴⁵-, por las Bases (BAPEs) y Frentes de Protección Etnoambiental (FPEs)⁴⁶ y por el Subsistema Especial de Salud Indígena⁴⁷, entre otras. Esas instituciones están destinadas a proteger y promover los derechos de los indígenas y tienen funcionarios públicos trabajando cerca de sus comunidades, sobrellevando una precariedad progresiva que incluye la pérdida de funcionarios y reducciones presupuestarias (Conselho Indigenista Missionário, 2020).

El derecho de participación directa de los pueblos y comunidades indígenas es fundamental para que puedan contribuir con los procesos de toma de decisiones que impactan sobre sus propias vidas. Este derecho se refuerza, asimismo, por normas del Convenio 169 de la OIT, el cual, como tratado de derechos humanos ratificado por Brasil, tiene estatus supra jurídico en el orden legal interno y funciona, por tanto, como norma hermenéutica y como paradigma de vigencia de las normas infra constitucionales, por intermedio del Control de Convencionalidad (artículo 5, §2, CF)⁴⁸.

⁴⁵ Creada por la Ley n. 5.371/1967, con el objeto de promover y proteger los derechos de los Pueblos Indígenas.

⁴⁶ Como aclara Amorim: “Las FPE son unidades desconcentradas de la FUNAI que trabajan con la implementación de la política indigenista dirigida a los pueblos indígenas aislados y recién contactados. Los Frentes actúan por intermedio de las Bases de Protección. Conforman estructuras físicas etnoambientales, ubicadas dentro de territorios indígenas, con el objetivo de controlar la entrada, vigilancia permanente y actuaciones de inspección en conjunto con otros organismos. Realizan actuaciones de localización y seguimiento de pueblos en aislamiento, dialogan con el medio indígena y no indígena, y realizan acciones de promoción de los derechos de los pueblos recién contactados”. AMORIM, Fabrício. Povos indígenas isolados no Brasil e a política indigenista desenvolvida para efetivação de seus direitos: avanços, caminhos e ameaças. *Revista Brasileira de Linguística Antropológica*, v. 8, n. 2, p. 19-39, 2016.

⁴⁷ Creado por la Ley n.9.836/1999, el Subsistema de Atención a la Salud Indígena es descentralizado y prevé órganos colegiados de formulación, monitoreo y evaluación de políticas de salud, como el Consejo Nacional de Salud y los Consejos Estatales y Salud Municipal. También determina la organización del sistema en Distritos Sanitarios Especiales Indígenas.

⁴⁸ Sobre la articulación entre el Derecho Constitucional, el Derecho Internacional de los derechos humanos y el Derecho Constitucional comparado, así como sobre el estado de los tratados de derechos humanos en Brasil: MELLO, Patrícia. Constitucionalismo, transformação e resiliência democrática no Brasil: o *Ius Constitutionale Commune* na América Latina tem uma contribuição a oferecer?, *Revista Brasileira de Políticas Públicas*, Brasília, v. 9, n. 2 p. 253-285, 2019. p. 252-283. MORALES, Mariela. O Estado Aberto: Objetivo do *Ius Constitutionale Commune* em Direitos Humanos. In: BOGDANDY, Armin; MORALES, Mariela; PIOVESAN, Flavia (org.). *Ius Constitutionale Commune na América Latina*: Marco conceptual. Curitiba: Juruá, 2016. v. 1. p. 53-75

La Constitución de 1988 también estableció la protección del medio ambiente de manera muy amplia. Desde el *punto de vista sustantivo*, determinó que “toda persona tiene derecho a un medio ambiente ecológicamente equilibrado”, imponiendo al Poder Público y a la comunidad “el deber de defenderlo y conservarlo para las presentes y futuras generaciones” (artículo 225, CF). La protección del medio ambiente prevista en esta disposición comprende no sólo espacios territoriales, fauna, flora y otros componentes. Alcanza también la tutela de animales contra el trato cruel, la protección de la calidad de vida, la preservación de “la diversidad e integridad del patrimonio genético”, la protección y restauración de todos los “procesos ecológicos esenciales” a los ecosistemas, así como la prohibición de prácticas que “causen la extinción de especies” (artículo 225, § 1, I, II, III, V, VII, CF). Esta visión amplia de la CF en la protección del medio ambiente fue expresada por el Supremo Tribunal Federal (STF):

[...] o meio ambiente constitui patrimônio público a ser necessariamente assegurado e protegido pelos organismos sociais e pelas instituições estatais (pelos Municípios, inclusive), qualificando-se como encargo irrenunciável que se impõe –sempre em benefício das presentes e das futuras gerações – tanto ao Poder Público quanto à coletividade em si mesma considerada... o direito à integridade do meio ambiente constitui prerrogativa jurídica de titularidade coletiva, refletindo, dentro do processo de afirmação dos direitos humanos, a expressão significativa de um poder deferido não ao indivíduo identificado em sua singularidade, mas, em um sentido verdadeiramente mais abrangente, atribuído à própria coletividade social.⁴⁹

También cabe destacar, en materia de protección de la naturaleza, la relevancia de los principios preventivo y precautorio, como lineamientos para todas y cada una de las decisiones que involucren riesgos ambientales o la mitigación de los efectos adversos al medio ambiente (artículo 225, § 1, I, II y IV; artículo 196, CF). En este sentido, según estos principios, se deben tomar medidas preventivas para evitar daños conocidos o previsibles (prevención). Además, se deben adoptar medidas

⁴⁹ BRASIL. Supremo Tribunal Federal. *Ação Direta de inconstitucionalidade –Briga de galos (Lei Fluminense nº 2.895/98)*. Recorrente: Orleir Messias Cameli e Outro (A/S); Recorrido: Ministério Público Federal; Relator: Ministro Celso de Mello. Juzgamiento, 20 abr. 2020. p. 301/25. Esta decisión se destaca por el propio STF en su Cuaderno de Jurisprudencia sobre el derecho al medio ambiente. Brasil, STF (2023, p. 234). En doctrina, BARROSO, Luis Roberto. A proteção do meio ambiente na Constituição brasileira. *Revista Forense*, v. 161, n. 317, p. 167-168, 1993.

de protección contra los daños al medio ambiente aun cuando no hay certeza científica en cuanto a la posibilidad (precaución). Será necesario elegir la medida más segura y potencialmente menos adversa al medio ambiente, según el estado actual del conocimiento. En caso de duda sobre el potencial nocivo de una empresa, debe evitarse un producto o servicio. Esto se debe a que el daño ambiental, una vez producido, es difícil de recuperar, por lo cual el énfasis debe ser parte de las acciones de prevención⁵⁰.

Desde el *punto de vista procesal*, destaca el requisito de un previo estudio de impacto ambiental, como condición para la evaluación y el eventual licenciamiento (autorización ambiental) de proyectos potencialmente dañinos (art. 225, §1, IV, CF). Se relaciona, asimismo, con un conjunto de disposiciones infra constitucionales relativas a los procedimientos de evaluación ambiental, entre otros instrumentos de ordenamiento ambiental⁵¹.

Institucionalmente, la Unión, los Estados y los Municipios tienen competencia legislativa concurrente para los sujetos ambientales, así como competencias admi-

nistrativas comunes para promover la protección del medio ambiente, bosques, fauna y flora (artículos 23, VI y VII; 24, VI, VII y VIII, CF)⁵². La Fiscalía Pública tiene entre sus funciones institucionales la protección del medio ambiente. La Defensoría Pública es responsable de la protección de los derechos humanos de las personas y grupos vulnerables, incluida aquellos desde la perspectiva ambiental (artículo 134, CF). La sociedad en su conjunto también es responsable de proteger el medio ambiente (artículo 225, CF). Asimismo, existen acciones judiciales directas que integran el control concentrado de la constitucionalidad. Son las “acciones populares” y las “acciones civiles públicas”⁵³ que constituyen instrumentos calificados para la defensa del medio ambiente (artículo 5º, LXXIII; artículo 102.a y §1º, artículo 129, III, CF)⁵⁴.

Existe un importante debate sobre la interpretación <de las reglas para la protección de la naturaleza⁵⁵. Con todo, para nosotros, una visión *ecocéntrica* es armónica con la CF de 1988. En este sentido, ésta expresa la idea de que todos los elementos de la Naturaleza son esenciales para sus procesos⁵⁶. Por ello, la Naturaleza debe

⁵⁰ FAUNDES, Juan Jorge; MELLO, Patricia; RUDOLF, Renata. Pueblos Indígenas, Naturaleza y Ecocentrismo: estándares internacionales y una mirada comparada desde Brasil. *CUHSO, Universidad Católica de Temuco*, v. 32, n. 2, p. 206-247, 2023. p. 221. FERNANDES, Patricia Viera dos Santos. A importância dos princípios da precaução e da prevenção na busca do desenvolvimento sustentável. *LE&C – Revista de Administração Pública e Política*, n. 156, jun. 2011, p. 33-34; SCHMIDT, Cíntia. Princípios de direito ambiental. *Int. Públ.*, ano 13, n. 69, p. 187-207, 2011. p. 192-200; THOMÉ, Romeu; LAGO, Talita Martins Oliveira. Barragens de rejeitos da mineração: o princípio da prevenção e a implementação de novas alternativas. *Revista de Direito Ambiental*, v. 85, p. 17-39, jan./mar 2017; ZANELLA, Tiago Vinicius. A aplicação da precaução no direito internacional do ambiente: uma análise à luz da proteção do meio marinho. *Revista Internacional de Direito Ambiental*, v. 13, n. 5, p. 307-332, jan./abr. 2016. Un análisis completo del principio de la precaución en Brasil v.: MORAES, Gabriela Garcia Batista Lima; FERNANDES, Isabella Maria Martins. O Princípio da Precaução como fundamento à vinculação da administração pública à discricionariedade técnica no planejamento de atividades de risco: uma crítica com base no caso do fraturamento hidráulico como técnica de exploração de gás não convencional no Brasil. *Revista de Direito Internacional*, v. 20, n. 3, p. 108-132, 2023. En sentido contrario, entendiendo que el principio de precaución conduce a una excesiva injerencia del Poder Judicial, genera parálisis y produce decisiones desproporcionales. REIS, Antonio Augusto; LAMARE, Julia A. O princípio da precaução e a intervenção judicial em processos de licenciamento ambiental de empreendimentos de energia. In: STEINDORFER, Fabriccio (coord.). *Direito da energia elétrica*. Curitiba: Juruá, 2017. p. 191-208.

⁵¹ FAUNDES, Juan Jorge; MELLO, Patricia; RUDOLF, Renata. Pueblos Indígenas, Naturaleza y Ecocentrismo: estándares internacionales y una mirada comparada desde Brasil. *CUHSO, Universidad Católica de Temuco*, v. 32, n. 2, p. 206-247, 2023. p. 231.

⁵² En el orden jurídico brasileño, las competencias concurrentes o comunes implican el otorgamiento de una misma competencia a más de una entidad federativa.

⁵³ Las acciones populares pueden presentarse por cualquier ciudadano brasileño, mientras las acciones civiles públicas por entidades gubernamentales y de la sociedad civil que cumplan con las condiciones legales. Las dos generan sentencias con efectos amplios, no limitados a las partes del caso, y pueden prestarse a paralizar proyectos de inversión dañinos al medio ambiente, al patrimonio histórico y cultural, o a otros derechos colectivos y difusos.

⁵⁴ MELLO, Patricia Perrone Campos; FAUNDES, Juan Jorge. “Povos Indígenas e proteção da Natureza: a caminho de um “giro hermenêutico ecocêntrico””. *Revista Brasileira de Políticas Públicas*, v. 10, n. 3, p. 222-251, 2020. p. 231.

⁵⁵ TRINDADE, Antonio Caçado. *Direitos humanos e meio-ambiente: Paralelo Dos Sistemas De Proteção Internacional*. Porto Alegre: Sérgio Antônio Fabris, 1993. TRINDADE, Antonio Caçado. The parallel evolutions of international human rights protection and of environmental protection and the absence of restrictions upon the exercise of recognizes human rights. In: TRINDADE, Antonio Caçado; LEAL, C. *Human rights and environment*. Fortaleza: Expressão Gráfica e Editora, 2017, p. 49-92. FERREIRA, Fabila; BOMFIM, Zulmira. Sustentabilidade Ambiental: visão antropocêntrica ou biocêntrica? *Ambientalmente sustentável*, v. 1, n. 9-10, p. 37-51, 2010. MARTÍNEZ, Esperanza; ACOSTA, Alberto. La Naturaleza entre la cultura, la biología y el derecho. *Polis, Revista Latinoamericana*, v. 13, n. 38, 623-627, 2014. p. 623-627. NAESS, Arne. The shallow and the deep, long-range ecology movement. A Summary. *An Interdisciplinary Journal of Philosophy*, v. 16, n. 1-4, 1973.

⁵⁶ GONÇALVES, Daniel Diniz; TÁRREGA, Maria Cristina Vidotte Blanco. Giro egocêntrico: do Direito Ambiental ao Direito Ecológico. *Revista Direito Ambiental e Sociedade*, v. 8, n. 1, p. 138-157, 2018. NUSSBAUM, Martha. Compassion and humanity: justice for

entenderse como un bien jurídico autónomo, como patrimonio global a ser protegido integralmente. La destrucción de ecosistemas, animales y plantas debe hacernos reflexionar sobre la cuestión de la justicia ecológica y, por lo tanto, sobre el derecho de todos los seres (humanos y no humanos) a desarrollar y completar naturalmente su ciclo de vital⁵⁷.

De hecho, el artículo 225 de la Constitución de 1988 admite diferentes formas de interpretación⁵⁸. En ese marco, consideramos que la interpretación más armónica es la que adopta una visión *ecocéntrica* de la protección ambiental, que le confiere mayor efectividad y amplitud a la protección de la Naturaleza⁵⁹. Una hermenéutica *ecocéntrica* de las normas para la protección del medio ambiente involucra un giro de paradigma significativo hermenéuticamente, porque *atribuye el centro del orden jurídico a la naturaleza por su valor intrínseco*⁶⁰.

Por otra parte, el reconocimiento del valor de la integridad de la Naturaleza es compatible con las cosmovisiones indígenas que reconocen en los elementos vivos y no vivos, significados y valores específicos, cultura-

les y espirituales, que deben ser preservados. En consecuencia, la hermenéutica intercultural indígena y la hermenéutica *ecocéntrica* convergen en una hermenéutica cautelar de la naturaleza⁶¹. Y, hoy, a la luz de las últimas decisiones de la Corte IDH, incluso, puede considerarse interpretación conforme la CADH.

3.2 Ordenamiento jurídico chileno

El artículo 5 inc. 2° de la Constitución Política de Chile de 1980 (CPR), incorpora constitucionalmente al ordenamiento jurídico chileno los tratados internacionales en materia de derechos humanos, ratificados por Chile y que se encuentren vigente.

Pero la CPR no reconoce en su texto a los pueblos indígenas. Luego, en perspectiva *sustantiva*, los derechos de los pueblos indígenas se resguardan, principalmente, por medio del Convenio N°169 de la OIT (ratificado en 2008), como tratado internacional en materia de derechos humanos (conforme el artículo 5 inc. 2° CPR). De igual forma, debe considerarse la CADH y la jurisprudencia de la Corte IDH en materia de derechos de los pueblos indígenas. De acuerdo a este marco constitucional, se generó un proceso jurisprudencial sostenido de reconocimiento de los derechos de los pueblos indígenas de alcance constitucional⁶².

nonhuman animals. In: NUSSBAUM, C. Martha. *Frontiers of justice*: disability, nationality, species membership. Cambridge: Harvard University Press, 2006. p. 324-407. SARLET, I.; FENSTERSEIFER, T. *Direito constitucional ecológico*. São Paulo: Revista dos Tribunais, 2019.

⁵⁷ MELLO, Patricia Perrone Campos; FAUNDES, Juan Jorge. “Povos Indígenas e proteção da Natureza: a caminho de um “giro hermenéutico ecocêntrico””. *Revista Brasileira de Políticas Públicas*, v. 10, n. 3, p. 222-251, 2020. p. 232. La expresión justicia ecológica (basada en una visión *biocéntrica*) se opone a la concepción de justicia ambiental, que se centra en la percepción *antropocéntrica* de la importancia de preservar los bienes ambientales dada su relevancia para el ser humano. GUDYNAS, Eduardo. La senda biocéntrica: valores intrínsecos, derechos de la naturaleza y justicia ecológica. *Tabula Rasa*, n. 13, p. 45-71, jul./dez. 2010. p. 60.

⁵⁸ El dispositivo incluso ha inspirado una propuesta para reformular el principio de la dignidad humana, para incorporar el reconocimiento de un mínimo existencial ecológico (Torres, 2009).

⁵⁹ GUDYNAS, Eduardo. La senda biocéntrica: valores intrínsecos, derechos de la naturaleza y justicia ecológica. *Tabula Rasa*, n. 13, p. 45-71, jul./dez. 2010. GONÇALVES, Daniel Diniz; TÁRREGA, Maria Cristina Vidotte Blanco. Giro egocéntrico: do Direito Ambiental ao Direito Ecológico. *Revista Direito Ambiental e Sociedade*, v. 8, n. 1, p. 138-157, 2018. MELLO, Patricia Perrone Campos; FAUNDES, Juan Jorge. “Povos Indígenas e proteção da Natureza: a caminho de um “giro hermenéutico ecocêntrico””. *Revista Brasileira de Políticas Públicas*, v. 10, n. 3, p. 222-251, 2020. p. 233.

⁶⁰ FAUNDES, Juan Jorge; MELLO, Patricia; RUDOLF, Renata. Pueblos Indígenas, Naturaleza y Ecocentrismo: estándares internacionales y una mirada comparada desde Brasil. *CUHSO, Universidad Católica de Temuco*, v. 32, n. 2, p. 206-247, 2023. p. 220. PEÑA, Mario. “La revolución de los derechos humanos ambientales y de los derechos de la naturaleza”. *Revista Iberoamericana de Derecho Ambiental y recursos naturales*, n. 28, 2018.

⁶¹ FAUNDES, Juan Jorge; MELLO, Patricia; RUDOLF, Renata. Pueblos Indígenas, Naturaleza y Ecocentrismo: estándares internacionales y una mirada comparada desde Brasil. *CUHSO, Universidad Católica de Temuco*, v. 32, n. 2, p. 206-247, 2023. p. 221. MELLO, Patricia Perrone Campos; FAUNDES, Juan Jorge. “Povos Indígenas e proteção da Natureza: a caminho de um “giro hermenéutico ecocêntrico””. *Revista Brasileira de Políticas Públicas*, v. 10, n. 3, p. 222-251, 2020. p. 233. En un sentido similar: SARLET, Ingo; FENSTERSEIFER, Tiago. Algunas notas sobre a dimensão ecológica da dignidade da pessoa humana e sobre a dignidade da vida em geral. *Revista Direito e Sociedade*, v. 1, n. 3, p. 69-94, 2014. p. 86-88.

⁶² CARMONA, Cristobal. La aplicación del derecho a consulta del Convenio 169 de la OIT en Chile: hacia una definición de su contenido sustantivo: afectación e instituciones representativas. In: MIRANDA, Ricardo; CARMONA, Cristobal (ed.). *Tesis de maestría sobre Pueblos Indígenas*. Buenos Aires: U. Nacional de San Martín, CIEP, 2013. v. 3. p. 15-139. DURÁN, Álvaro. Comentario de jurisprudencia. La susceptibilidad de afectación directa como requisito de procedencia de la consulta a los pueblos indígenas en el sistema de evaluación de impacto ambiental. *Revista de Derecho Universidad de Concepción*, v. 89, n. 250, p. 393-421, 2021. FAUNDES PEÑAFIEL, Juan Jorge; MELLO, Patricia Perrone Campos. Avaliação Ambiental e Proteção Cultural dos Povos Indígenas no Chile, à luz do Direito Internacional dos Direitos Humanos. *Revista de Estudos e Pesquisas sobre as Américas*, v. 16, n. 2, p. 60-93, 2024. DOI: 10.21057/10.21057/repamv16n2.2022.48817. HERVÉ, Dominique, BASCUR, Débora. “La Protección de los Derechos de las Comunidades Indígenas en

La jurisprudencia de los Tribunales Superiores de Justicia de Chile ha reconocido en sus fallos el derecho humano a la identidad cultural de los pueblos indígenas con diversos alcances, como parte del derecho esencial que la Constitución asegura “de intervenir con igualdad de condiciones en su mayor realización espiritual y material posible”, en relación al Convenio 169 y en el derecho de igualdad ante la ley. Entonces, el principio de igualdad se entiende en un sentido amplio, como el derecho radicado en la dignidad fundamental de la persona a llevar adelante su vida conforme todos los aspectos de su identidad personal, lo que, comprende su identidad y marco cultural, sus formas de vida en sentido colectivo, como integrante de un grupo que posee, en común, normas y valores culturales, espirituales, religiosos “una cosmovisión propia”; a ello, se asocian otras garantías constitucionales, como el derecho a la identidad personal (implícito en el derecho a la honra y la vida privada y familiar –19 N°4 CPR) y el derecho a la libertad de conciencia y religión (19 N°6, CPR)⁶³.

Constitucionalmente, la protección de las tierras se ampara de forma conexa entre las garantías constitucionales generales de “vivir en un medio ambiente libre de contaminación” (19 N°8, CPR) y de protección de la propiedad (19 N°24, CPR). Ellas configuran la protección de la propiedad indígena, en tanto hábitat y territorios indígenas, sustento material de las formas de vida indígena que el derecho humano a la identidad cultural ampara⁶⁴.

Luego, la protección de tierras y territorios indígenas ha sido objeto de un extenso debate jurisprudencial, con diversos desarrollos, tanto desde la perspectiva de acciones enmarcadas en la propiedad en sí (que escapan al objeto de este trabajo) y en relación a los territorios y la protección del medio ambiente (naturaleza) que abordamos sucintamente aquí.

el SEIA por Parte de los Tribunales Ambientales: ¿Avance y/o Retrosoco? *Justicia Ambiental*, v. 9, n. 11, p. 197-232, 2019. GUERRA, Felipe; SÁNCHEZ, Gonzalo. “La función epistémica del derecho de los pueblos indígenas a la consulta previa en Chile”. *Ius et Praxis*, v. 27, n. 3, 2021.

⁶³ FAUNDES, Juan Jorge. El derecho fundamental a la identidad cultural de los pueblos indígenas, configuración conforme el derecho internacional y perspectivas de su recepción en Chile. *Ius et Praxis*, v. 26, n. 1, p. 77-100, 2020. p. 81-83.

⁶⁴ FAUNDES, Juan Jorge. El derecho fundamental a la identidad cultural de los pueblos indígenas, configuración conforme el derecho internacional y perspectivas de su recepción en Chile. *Ius et Praxis*, v. 26, n. 1, p. 77-100, 2020. p. 81-83.

En *perspectiva procedimental*, la Carta no contempla un recurso especial en materia de pueblos indígenas. Pero desde la ratificación y entrada en vigencia del Convenio 169 (2009), el recurso de Protección Constitucional (art. 20 CPR) fue considerado la vía adecuada para el amparo de los derechos de los pueblos indígenas que la CPR asegura. Así fue entendido bajo el estándar de un recurso rápido, sencillo y eficaz, conforme las garantías del debido proceso –en un sentido amplio– y del acceso a la justicia (19N°3 CPR), todo conforme los estándares interamericanos (art. 8 y 25, CADH).

Sin embargo, con la instalación de los tribunales ambientales (de competencia técnica ambiental)⁶⁵, los recursos de protección constitucional fueron rechazados en su mayoría. La jurisprudencia predominante afirmó que, en materia de consulta indígena y evaluación ambiental, la competencia de control jurisdiccional y técnica era exclusiva de los tribunales ambientales, que disponían de los medios técnicos y procesales requeridos. Mientras –se sostenía–, que el recurso de protección, de naturaleza cautelar y de emergencia, no dispone de tales medios. No obstante, las cortes de apelaciones y la Corte Suprema, aunque excepcionalmente, siguieron conociendo algunos casos graves y urgentes de contenido ambiental por la vía del recurso de protección. En especial, la Corte Suprema, sin cuestionar la competencia técnica ambiental, utiliza hasta la fecha su competencia constitucional de protección, como mecanismo de resguardo del medio ambiente y de los derechos fundamentales de los pueblos indígenas, a lo menos, en casos de afectación o riesgo grave, que requieren una medida urgente de restablecimiento del Derecho (como la violación manifiesta del derecho humano a la identidad cultural, del deber de consulta conforme el Convenio 169, en casos de daño ambiental, entre otros)⁶⁶.

Este debate, es de relevancia, no necesariamente por el control constitucional o la competencia misma de la Corte Suprema (que también actúa en segunda instancia de casación ambiental)⁶⁷, sino porque el Recurso de

⁶⁵ CHILE. *Ley 20.600 Crea los Tribunales Ambientales*. Judicialmente, inicia su operación con el Segundo Tribunal Ambiental (04/03/2013) y puede considerarse concluida con la entrada en operación 1° TA (04/09/2017).

⁶⁶ CARRASCO, Edecio. *El derecho a vivir en un medio ambiente libre de contaminación*. Perspectivas, evolución y estándares jurisprudenciales. Santiago: DER ediciones, 2020. p. 63-178. MORAGA, Pilar. Comentario de sentencia. Sentencia de la Corte Suprema, de 30 de enero de 2017. *Actualidad Jurídica Ambiental*, v. 18, n. 4, 2017.

⁶⁷ Debe advertirse que para algunos, la competencia de casación

Protección constitucional ofrece un acceso amplio y relativamente desformalizado para el amparo de los derechos fundamentales, lo cual, a su vez, asegura mayores garantías de acceso a la justicia, en especial para grupos vulnerables como los pueblos indígenas.

Respecto a la protección del medio ambiente, la CPR establece una disposición muy acotada en su artículo 19 N°8, pero ha tenido un extenso desarrollo jurisprudencial. Desde el punto de vista *sustantivo*, el texto asegura a todas las personas “El derecho a vivir en un medio ambiente libre de contaminación” y establece que es “deber del Estado velar para que este derecho no sea afectado y tutelar la preservación de la naturaleza”.

La visión jurisprudencial de la protección constitucional del medio ambiente ha transitado desde una interpretación literal, restringida, asociada a la idea de “contaminación” (bajo parámetros objetivos medibles)⁶⁸, hasta una concepción más amplia que excede el texto comprendiendo, por ejemplo, la afectación de áreas con valor patrimonial, las condiciones hídricas multifactoriales y o de la bio diversidad, entre otras. En este sentido, a modo de ejemplo, a dicho al Corte Suprema: [...] la noción de contaminante **es amplia y funcional** y es la interpretación que mejor se adecua a la finalidad que procura dar reconocimiento efectivo al derecho constitucional a vivir en un medio ambiente libre de contaminación⁶⁹.

Con todo, hoy, aunque el texto constitucional no ofrece una definición, mayoritariamente se entiende que es un derecho fundamental, subjetivo, colectivo y público, cuyos titulares son todas las personas, incluso más allá de las personas individualmente consideradas que ampara “solo el derecho a un entorno que admita el desarrollo de la vida de las personas... en relación a él”⁷⁰. Se trata de un derecho que debe leer en “una

perspectiva “ecosistémica y amplia”, pero en relación a las personas potencialmente afectadas respecto del entorno natural necesario para su vida y desarrollo (Carrasco, 2020, p. 8). Así, se entiende que la CPR contiene una comprensión antropocéntrica, aunque moderada, en tanto la protección del derecho supone el amparo de “toda forma de vida” y la “armonía con el hábitat y con los ecosistemas existentes y en concordancia con el desarrollo sustentable [buscando] no comprometer las expectativas de las generaciones actuales y futuras”⁷¹.

Los principios preventivo y precautorio ambientales no son parte del texto, pero han tenido un desarrollo jurisprudencial progresivo en las últimas décadas, de la mano con su avance internacional. En este sentido, al entender el derecho humano al medio ambiente sano como parte de la Constitución material (vía art. 5 inc. 2° CPR), se amplía el amparo constitucional e incorpora los principios preventivo y precautorio que son parte del contenido del derecho, lo que ya se expresa en las decisiones judiciales recientes que revisaremos.

En consecuencia, este marco ambiental-intercultural, obliga a un análisis en concreto conforme el cual: por una parte, preventivamente, si fuere del caso, se opte por la medida de menor impacto en el medio ambiente, incluidos los indígenas potencialmente afectados; por otra, dado el principio precautorio, frente a un riesgo grave e irreversible de daño ambiental, aún a falta de evidencia o certeza técnico-científica, se adopten las medidas necesarias para evitar tal afectación, asegurando de forma efectiva las formas de vida tradicional —los intangibles culturales indígenas—.

Paralelamente, la jurisprudencia ha basado la protección especial de los pueblos indígenas, respecto de actividades con efectos ambientales, en las garantías genéricas de la CPR, del artículo 19 N°8, recién vista, junto al principio constitucional de igualdad, contemplado en los artículos 1 y 19 N°2 y la protección de la propiedad, del artículo 19 N°24. A este marco constitucional, se suma el artículo 4 inciso 2° de la Ley 19300 dispone que:

ambiental de la Corte Suprema excluiría el control de constitucionalidad, limitándose solo al legal, ergo, no habría equivalencia entre ambos controles. En tal sentido, v. CARRASCO, Edecio. De Trilium a Central Los Cóncores: Continuidad y Cambio del Recurso de Protección Ambiental en Veinte Años de Jurisprudencia. *Justicia ambiental*, Año 8, n. 9, p. 275-298, 2018. p. 294-295. 8 Yáñez Veas, Wendy del Carmen con Comisión de Evaluación Ambiental de la región de Coquimbo y Prime Energía SpA (2017); CS, Rol 6121 – 2017, 6.6.2017, C. 2. Voto disidente, Ministro Sergio Muñoz, disidencia primera.

⁶⁸ ARELLANO, Gustavo; GUARACHI, Federico. Protección del medio ambiente en el contexto de una nueva constitución: recomendaciones en base a la experiencia comparada. *Estudios Constitucionales*, v. 19, n. 1, p. 66-110, 2021. p. 72-73.

⁶⁹ CS, Rol 15.996-201331.8. 2014 (destacado nuestro).

⁷⁰ CARRASCO, Edecio. *El derecho a vivir en un medio ambiente libre de*

contaminación. Perspectivas, evolución y estándares jurisprudenciales. Santiago: DER ediciones, 2020. p. 6-7.

⁷¹ CARRASCO, Edecio. *El derecho a vivir en un medio ambiente libre de contaminación*. Perspectivas, evolución y estándares jurisprudenciales. Santiago: DER ediciones, 2020. p. 21-22. AGUILAR, Gonzalo. Las deficiencias de la fórmula ‘derecho a vivir en un medio ambiente libre de contaminación’ en la Constitución chilena y algunas propuestas para su revisión. *Estudios Constitucionales*, v. 14, n. 2, 2016. p. 407.

Los órganos del Estado, en el ejercicio de sus competencias ambientales y en la aplicación de los instrumentos de gestión ambiental, deberán propender por la adecuada conservación, desarrollo y fortalecimiento de la identidad, idiomas, instituciones y tradiciones sociales y culturales de los pueblos, comunidades y personas indígenas, de conformidad a lo señalado en la ley y en los convenios internacionales ratificados por Chile y que se encuentren vigentes.

De tal manera, el amparo sustantivo de los derechos de los pueblos indígenas, en relación con los proyectos de inversión (con efectos ambientales) que pueden afectar sus tierras y territorios, se ha justificado en estos mínimos constitucionales y en base a un extenso desarrollo jurisprudencial que aplica el marco legal y reglamentario, a la luz de los tratados internacionales en materia de derechos humanos vinculantes para este país⁷².

En perspectiva *procesal e institucional*, en materia legal, la Ley 19300 (1993), “Ley general de Bases del medio ambiente”, regula el Sistema de Evaluación de Impacto Ambiental (SEIA). Y, a partir de 2010, existe la llamada “Nueva Institucionalidad Ambiental (NIA)”, un robusto marco institucional que creó el Ministerio del medio Ambiente, la Superintendencia del Medio Ambiente (SMA) y el Servicio de Evaluación Ambiental (SEA) y, en especial, los Tribunales Ambientales⁷³.

Conjuntamente, las disposiciones del Convenio 169 pasaron a integrar materialmente el SEIA, como controlante convencional de mayor jerarquía o, a lo menos, imperativo de interpretación conforme⁷⁴. Este tratado, en su artículo 6 dispone que los estados deberán consultar a los pueblos Indígenas: “cada vez que se prevean medidas legislativas o administrativas susceptibles de

afectarles directamente”. Entonces, se sigue que los pueblos indígenas deben ser consultados ante la posibilidad de que sean afectados por una medida administrativa o legislativa, sin que deba ocurrir tal afectación. Se dispone, un requisito precautorio de afectación probable, que no exige acreditaciones previas y ciertas. Este criterio es clave ya que los efectos “intangibles culturales”, por su naturaleza, no son perceptibles o comprensibles para terceros no integrantes de los pueblos indígenas⁷⁵. Los pueblos indígenas, sus comunidades e integrantes, en general, presentan barreras de acceso para acreditar (especialmente de forma previa), administrativa o judicialmente, que una determinada medida les afecta (o afectará). O bien, muchas veces, no conocen con certeza técnica todos efectos de una medida (proyecto), por lo que la consulta previa es el medio procesal, dialógico, que permitirá una acabada o mejor comprensión de los efectos de ésta. El objetivo será que los potencialmente afectados logren exponer cómo sus componentes culturales se verían afectados por el proyecto en evaluación ambiental.

Por su parte, la Ley 19300 señala los proyectos y actividades que deberán someterse al SEIA, en el artículo 10 de la Ley, si un proyecto o actividad genera o presenta alguno de los efectos, características o circunstancias (ECC) establecidas en su artículo 11, letras c), d), e) y f), en relación con los artículos 7, 8, 9 y 10 del Decreto 40, deberá presentar un EIA, en cuyo marco debe realizarse el “Procedimiento de Consulta Indígena” (PCI). Estos ECC se pueden sintetizar como: (i) reasentamiento de comunidades humanas; (ii) alteración significativa de los sistemas de vida y costumbres de grupos humanos; (iii) localización, valor ambiental, paisajístico o turístico del territorio; (iv) alteración del patrimonio cultural (monumentos, sitios con valor antropológico, arqueológico, histórico).

Entonces, el SEA será responsable de implementar un PCI cuando alguna actividad o proyecto genere un

⁷² FAUNDES PEÑAFIEL, Juan Jorge; MELLO, Patricia Perrone Campos. Avaliação Ambiental e Proteção Cultural dos Povos Indígenas no Chile, à luz do Direito Internacional dos Direitos Humanos. *Revista de Estudos e Pesquisas sobre as Américas*, v. 16, n. 2, p. 60-93, 2024. DOI: 10.21057/10.21057/repamv16n2.2022.48817.

⁷³ Ley 20.417 Crea el Ministerio, el Servicio de Evaluación Ambiental y la Superintendencia del Medio Ambiente; Chile, Ley 20.473 Otorga, transitoriamente, las facultades fiscalizadoras y sancionadoras que indica a la comisión señalada en el artículo 86 de la ley n° 19.300; Chile, Ley 20.600 Crea los Tribunales Ambientales.

⁷⁴ DÍAZ, Ingrid. Constitución y derechos humanos: Técnicas de articulación entre derecho internacional y derecho interno. *Estudios constitucionales*, v. 20, n. esp., p. 84-109, 2022. p. 92-95. También, como filtro hermenéutico intercultural. MELLO, Patricia Perrone Campos; FAUNDES, Juan Jorge. “Povos Indígenas e proteção da Natureza: a caminho de um “giro hermenéutico ecocêntrico””. *Revista Brasileira de Políticas Públicas*, v. 10, n. 3, p. 222-251, 2020.

⁷⁵ ANAYA, James. *Principios Internacionales Aplicables a la Consulta en Relación con la Reforma Constitucional en materia de Derechos de los Pueblos Indígenas en Chile*. Informe del Relator Especial de N.U. para los Derechos Humanos de los Indígenas. Chile: UN, 2009. p. 23. FAUNDES, Juan Jorge. *El derecho humano a la identidad cultural en el Derecho Internacional: diálogo entre la corte interamericana de derechos humanos y el tribunal europeo de derechos humanos*. Valencia: Tirant lo Blanch, 2023. p. 188, 2020b, González, p. 7; PUSCHEL, Gabriela. *El concepto de territorio indígena en la jurisprudencia chilena como criterio de aplicación de la consulta previa en el marco del SEIA*. 2021. Tesis (Licenciatura) - Universidad de Chile, Santiago, 2021. p. 19.

impacto significativo a grupos humanos pertenecientes a pueblos indígenas, en los términos recién descritos. Y, para descartar el PCI, los órganos estatales con competencia ambiental, administrativa y jurisdiccional, deben establecer que no hay afectación ni *susceptibilidad de afectación*, esto es, demostrar que no se generan los referidos ECC.

Dado que esta potencial afectación, con frecuencia, no logra ser apreciada directamente por los terceros externos (como los agentes reguladores del SEIA), el PCI debe ser implementado antes de disponer cualquier medida (proyecto) que pueda generar efectos en territorios de presencia indígena. Es una comprensión del PCI como un mecanismo para el amparo sustantivo de derechos de los pueblos indígenas, en tanto busca la visibilización intercultural de los efectos (especialmente aquellos intangibles culturales). De esta manera, el presupuesto de *susceptibilidad de afectación* debe activar el PCI ante la eventual posibilidad de la generación de un efecto adverso respecto de pueblos indígenas, sus comunidades o integrantes, sin necesidad de certeza técnica ni evidencia directa de dicha afectación.

Luego la consulta indígena, advertida la *susceptibilidad de afectación* que pueda generar determinada medida, permite integrar la participación efectiva e informada de los grupos indígenas en la toma de decisiones estatales que los podrían afectar en sus formas de vida, sus “intangibles culturales”, como los primeros actores informantes. De esta forma, tendrán la oportunidad, en el marco del PCI, contando con los medios adecuados y pertinentes, de aportar un rango mayor de evidencias de los riesgos en curso sobre su cultura y modos de vida. Entonces, la consulta, opera como un mecanismo para el resguardo de derechos fundamentales de los pueblos indígenas⁷⁶, permitiendo la identificación de eventuales

afectaciones de otros derechos fundamentales sustantivos que el Estado debe cautelar.

En cuanto al procedimiento propiamente tal para recurrir en casos de incumplimiento del deber de consulta, siguiendo la jurisprudencia mayoritaria, la consulta indígena debe apegarse a los estándares del Convenio 169, incluso preferentemente a la regulación interna. Pero, a la luz de una tendencia jurisprudencial restrictiva, que ha sido preponderante hasta poco tiempo atrás, se ha observado en la regulación ambiental chilena un conjunto de deficiencias estructurales⁷⁷; y, en ese marco que a la consulta solo se le ha dado un alcance procesal⁷⁸.

Finalmente, más allá de la visión *antropocéntrica* (moderada) que ha sido preponderante en la comprensión constitucional de la protección del medio ambiente contenida en la CPR, postulamos que, a la luz de los derechos humanos a la identidad cultural y el medio ambiente sano –hoy integrantes del orden jurídico chileno–, y dada la amplitud conceptual del texto constitucional (19N°8 CPR), es posible una hermenéutica ecocéntrica del marco constitucional chileno –no excluyente de la antropocéntrica–, que otorgue reconocimiento y valor a la Naturaleza en sí misma, como medio en el que convivimos y del que dependemos todas las especies que, asimismo, es armónico con una mirada intercultural inclusiva de las cosmovisiones, espiritualidad y valores indígenas, también requirentes de amparo constitucional.

DES, Juan Jorge; RAMÍREZ, Silvina (ed.). *Derecho fundamental a la identidad cultural: Abordajes plurales desde América Latina*. Santiago: RIL Editores, 2020. p. 343-359.

⁷⁶ AYLWIN, José; MEZA-LOPEHANDÍA, Matías; YÁÑEZ, Nancy. *Los pueblos indígenas y el derecho*. Santiago: Lom Ediciones S.A., 2013. AGUAS, Javier; NAHUEL PAN, Héctor. Los límites del reconocimiento indígena en Chile neoliberal. La implementación del Convenio 169 de la OIT desde la perspectiva de dirigentes mapuche williche. *CUHSO*, v. 29, n. 1, p. 108-130, 2018. MILLAMÁN, Sergio. *Consulta indígena, pueblo mapuche, territorios y evaluación medioambiental*. Documento ICSO- N° 52. [S.l.]: UDP, 2019. Disponible: https://lab-constitucional.udp.cl/cms/wp-content/uploads/2020/04/ICSO_DT_52_Millaman.pdf

⁷⁸ CARMONA, Cristóbal. “Evaluación ambiental, consulta indígena y el desplazamiento de los derechos de los pueblos indígenas”. *Revista de Derecho de la Universidad de Concepción*, v. 88, n. 248, p. 199-232, 2020a. SILVA, Carolina; PAROT, Gonzalo. “Desempeño del SEIA para canalizar la consulta indígena del Convenio. *Revista de Derecho Ambiental*, n. 6, 2016.

⁷⁶ ANAYA, James. *Principios Internacionales Aplicables a la Consulta en Relación con la Reforma Constitucional en materia de Derechos de los Pueblos Indígenas en Chile*. Informe del Relator Especial de N.U. para los Derechos Humanos de los Indígenas. Chile: UN, 2009. CARMONA, Cristóbal. La aplicación del derecho a consulta del Convenio 169 de la OIT en Chile: hacia una definición de su contenido sustantivo: afectación e instituciones representativas. In: MIRANDA, Ricardo; CARMONA, Cristóbal (ed.). *Tesis de maestría sobre Pueblos Indígenas*. Buenos Aires: U. Nacional de San Martín, CIEP, 2013. v. 3. p. 15-139. CARMONA, Cristóbal. “Evaluación ambiental, consulta indígena y el desplazamiento de los derechos de los pueblos indígenas”. *Revista de Derecho de la Universidad de Concepción*, v. 88, n. 248, p. 199-232, 2020. CARMONA, Cristóbal. ¿La identidad cultural como límite de la Consulta Indígena en el SEIA? Notas para una subversión de la comprensión “procedimental” de la consulta. In: FAUN-

4 Pueblos indígenas y naturaleza, decisiones de Brasil y Chile

En Chile, desde la ratificación y entrada en vigor del Convenio 169 (2009), la jurisprudencia de los tribunales superiores ha sido muy variada y con alguna frecuencia contradictoria. Mientras, la Constitución Federal de Brasil de 1988 contiene disposiciones expresas de reconocimiento, lo que debiera favorecer, en principio, una jurisprudencia más consistente, pero el sistema brasileño goza de sus propias complejidades, debates jurisprudenciales y dificultades de cumplimiento efectivo.

Con todo, dado que en nuestro estudio buscamos dar cuenta de las posibilidades constitucionales, abiertas desde los derechos humanos a la identidad cultural y al medio ambiente sano, seleccionamos cuatro decisiones (y algunas conexas a ellas) de cada país que reflejan un enfoque hermenéutico intercultural ambiental.

4.1 Jurisprudencia chilena

En el caso de Chile, las decisiones ambientales, de competencia constitucional, tienen una data más extensa, que ha tenido una dinámica progresivamente evolutiva⁷⁹. Pero las cuestiones indígenas solo se abordan en perspectiva *constitucional-ambiental* tras la ratificación del Convenio 169, con la primera sentencia en 2009.

Para efectos de esta sucinta comparación seleccionamos decisiones que permiten mostrar el enfoque jurisprudencial que se apega a los estándares del Convenio 169. Sin embargo, en paralelo a ellas, un conjunto de otros fallos han seguido una tendencia mucho más restrictiva⁸⁰.

4.1.1 “Linconao Francisca con Forestal Palermo” (2009)

Se trata del primer fallo dictado por un Tribunal Superior de Justicia en Chile que aplicó el Convenio

⁷⁹ CARRASCO, Edecio. *El derecho a vivir en un medio ambiente libre de contaminación*. Perspectivas, evolución y estándares jurisprudenciales. Santiago: DER ediciones, 2020.

⁸⁰ CARRASCO, Edecio. *El derecho a vivir en un medio ambiente libre de contaminación*. Perspectivas, evolución y estándares jurisprudenciales. Santiago: DER ediciones, 2020. HERVÉ, Dominique, BASCUR, Débora. “La Protección de los Derechos de las Comunidades Indígenas en el SEIA por Parte de los Tribunales Ambientales: ¿Avance o/o Retroceso? *Justicia Ambiental*, v. 9, n. 11, p. 197-232, 2019.

N°169 de la OIT, confirmado por la Excma. Corte Suprema, se pronunció sobre el alcance constitucional de los conceptos de “territorio” y su directa relación con el “hábitat”, “bajo interdependencia con los derechos culturales y la protección del medio ambiente”, en relación a los derechos de los pueblos indígenas, incorporados al ordenamiento jurídico chileno a partir de la ratificación del Convenio N°169 de la OIT.

Señaló la decisión que se había vulnerado la garantía constitucional del derecho a vivir en un medio ambiente libre de contaminación (19 N°8 CPR). Sostiene expresamente una interpretación amplia del concepto de “medio ambiente”, en particular, que contiene los elementos culturales propios de la cosmovisión indígena mapuche (Faundes, 2010)⁸¹. Dice la sentencia:

[...] esta Corte asume que el derecho a vivir en un medio ambiente libre de contaminación debe considerarse en forma amplia [...]. Si no hay un medio ambiente adecuado para vivir, resulta ilusorio que el hombre sea digno en libertad e igualdad y pueda disfrutar el pleno goce y ejercicio de sus derechos. Además, debe ser considerado en forma amplia y holística, por los deberes que impone el artículo 19 N°8 al Estado... para que no sea afectado y tutelar la preservación de la naturaleza... Si no se admite una concepción amplia, no se divisa cómo el Estado puede cumplir sus deberes Constitucionales indicados. En todo caso, no existe en el medio ambiente un grupo, o persona aislada, un elemento vivo o inerte que no esté relacionado con su entorno⁸².

En relación a los intangibles culturales indígenas expresa:

[...] el Derecho a Vivir en un medio libre de contaminación para la actora [Machi⁸³] se ha visto afectado, puesto que se vulnera la integridad física y psíquica [del Pueblo Mapuche], se agravia en su naturaleza humana y la calidad de vida y en la protección de sus sistemas de salud, puesto que el Menoko⁸⁴ es un lugar, espacio cultural, que no debe ser molestado, sino que siempre protegido⁸⁵.

⁸¹ CA Temuco, Rol N° 1773-2008, 16.9.2009. CS, Rol 7287-2009, 30.11.2009 (confirma).

⁸² CA Temuco, Rol N° 1773-2008, 16.9.2009. CS, 7287-2009, 30.11.2009 (confirma), C. 5.

⁸³ Autoridad ancestral mapuche, entre otros aspectos, cumple el rol guía espiritual en la cosmovisión mapuche.

⁸⁴ El *menoko*, es un manantial, espacio ecológica y culturalmente relevante, en tanto fuente de agua, de presencia de flora nativa-medicinal y, en especial, por el significado cosmogónico mapuche dado por la entidad (intangible) tutelar (*ngen*) que “reside” en ese lugar.

⁸⁵ Corte de Apelaciones de Temuco, Rol N° 1773-2008, 16.9.2009. Corte Suprema, 7287-2009, 30.11.2009 (confirma), párr. décimo cuarto.

4.1.2 Sentencia de la Corte Suprema del caso de la Consejera del pueblo Kawésqar contra el Director Ejecutivo del Servicio de Evaluación Ambiental de Magallanes y la Antártica Chilena (2021)⁸⁶

La decisión estableció como presupuesto de procedencia de la consulta indígena un criterio de “probabilidad”, de una afectación “potencial”. Consideró que los derechos reconocidos en el Convenio 169 constituyen garantías fundamentales incorporados a la CPR⁸⁷. Declaró, que “cualquier proceso que pueda afectar alguna realidad de los pueblos originarios, supone que sea llevado a cabo desde esa particularidad y en dirección a ella”⁸⁸. Dijo que, para la determinación de la *susceptibilidad de afectación* directa, el factor geográfico de la regulación ambiental constituye un elemento indiciario, cuya amplitud se encuentra determinada por los posibles impactos que pueda tener una medida en los derechos reconocidos de los pueblos indígenas⁸⁹. Asimismo, que para que la consulta no sea obligatoria se requerirá “que el titular del proyecto demuestre de forma exhaustiva que no se dan los efectos del artículo 11 letras c) y d) de la Ley N° 19.300”⁹⁰. De esta manera, **invirtió el onus probandi para poder justificar la omisión de una consulta indígena**, en consecuencia, la sola *susceptibilidad de afectación* resultó presupuesto *a priori* de procedencia de la referida consulta.

4.1.3 “Luis Araneda Necumán y otros con Director Ejecutivo del Servicio De Evaluación Ambiental” (“Central Hidroeléctrica Doña Alicia”)

En el caso “Central Hidroeléctrica Doña Alicia”, también destacó la Corte Suprema “la preminencia del principio precautorio” en la evaluación ambiental, explicitando que su “significación y relevancia excede el marco puramente formal”; porque este principio, en especial:

[...] se estructura y rige el desarrollo y ponderación de los elementos que juegan en el proceso de evaluación ambiental buscando la relación existente entre el conocimiento científico disponible y la

complejidad de los sistemas ecológicos. Esto significa que, frente a una situación que pudiera generar daño ambiental pero mediando incertidumbre científica en cuanto a sus efectos, deben adoptarse las medidas necesarias para evitar ese riesgo [...]⁹¹.

4.1.4 Jara Alarcon Luis con Servicio de Evaluación Ambiental

En este caso la Corte Suprema definió estándares para establecer la susceptibilidad de afectación, en especial, frente a los componentes culturales de las formas de vida tradicional, desde el punto de vista del principio precautorio ambiental. Dijo que:

[...] toda evaluación ambiental debe abarcar, de manera cabal, no sólo los impactos que sean declarados por el titular, sino también todas aquellas circunstancias que sean conocidas por la autoridad y que puedan tener incidencia en los mayores o menores efectos de un proyecto sobre el medio ambiente... todos los cuales recogen el carácter precautorio de los instrumentos de política ambiental [...] sólo de esa forma la autoridad estará en condiciones de adoptar medidas que resulten eficaces para hacerse cargo del real impacto ambiental y, consecuentemente, evitar eventuales daños irreparables [...]⁹².

[...] las medidas que se adopten deben orientarse a salvaguardar las personas, las instituciones, los bienes, el trabajo, la cultura y el medio ambiente de los pueblos interesados⁹³.

[...] la participación de los pueblos afectados por un proyecto en el PCI, les permite ser parte de un intercambio de información relevante acerca de las obras a realizar y la forma en que ellas influirán en sus sistemas de vida, la exposición de los puntos de vista de cada uno de los potenciales afectados de manera de determinar la forma específica en que el proyecto les perturba, el ofrecimiento de medidas de mitigación, compensación y/o reparación por parte del titular del proyecto [...]

Sólo así es posible [cumplir con] el artículo 4° de la Ley N°19.300... otorgando a los pueblos indígenas la posibilidad de influir de manera real y efectiva en las decisiones públicas que sean de su interés.

En tanto de los antecedentes del proyecto aparecía la existencia de una susceptibilidad de afectación directa a pueblos indígenas, necesariamente debe seguirse un PCI, toda vez que éste es el estándar empleado para determinar su obligatoriedad [...]⁹⁴.

⁸⁶ CS, Rol 36.919-2019, 22.2.2021, acoge casación contra sentencia del 3° TA.

⁸⁷ CS, Rol 36.919-2019, 22.2.2021, C. 1.

⁸⁸ CS, Rol 36.919-2019, 22.2.2021, C. 7.

⁸⁹ CS, Rol 36.919-2019, 22.2.2021, C. 15.

⁹⁰ CS, Rol 36.919-2019, 22.2.2021, C. 14.

⁹¹ CS, Rol 3971-2017, 28.6.2018, C. Trigésimo cuarto.

⁹² Corte Suprema Rol 8573 2019, Sentencias de Casación y de reemplazo) 13/01/2021.

⁹³ Corte Suprema Rol 8573 2019 13/01/2021. Rol 8573 2019 (13/01/2021, cons. Cuadragésimo noveno (Sentencia de Casación)

⁹⁴ Corte Suprema Rol 8573 2019. 13/01/2021. Rol 8573 2019 (Sentencias de Casación y de reemplazo) 13/01/2021. Cons. Quinc-

Así, bajo los presupuestos de las decisiones chilenas revisadas, para la Corte Suprema, la evaluación ambiental de proyectos con efectos en pueblos indígenas, en especial respecto de la ponderación de los intangibles culturales, se encuentra *governada* por el principio precautorio ambiental. En consecuencia, este principio se impone como premisa de apreciación epistémica e imperativo interpretativo, en favor del resguardo de la naturaleza, en armonía con los derechos de los pueblos indígenas, sus comunidades e integrantes, cuando demandan la protección de sus modos de vida tradicionales.

4.2 Jurisprudencia brasileña

A continuación revisamos algunas decisiones del Supremo Tribunal Federal (STF) que ejemplifican a grandes rasgos el tránsito jurisprudencial respecto de los derechos de los pueblos indígenas y tradicionales, en los que el derecho a las tierras indígenas asegurado constitucionalmente es central. Y, desde ahí, se enlaza con el derecho al medio ambiente sano, en armonía con la protección misma de la naturaleza⁹⁵. Solo estudiamos algunos fallos emblemáticos que dan cuenta de los mandatos constitucionales referentes a pueblos indígenas, que conlleva la protección del medio ambiente y que dan cuenta de diversas tensiones no resueltas.

4.2.1 PET n° 3388: Caso Raposa Serra do Sol⁹⁶

La PET n° 3388 refiere al régimen constitucional de demarcación de las tierras indígenas en Brasil. Es un caso de alta relevancia, porque a partir de esta sentencia se desarrolló el régimen constitucional de reconocimiento de la propiedad indígena en Brasil⁹⁷. Corres-

ponde a una acción popular que busca la declaración de nulidad del proceso administrativo de demarcación de la a tierra indígena *Raposa Serra do Sol*. El STF declaró parcialmente improcedente la petición, afirmando la constitucionalidad del proceso de demarcación de las tierras.

ponde a una acción popular que busca la declaración de nulidad del proceso administrativo de demarcación de la a tierra indígena *Raposa Serra do Sol*. El STF declaró parcialmente improcedente la petición, afirmando la constitucionalidad del proceso de demarcación de las tierras.

Conjuntamente, delimitó normativamente el proceso de demarcación e impuso condicionantes para el ejercicio del derecho a la demarcación de las tierras indígenas, conforme lo previsto en los artículos 231 e 232 de la CF. La sentencia, abarca un conjunto amplio de temas como la propia naturaleza de la relación de los indígenas con las tierras amparada constitucionalmente, el contenido del derecho a la demarcación indicada, la propiedad estatal (de la Unión), la consulta indígena y la participación indígena en la toma de decisiones en estas tierras, junto a los intereses vinculados a la seguridad de la Unión (Estado federal) en estos espacios, entre otros.

Primero, en términos generales prescribió:

Áreas indígenas são demarcadas para servir concretamente de habitação permanente dos índios de uma determinada etnia, de par com as terras utilizadas para suas atividades produtivas, mais as ‘imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar’ e ainda aquelas que se revelarem ‘necessárias à reprodução física e cultural’ de cada qual das comunidades étnico-indígenas, ‘segundo seus usos, costumes e tradições’ (usos, costumes e tradições deles, indígenas, e não usos, costumes e tradições dos não-índios). Terra indígena, no imaginário coletivo aborígene, não é um simples objeto de direito, mas ganha a dimensão de verdadeiro ente ou ser que resume em si toda ancestralidade, toda coetaneidade e toda posteridade de uma etnia⁹⁸.

Describiendo el contenido del artículo 231 CF y el sentido del reconocimiento de la propiedad indígena plantea:

O termo ‘originários’ a traduzir uma situação jurídico-subjetiva mais antiga do que qualquer outra, de maneira a preponderar sobre eventuais escrituras públicas ou títulos de legitimação de posse em

uagésimo (Sentencia de Casación).
⁹⁵ BRASIL. Supremo Tribunal Federal. *Direito ambiental*. Brasília: Secretaria de Altos Estudos, Pesquisas e gestão da Informação: 2023. <https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/DireitoAmbiental.pdf>
⁹⁶ BRASIL. Supremo Tribunal Federal. *Petição n° 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009.
⁹⁷ Un análisis más extenso de las decisiones basales (PET n° 3388. Relator Ministro A. Brito, 19.03.2009; PET 3.388 ED, Relator Ministro L.R. Barroso, 23.10.2013). v.: Mello, Faundes (2019). CONSELHO NACIONAL DE JUSTIÇA. *Cadernos de Jurisprudência do Supremo Tribunal Federal: Concretizando Direitos Humanos. Direitos dos Povos Indígenas*. Brasília: CNJ, 2023. p. 57-66. Disponible: https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/Cadernos_STF_Povos_Indigenas_digital.pdf. A la fecha de

cierre de este trabajo (agosto 2024), una nueva decisión, a lo menos en su tesis central, ratificó la tesis excluyente del “marco temporal restrictivo” del derecho a la demarcación conforme el artículo 231 CF 1988, fue resuelta recién en 2023 y tuvo un alto impacto en BRASIL. Supremo Tribunal Federal. *RE 1017365*. 30/08/2023. Luego, tenemos la ADC 87, “*Ação declaratória de constitucionalidade 87 Distrito Federal*” (decisión conjunta ADC 87, ADI 7.582, ADI 7.583, ADI 7.586 e ADO 86). Decisión Monocrática, Ministro Relator Gilmar Mendes. 22.04.2024. Dispositivo 1., p. 16.
⁹⁸ BRASIL. Supremo Tribunal Federal. *Petição n° 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009. p. 8.

favor de não-índios. Termo sinônimo de primevo, em rigor, porque revelador de uma cultura pré-européia... A primeira de todas as formas de cultura e civilização genuinamente brasileiras, merecedora de uma qualificação jurídica tão superlativa a ponto de a Constituição dizer que ‘os direitos originários’ sobre as terras indígenas não eram propriamente outorgados ou concedidos, porém, mais que isso, ‘reconhecidos’ (parte inicial do art. 231...); isto é, direitos que os mais antigos usos e costumes brasileiros já consagravam por um modo tão legitimador que à Assembléia Nacional Constituinte de 1987/1988 não restava senão atender ao dever de consciência de um explícito reconhecimento⁹⁹.

O que termina por fazer desse tipo tradicional de posse fundiária um heterodoxo instituto de Direito Constitucional, e não uma ortodoxa figura de Direito Civil. Visto que terra indígena, no imaginário coletivo aborígene, deixa de ser um mero objeto de direito para ganhar a dimensão de verdadeiro ente ou ser que resume em si toda ancestralidade, toda coetaneidade e toda posteridade de uma etnia...¹⁰⁰.

Sobre la relación de los indígenas con las tierras, en relación al concepto constitucional de “tradicionalidade da ocupação” (art. 231 CF), el voto del relator indica que se trata de:

Mas um tipo qualificadamente tradicional de perdurabilidade da ocupação indígena, no sentido entre anímico e psíquico de que viver em determinadas terras... Espécie de cosmogonia ou pacto de sangue que o suceder das gerações mantém incólume, não entre os índios enquanto sujeitos e as suas terras enquanto objeto, mas entre dois sujeitos de uma só realidade telúrica: os índios e as terras por ele ocupadas. As terras, então, a assumir o status de algo mais que útil para ser um ente. A encarnação de um espírito protetor. Um bem sentidamente congênito, porque expressivo da mais natural e sagrada continuidade etnográfica, marcada pelo fato de cada geração aborígene transmitir a outra, informalmente ou sem a menor precisão de registro oficial, todo o espaço físico de que se valeu para produzir economicamente, procriar e construir as bases da sua comunicação linguística e social genérica. Nada que sinalize, portanto, documentação dominial ou formação de uma cadeia sucessória. E tudo a expressar, na perspectiva da formação histórica do povo brasileiro, a mais originária mundividência ou cosmovisão [...]¹⁰¹.

En relación a las tierras, como sustento material de las formas de vida indígena en diálogo con la protección misma de la naturaleza (*ergo*, como base mínima que debe ser demarcada), señala el voto del relator:

[...] do advérbio ‘tradicionalmente’, grafado no caput do art. 231 da Constituição, ele coincide com a própria finalidade prática da demarcação; quer dizer, áreas indígenas são demarcadas para servir, concretamente, de habitação permanente dos índios de uma determinada etnia, de par com as terras utilizadas para suas atividades produtivas (deles, indígenas de uma certa etnia), mais as imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e as necessárias à sua reprodução física e cultural, segundo seus usos, costumes e tradições (§ 1º do art. 231). Do que decorre, inicialmente, o sobredireito ao desfrute das terras que se fizerem necessárias à preservação de todos os recursos naturais de que dependam, especificamente, o bem-estar e a reprodução físico-cultural dos índios. Sobredireito que reforça o entendimento de que, em prol da causa indígena, o próprio meio ambiente é normatizado como elemento indutor ou via de concreção (o meio ambiente a serviço do indigenato, e não o contrário, na lógica suposição de que os índios mantêm com o meio ambiente uma relação natural de unha e carne [...]¹⁰².

Asimismo, para comprender de mejor forma el régimen brasileño en relación a la presencia territorial indígena, debe tenerse presente que los pueblos indígenas y tradicionales habitan espacios bajo diversos estatutos territoriales (cuyo examen en profundidad escapa a este trabajo). Hasta aquí, los pasajes destacados de la decisión abordan la situación en concreto de las tierras indígenas. Pero el escenario normativo territorial es complejo conteniendo tierras de conservación (parques nacionales, en Chile denominados genéricamente como “áreas silvestres protegidas”), zonas fronterizas (con actuación preponderante del poder público y las fuerzas armadas) y las tierras indígenas en sí, de propiedad de la Unión (Estado Federal), bajo régimen constitucional de usufructo perpetuo en favor de los respectivos pueblos indígenas (art. 231 CF). Éstas, a su vez, pueden estar reconocidas a como tales (homologadas), demarcadas o con procesos de demarcación requeridos a la administración, pero pendientes. En ese contexto, la decisión se hace cargo de este marco y afirma la existencia de un régimen de “convivencia”, de respeto de los derechos indígenas, pero de recíprocas limitaciones. Así, en rela-

⁹⁹ BRASIL. Supremo Tribunal Federal. *Petição nº 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009. p. 298/43.

¹⁰⁰ BRASIL. Supremo Tribunal Federal. *Petição nº 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009. p. 303/49.

¹⁰¹ BRASIL. Supremo Tribunal Federal. *Petição nº 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009. p. 297/43.

¹⁰² BRASIL. Supremo Tribunal Federal. *Petição nº 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009. p. 301/47.

ción a las “Unidades de Conservação e Terras Indígenas” afirma el voto del Ministro Menezes Direito:

Das normas examinadas, logo se vê que há um conflito, aparente nos respectivos textos, entre os dispositivos que regulam as terras indígenas e aqueles que tratam das unidades de conservação. Anote-se que tanto as terras indígenas quanto as unidades de conservação têm sede constitucional. Da mesma forma que as terras indígenas são reconhecidas no art. 231, mas dependem de um processo de regularização fundiária para que os direitos dos índios sejam assegurados, as unidades de conservação também são reconhecidas no inciso III do § 1º do art. 225, embora devam ser identificadas e regularizadas na forma da lei. Isso porque... ‘o conjunto de unidades de conservação deve representar amostras significativas e ecologicamente viáveis das diferentes populações, habitats e ecossistemas do território nacional e das águas jurisdicionais. Atualmente, as unidades de conservação são entendidas como um sistema, e não se considera cada unidade como um fim em si mesma, ou como um fragmento isolado, mas como parte de um sistema de ordenamento territorial’ [...] Ao contrário do que sustentam alguns defensores de um caráter absoluto dos direitos indígenas, estes são, em verdade, uma das diversas expressões do interesse público de âmbito nacional. **À nação brasileira interessa, sem dúvida, a proteção e a preservação dos interesses indígenas, mas interessa também a preservação do meio ambiente e da segurança de nossas fronteiras além de outros interesses públicos representados pela União, como prevê literalmente o art. 231 da Constituição da República.** É importante identificar tais interesses para que o estatuto jurídico das comunidades indígenas possa ser de una vez por todas definido considerando a disciplina constitucional... E em nossos dias é necessário ter presente que a preservação do meio ambiente é imperativa para a humanidade e não apenas para as nações ou comunidades individualmente consideradas.¹⁰⁵

¹⁰⁵ BRASIL. Supremo Tribunal Federal. *Petição nº 3388*. Embte.: Augusto Affonso Botelho Neto; Embdo.: União. Relator: Ministro Carlos Britto. Juzgamiento, 19 mar. 2009. p. 404/46. Destacado nuestro.

4.2.2 STF, RE 1017365. Recurso Extraordinário 1.017.365 Santa Catarina (Tesis del “Marco Temporal”)^{104, 105}

En lo nuclear, esta decisión retoma el debate en torno a la cuestión del “marco temporal”, como límite al derecho constitucional a la demarcación de las tierras indígenas, ya debatida en el *Caso Raposa Serra do Sol* (2009).

Tras un extenso proceso, el STF afirmará que el derecho a la demarcación se encuentra garantizado en la CF (artículo 231). En ese sentido, la decisión referirá a que ya la Corte IDH en el *Caso Xukerú vs. Brasil* (2018) sancionó al Estado Brasileño por el incumplimiento de su deber de adoptar las medidas efectivas para asegurar el derecho a la demarcación establecido constitucio-

¹⁰⁴ BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 1.017.365 Santa Catarina*. Relator: Ministro Edson Fachim. Juzgamiento, 30 jul. 2023.

¹⁰⁵ A la fecha de cierre de este estudio (agosto 2024) nuevas acciones han reabierto el debate del “Marco Temporal”. Esta vez, el Congreso buscó establecer el referido “marco temporal” por medio de la Ley 14.701-23. Esta iniciativa legislativa fue vetada en varios artículos por el Presidente de la República, pero el Congreso insistió, superando los vetos. Luego, en relación a esta ley, se han presentado: (i) la ADI 7582 que solicita la invalidación; (ii) la ADI 7583 (*Ação Direta de Inconstitucionalidade*) que también impugna la validez de la ley; (iii) la ADI 7586, que también cuestiona la Ley 14.701/2023, en base a que impone graves limitaciones al ejercicio de los derechos fundamentales de los pueblos indígenas, sin tener amparo en norma constitucional alguna; (iv) la ADC 87 (*Ação Declaratória de Constitucionalidade*), que pide la validación de la ley indicada. El Ministro Relator Gilmar Mendes, resolvió de manera conjunta las acciones indicadas (ADC 87), dispuso la suspensión cautelar de todas las acciones judiciales que discuten la constitucionalidad la nueva Ley 14.701-2023, con lo que *esta ley mantiene vigencia* preliminar, sin perjuicio de la revisión definitiva del caso por el Pleno del STF (“ad-referendum”). BRASIL, STF. ADC 87, “*Ação declaratória de constitucionalidade 87 Distrito Federal*” (decisión conjunta ADC 87, ADI 7.582, ADI 7.583, ADI 7.586 e ADO 86). Decisión Monocrática, Ministro Relator Gilmar Mendes. 22.04.2024. Dispositivo 1., p. 16. A esta fecha, el proceso se encuentra con un proceso de “conciliación” dispuesto por el Ministro Relator Gilmar Mendes (utilización de los “meios consensuais de solução de litígios, a intimação, no prazo de 30 (trinta) dias, das duas casas do Congresso Nacional para a prestação de informações (Lei 9.868/1999, arts. 6º e 11).”, 22.04.2024). El proceso ha tenido dos audiencias públicas (5.8.2024/28.8.2024), con el actual retiro de los representantes indígenas. Además, existe un pedido de “vista”, por parte del Presidente de STF, encontrándose prevista su pronta discusión por el Plenario del STF. v. BRASIL, STF. “*Partidos pedem que Supremo valide lei do marco temporal*” (28/12/2023). Disponible en: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=523472&ori=1>. BRASIL. Supremo Tribunal Federal. “*STF recebe mais uma ação contra lei que institui o marco temporal indígena*”. *Supremo Tribunal Federal Notícias*, 2 jan. 2024. Disponible en: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=523742&ori=1>

nalmente¹⁰⁶. Luego, que la tesis del “Marco Temporal” (limitación al derecho constitucional de demarcación, solo a aquellos pueblos o comunidades que tenían ocupación material de sus tierras a la fecha de entrada en vigencia de la CF, el 5/10/1988), debatida en la especie, no se apega al sentido de la CF y, en especial, vulnera las obligaciones internacionales de Brasil. Señala la “emenda” (resumen oficial de la decisión):

I - A demarcação consiste em procedimento declaratório do direito originário territorial à posse das terras ocupadas tradicionalmente por comunidade indígena; II - A posse tradicional indígena é distinta da posse civil, consistindo na ocupação das terras habitadas em caráter permanente pelos indígenas, nas utilizadas para suas atividades produtivas, nas imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e nas necessárias a sua reprodução física e cultural, segundo seus usos, costumes e tradições, nos termos do §1º do artigo 231 do texto constitucional; III - A proteção constitucional aos direitos originários sobre as terras que para suas atividades produtivas, as imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e as necessárias a sua reprodução física e cultural, nos termos do §1º do artigo 231, sempre segundo os usos, costumes e tradição da comunidade¹⁰⁷.

Así, el STF, repasa las bases constitucionales de los derechos de los pueblos indígenas en Brasil, conforme “las posibilidades hermenéuticas del artículo 231 de la Constitución de 1988”, tales como: la posesión de las tierras indígenas de ocupación tradicional; la naturaleza jurídica meramente declaratoria del derecho originario (preestatal) de los indígenas y la compatibilidad de la posesión indígena con la protección ambiental¹⁰⁸. En este sentido, expresó el acuerdo del STF:

Ao reconhecer aos indígenas ‘sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam’, o artigo 231 tutela aos povos indígenas direitos fundamentais, com as consequentes garantias inerentes à sua proteção, quais sejam, consistir em cláusulas pétreas, anteparo em face de maiorias eventuais, interpretação extensiva e vedação ao retrocesso. ... O texto constitucional reconhece a existência dos direitos territoriais ori-

¹⁰⁶ BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 1.017.365 Santa Catarina*. Relator: Ministro Edson Fachim. Juzgamiento, 30 jul. 2023. p. 31;638-639;668.

¹⁰⁷ BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 1.017.365 Santa Catarina*. Relator: Ministro Edson Fachim. Juzgamiento, 30 jul. 2023. p. 7-8.

¹⁰⁸ BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 1.017.365 Santa Catarina*. Relator: Ministro Edson Fachim. Juzgamiento, 30 jul. 2023. p. 7-8.

ginários dos indígenas, que lhe preexistem, logo, o procedimento administrativo demarcatório não constitui a terra indígena, mas apenas declara que a área é de ocupação pelo modo de viver da comunidade. ... A posse indígena espelha o habitat de uma comunidade, a desaguar na própria formação da identidade, à conservação das condições de sobrevivência e do modo de vida indígena, distinguindo-se da posse civil, de feição marcadamente econômica e mercantil. ... A tradicionalidade da ocupação indígena abrange as áreas por eles habitadas em caráter permanente, as utilizadas tradicionalmente ocupam independente da existência de um marco temporal em 05 de outubro de 1988...¹⁰⁹.

Finalmente, en relación con los estándares interamericanos, señaló el Ministro Barroso:

... É muito importante assinalar... a decisão da [Corte IDH] no caso do Povo Indígena Xucuru e seus Membros vs. Brasil... em que se reconheceu a responsabilidade internacional do Brasil pela irrazoável demora na demarcação e pelo prejuízo sofrido por tal povo...

... parece-me haver plena compatibilidade constitucional da dupla afetação da área para a proteção indígena e para a proteção ambiental de forma simultânea. Todas as pesquisas documentam que as áreas demarcadas para as comunidades indígenas têm um índice de desmatamento significativamente inferior às reservas ambientais do poder público e às florestas de uma maneira geral. De modo que não há nenhuma incompatibilidade entre preservação ambiental e ocupação pelas comunidades indígenas¹¹⁰.

4.2.3 RE n° 654833/AC: imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)¹¹¹

La RE n° 654833/AC: imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)”. Su objetivo era la reparación de daños materiales, morales y ambientales

¹⁰⁹ BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 1.017.365 Santa Catarina*. Relator: Ministro Edson Fachim. Juzgamiento, 30 jul. 2023. p. 14-16.

¹¹⁰ BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário 1.017.365 Santa Catarina*. Relator: Ministro Edson Fachim. Juzgamiento, 30 jul. 2023. p. 668.

¹¹¹ BRASIL. Supremo Tribunal Federal. *RE n° 654833/AC*. Imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)”. Recorrente: Procurador Geral da República. Relator: Ministro Alexandre de Moraes. Juzgamiento, 20 abr. 2020. Corresponde a un recurso extraordinario con alcance general (Tema 9999) interpuesto ante el Superior Tribunal de Justiça (STJ), mediante acción civil pública interpuesta por el Ministério Público Federal (MPF), elevado al STF.

derivados de invasiones del área indígena ocupada por la comunidad *Ashaninka-Kampa do Rio Amônia*. Se sostenía la imprescriptibilidad de la acción de reparación civil del daño ambiental. El STF reconoció la hipótesis de la imprescriptibilidad de la acción de reparación civil de daño ambiental, entre otros aspectos, dado que el medio ambiente “debe ser considerado patrimonio común de toda la humanidad, como garantía de su protección integral, especialmente en relación a las generaciones futuras... La reparación del daño ambiental es un derecho fundamental indisponible...”¹¹². Entre otros aspectos, dice la decisión:

... o direito de viver em um ambiente saudável, com plenas condições de o ser humano desenvolver todas as suas capacidades sociais, culturais, de trabalho e lazer, encontra raízes no núcleo essencial dos direitos fundamentais atinentes à vida, à saúde, à liberdade e à igualdade.¹¹³

... no tocante à indisponibilidade do direito ao meio ambiente ecologicamente equilibrado, enquanto direito fundamental inerente à própria condição humana, alinha-se à compreensão desta SUPREMA CORTE¹¹⁴.

... a natureza transgeracional do direito ao meio ambiente saudável e íntegro. Nesses termos: “[...] Todos têm direito ao meio ambiente ecologicamente equilibrado. Trata-se de um típico direito de terceira geração (ou de novíssima dimensão), que assiste a todo o gênero humano... Incumbe, ao Estado e à própria coletividade, a especial obrigação de defender e preservar, em benefício das presentes e futuras gerações, esse direito de titularidade coletiva e de caráter transindividual... O adimplemento desse encargo, que é irrenunciável, representa a garantia de que não se instaurarão, no seio da coletividade, os graves conflitos intergeracionais marcados pelo desrespeito ao dever de solidariedade, que a todos se impõe, na proteção desse bem essencial de uso comum das pessoas em geral.¹¹⁵

¹¹² BRASIL. Supremo Tribunal Federal. *RE nº 654833/AC*. Imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)”. Recorrente: Procurador Geral da República. Relator: Ministro Alexandre de Moraes. Juzgamiento, 20 abr. 2020. p. 2/2 (traducción es nuestra).

¹¹³ BRASIL. Supremo Tribunal Federal. *RE nº 654833/AC*. Imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)”. Recorrente: Procurador Geral da República. Relator: Ministro Alexandre de Moraes. Juzgamiento, 20 abr. 2020. p. 20/5.

¹¹⁴ BRASIL. Supremo Tribunal Federal. *RE nº 654833/AC*. Imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)”. Recorrente: Procurador Geral da República. Relator: Ministro Alexandre de Moraes. Juzgamiento, 20 abr. 2020. p. 21/6.

¹¹⁵ BRASIL. Supremo Tribunal Federal. *RE nº 654833/AC*. Imprescritibilidade de pretensão de reparação civil de dano ambiental (Comunidade Ashaninka-Kampa do Rio Amônia)”. Recorrente:

4.2.4 STF ADPF 709

La ADPF 709¹¹⁶ es una acción de control de constitucionalidad presentada directamente al STF por la *Articulação dos Povos Indígenas do Brasil* en conjunto con diversos partidos políticos brasileños, en que se invoca violación al derecho de los pueblos indígenas a la vida y a la salud frente a la pandemia por COVID-19. Los postulantes afirman que tales pueblos presentan condiciones de vulnerabilidad epidemiológica más grave que la mayoría de los brasileños al COVID, en razón de su menor exposición a enfermedades infectocontagiosas, su modo de vida comunitario y su residencia en locales con difícil acceso a servicios de salud. Afirman, además, que el gobierno no estaría adoptando medidas adecuadas a su protección.

El STF concedió en parte las medidas cautelares pertinentes a estos requerimientos. Expuso, en primer término, que la protección y respeto del aislamiento y, por tanto, de la identidad cultural, en el caso de esos pueblos indígenas, es la mejor forma de protección de su derecho a la vida y a la salud, teniendo el aislamiento como la mejor defensa ante el contagio (siguiendo las directrices internacionales de la ONU y la CIDH)¹¹⁷.

Asimismo, a esa fecha, el Presidente de la República había declarado que no demarcaría tierras indígenas durante su gobierno¹¹⁸. En esas condiciones, no asegurar el aislamiento voluntario, se estaba vulnerando el derecho a la tierra asegurado a los pueblos indígenas por la CF de 1988. que el derecho de los pueblos a vivir en aislamiento voluntario está contenido en su derecho a la libre determinación, enlazado con sus derechos a las tierras asegurado constitucionalmente y su derecho a la identidad cultural, conforme los artículos 2, 5 y 7 del Convenio N°169 de la OIT¹¹⁹. Así, se dijo:

Procurador Geral da República. Relator: Ministro Alexandre de Moraes. Juzgamiento, 20 abr. 2020. p. 23/8.

¹¹⁶ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, juzgamiento. 05 ago. 2020.

¹¹⁷ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, juzgamiento. 05 ago. 2020. p. 42/11.

¹¹⁸ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, juzgamiento. 05 ago. 2020. p. 38/7.

¹¹⁹ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, juzgamiento. 05 ago. 2020. p. 14-15.

... a Constituição de 1988 assegura aos povos indígenas o direito à sua ‘organização social, costumes, línguas, crenças e tradições’, bem como os ‘direitos originários sobre as terras que tradicionalmente ocupam’ (CF, art. 231). Na mesma linha, a Convenção 169 da OIT, vinculante para o Brasil, assegura o direito dos povos indígenas à autodeterminação e à identidade cultural (artigos 2º, 1; 4º, 1 e 2; 5º e 7º).¹²⁰

En este contexto, el STF estableció que, las acciones (omisiones) gubernamentales ponían en riesgo el derecho a la identidad cultural, en relación a la preservación de su sobrevivencia y existencia como pueblo, lo que demandaba un deber de actuación para el Estado:

... a opção pelo não contato decorre de seu direito à autodeterminação e constitui uma forma de preservar a sua identidade cultural e as suas próprias organizações, usos, costumes e tradições. Nessa medida, o ingresso de qualquer membro exógeno à comunidade, sem a sua autorização, constitui um ilícito. Tais povos têm direito ao isolamento e o Estado tem o dever de assegurá-lo.¹²¹

Por último, todo el proceso fue desarrollado desde la metodología pionera de un “proceso estructural”, demandando acciones de diversos organismos del Estado, instalando al efecto, por requerimiento judicial cautelar, una “mesa de situación” en la cual, junto a los organismos públicos incumbentes, la participación de los propios pueblos indígenas mediante sus organizaciones de representación, fue central. En este sentido dice el voto del Relator:

“... estabelecer um diálogo intercultural entre nossa própria cultura e a cultura indígena... parecia imprescindível para a solução adequada desses problemas.

As comunidades indígenas têm que expressar suas necessidades e auxiliar o Estado na busca das soluções cabíveis e possíveis, inclusive porque é preciso ter em conta que as comunidades têm suas particularidades, peculiaridades e tradições culturais, muitas vezes, diversas. [...] A participação das comunidades indígenas... além de decorrer de um princípio de justiça natural - porque estamos tratando da vida, da terra e da cultura deles - também decorre de tratados internacionais que determinam que sejam ouvidos e considerados em todas as questões que digam respeito a seus povos, conforme decorre da

¹²⁰ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, julgamento. 05 ago. 2020. p. 40.

¹²¹ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, julgamento. 05 ago. 2020. p. 42.

Convenção 169 da Organização Internacional do Trabalho.¹²²

El STF determinó que el Gobierno Federal debía elaborar un Plan General de Enfrentamiento al COVID para Pueblos Indígenas (Plan General), con la participación de los representantes de los indígenas. El Plan General garantizó múltiples servicios y prestaciones positivas en materia de salud, acceso al agua, seguridad alimentaria, habitación y beneficios asistenciales, con el fin de garantizar su protección durante la pandemia. Con el desarrollo de vacunas anti-COVID, aseguró a todos los pueblos indígenas el derecho a la vacunación prioritaria.¹²³

Respecto de los principios de prevención y precaución señaló el voto del Relator:

No que respeita aos princípios da precaução e da prevenção, é importante frisar que se alega, na inicial, um risco iminente de extermínio em massa de povos indígenas em decorrência da expansão da pandemia por COVID-19. Em tais circunstâncias, de alegação de risco ao direito à vida e à saúde, a jurisprudência do Supremo Tribunal Federal tem entendido que as decisões judiciais devem pautar-se por tais princípios.

Em caso de dúvida, devem-se adotar as medidas mais protetivas de que se disponha e vedar aquelas cuja segurança seja incerta...¹²⁴.

Puede destacarse de este caso que el STF, tanto al identificar el riesgo, como al otorgar las medidas cautelares respectivas y en su función de monitoreo del cumplimiento de estas acciones, dio cuenta de una comprensión del derecho humano a la identidad de los pueblos indígenas y tradicionales que sigue el texto y el espíritu de la CF, en armonía con los estándares adelantados por la CIDH y la Corte IDH.

5 Conclusiones

Internacionalmente, tanto Chile, como Brasil, han recepcionado por medio de mecanismos constitucio-

¹²² BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, julgamento. 05 ago. 2020. p. 23-24.

¹²³ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, julgamento. 05 ago. 2020. p. 13-16.

¹²⁴ BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 709*. Relator: Ministro Luís Roberto Barroso, julgamento. 05 ago. 2020. p. 38/7.

nales los derechos humanos a la identidad cultural y al medio ambiente sano lo que, respectivamente, en interacción con el conjunto de fuentes internacionales de derechos humanos, generales y regionales, genera un nuevo marco de obligaciones de aplicación en el ámbito interno.

Este nuevo ordenamiento contribuye a la interacción del Derecho Internacional de los Derechos Humanos (general, regional interamericano y las decisiones comparadas regionales de alcance constitucional), bajo la perspectiva hermenéutica argumental que llamamos *constitucionalismo en red*.

Conjuntamente, las garantías procesales, generales y especiales, constituyen la base para sostener la necesidad de que todo mecanismo de evaluación ambiental, administrativa o judicial, contenga los medios para ponderar los elementos propios de las formas de vida de los pueblos indígenas (*intangibles culturales*) que pueden ser afectados por proyectos de inversión u otras acciones del Estado o de particulares.

Si bien, el texto de la CF brasileña es expreso y consistente en el reconocimiento los derechos de los pueblos indígenas, su identidad cultural y al medio ambiente sano, mientras la CPR chilena, omite los primeros y es escueta en materia ambiental, en ambos casos ha sido la jurisprudencia de nivel superior (STF en Brasil, Cortes de Apelaciones y Corte Suprema en Chile), las que han dotado de contenido y estándares a estos derechos.

En general, en Chile, conforme la regulación ambiental y la interpretación, en general, seguida, la labor de los organismos administrativos y judiciales, en especial los técnico ambientales, se centran en determinar si se descartan o no, en los proyectos de inversión sometidos a evaluación, alguno de los efectos, características o circunstancias contemplados en el artículo 11 de la Ley 19.300 (ECC), como factor detonante de la consulta indígena. A la luz de estos dispositivos, la noción de *susceptibilidad de afectación*, desarrollada jurisprudencialmente, establecida como requisito de procedencia de la consulta indígena, ha sido debatida. Primero, se sostuvo una tesis formalista restrictiva (centrada en la interpretación legal interna que exige un estándar alto de evidencia previa) que desplazó el rol tutelar de la consulta indígena, respecto de los derechos sustantivos de los pueblos indígenas, hacia un complejo sistema administrativo y judicial. Luego, transitó a otra (más abierta, conforme el Convenio 169, de afectación solo probable) que hoy

es convergente con los principios preventivo y precautorio ambientales, conforme los derechos humanos a la identidad cultural y al medio ambiente sano, asegurados internacionalmente, vinculantes para ambos estados.

En Brasil, el foco principal ha radicado en el derecho a la demarcación de las tierras indígenas. La CF reconoce el derecho originario de los pueblos indígenas a las tierras (art. 231 CF), otorgando un usufructo perpetuo e imprescriptible sobre ellas, reservándose la Unión (Estado Federal), la propiedad en sí, como forma de resguardo de estas tierras. El debate se centró en los eventuales límites temporales de este derecho dado que se ha postulado que sólo gozarían de este derecho quienes poseyeran o tuvieran ocupación de las tierras a la fecha de entrada en vigencia de la Constitución en 1988 (tesis del “marco temporal”). Al respecto, aunque la jurisprudencia del STF ha tendido a no admitir la tesis del “marco temporal”, el debate está abierto, es complejo e involucra a los tres poderes del Estado. A agosto de 2024 no existe una sanción definitiva del asunto, lo que debilita el marco constitucional en su conjunto.

Asimismo, con ocasión de los graves efectos de la Pandemia de COVID en los pueblos indígenas, el STF, determinó los deberes de diligencia del Estado Brasileño, requiriéndole adoptar diversas medidas de protección, bajo la que podemos llamar una *hermenéutica constitucional cautelar intercultural*. El STF, tanto al identificar el riesgo, como al otorgar las medidas cautelares respectivas y en su función de monitoreo del cumplimiento de estas acciones, dio cuenta de una comprensión del derecho humano a la identidad cultural de los pueblos indígenas y tradicionales que sigue el texto y el espíritu de la CF, en armonía con los estándares adelantados por la CIDH y la Corte IDH.

Sin perjuicio de una gramática expresa y robusta de la CF de 1988 -aunque no ajena al debate sobre su alcance, especialmente temporal- y otra escueta de la CPR de 1980, pero de interpretación extensiva, en ambos casos es posible advertir, especialmente en el ciclo jurisprudencial más reciente, un enfoque hermenéutico cautelar de comunidades locales, en especial indígenas y tradicionales.

Los derechos humanos a la identidad cultural y al medio ambiente sano, incorporados a los respectivos ordenamientos jurídicos, se materializan, tanto, en el reconocimiento de la identidad cultural como imperativo interpretativo constitucional: como, en los principios

preventivo y precautorio ambientales que gobiernan los procesos de evaluación ambiental, en sus dimensiones administrativas y de control judicial de autorizaciones, licenciamientos o evaluación ambientales. Incluso, fundamentan las medidas que implemente el Estado en procesos de emergencia o extraordinarios, como fue el caso de la Pandemia de COVID.

De igual forma, se observa un avance emergente y progresivo del paradigma *ecocéntrico* —protector de la naturaleza por su valor en sí—, enfoque convergente con los respectivos estatutos constitucionales y el Derecho Internacional (general e interamericano) estudiado, pero cuyo desarrollo no está plenamente consolidado y debe ser objeto de más seguimiento.

Conforme la perspectiva hermenéutica *cautelar-intercultural—ambiental*, reflejada en las decisiones seleccionadas, las cortes domésticas con competencia constitucional (de Brasil y Chile) han alcanzado entendimientos que (en abstracto) “dialogan” en torno a unos mismos derechos y problemas. En ese sentido muestran componentes del *constitucionalismo en red*. Con todo, solo observamos un “diálogo” en abstracto, en tanto, el espacio de convergencia hermenéutica, si bien se constata respecto de las fuentes generales y regionales interamericanas (en particular en relación a la jurisprudencia de la Corte IDH), no se observa un diálogo horizontal efectivo, en concreto, en los casos estudiados de Chile y Brasil. Ahora bien, al efecto, las conclusiones de este trabajo pueden contribuir, en tanto contenido normativo argumental disponible para futuras decisiones que avancen en ese diálogo comparado horizontal que, sustantivamente ya posee una ruta armónica, aunque con respectivas tensiones internas.

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Resumo

A mobilidade humana surge como uma resposta às mudanças climáticas, especialmente em contextos de vulnerabilidade socioambiental. Em casos de desastres naturais, como o ocorrido no estado brasileiro do Rio Grande do Sul, a resiliência climática não pode se restringir, apenas, às estratégias de mitigação e adaptação, sendo essencial incorporar soluções baseadas no conceito de perdas e danos. Contudo, esse conceito ainda carece de definição precisa no Direito Internacional, o que gera lacunas na proteção jurídica dos deslocados ambientais. O objetivo da pesquisa apresentada neste artigo é investigar como os instrumentos jurídicos, baseados no conceito de perdas e danos, contribuem para o avanço da tutela jurídica dos deslocados ambientais, especialmente daqueles afetados pela catástrofe climática no Rio Grande do Sul. No que se refere ao método de investigação, a pesquisa é de natureza qualitativa, realizada por meio de análise documental e bibliográfica. Constatou-se que, embora os deslocados ambientais sejam contemplados pelo regime internacional sobre mudanças climáticas, a proteção oferecida a esse grupo é insuficiente. A tutela desses indivíduos vulneráveis depende, substancialmente, das legislações nacionais e da capacidade de cada Estado em implementar medidas adequadas, o que agrava a vulnerabilidade de países menos desenvolvidos — frequentemente os mais afetados pelas mudanças climáticas, mas que menos contribuíram para sua ocorrência.

Palavras-chave: mobilidade humana; perdas e danos; deslocados ambientais; desastres naturais; vulnerabilidade socioambiental.

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Abstract

Human mobility emerges as a response to climate change, particularly in contexts of socio-environmental vulnerability. In cases of natural disasters, such as the one that occurred in the Brazilian state of Rio Grande do Sul, climate resilience cannot be limited to mitigation and adaptation strategies alone; it is essential to incorporate solutions based on the concept of loss and damage. However, this concept still lacks a precise definition in International Law, creating gaps in the legal protection of environmental migrants. The objective of this paper is to investigate how legal instruments based on the concept of loss and damage contribute to advancing the legal protection of environmental migrants, especially those affected by the climate catastrophe in Rio Grande do Sul. Regarding the research method, this study is qualitative in nature, conducted through documentary and bibliographic analysis. The paper concluded that, although environmental migrants are included in the International Climate Change Regime, the protection provided to this group is insufficient. The protection of these vulnerable individuals largely depends on national legislation and each state's ability to implement appropriate measures, which exacerbates the vulnerability of less developed countries — often the most affected by climate change, yet the least responsible for its occurrence.

Keywords: human mobility; loss and damage; environmental migrants; natural disasters; socio-environmental vulnerability.

1 Introdução

O aquecimento global causado pelo impacto da atividade humana, principalmente pelas emissões de gases de efeito estufa, é a causa de muitos fenômenos climáticos e meteorológicos extremos em todas as regiões do mundo¹. Estes incluem o aumento da frequência e da intensidade dos picos de temperatura, as chuvas intensas; em algumas regiões, a seca prolongada e os ciclones

tropicais, bem como a redução do gelo no mar Ártico, da cobertura de neve e do permafrost².

As alterações climáticas têm, portanto, um impacto negativo generalizado, especialmente para os mais vulneráveis. Uma vez que “a vulnerabilidade humana e os ecossistemas são interdependentes”³, as regiões e populações com limitações de desenvolvimento consideráveis são as mais vulneráveis aos riscos climáticos. Atualmente, há entre 3,3 a 3,6 bilhões de pessoas em contextos vulneráveis às mudanças climáticas⁴. Para essas pessoas, a migração é uma forma de adaptação - embora particularmente extrema - face a condições ambientais difíceis⁵. A migração constitui, portanto, um recurso ao qual as pessoas recorrem quando outros meios de adaptação falharam⁶.

Mundialmente, houve cerca de 26,4 milhões de deslocamentos internos em razão de desastres em 2023⁷. Nas Américas, o Brasil ocupa o primeiro lugar na classificação dos países com mais deslocamentos internos⁸. Em 2023, o país contabilizou 745 mil deslocamentos internos em razão de desastres, aproximadamente um

¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. *Summary for policymakers, in climate change 2023: synthesis report, contribution of working groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: IPCC, 2023.

² INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. *Summary for policymakers, in climate change 2023: synthesis report, contribution of working groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: IPCC, 2023.

³ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. *Summary for policymakers, in climate change 2023: synthesis report, contribution of working groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: IPCC, 2023. p. 5.

⁴ SUMMARY for Policymakers. In: INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. *Climate change 2022: impacts, adaptation and vulnerability: contribution of working group II to the sixth assessment report of the Intergovernmental Panel On Climate Change*. Cambridge: Cambridge University Press, 2022.

⁵ EUROPEAN PARLIAMENT. Policy Department for Citizens' Rights and Constitutional Affairs. *Climate change and migration: legal and policy challenges and responses to environmentally induced migration*. Brussels: European Union: European Parliament, 2020. Disponível em: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU\(2020\)655591_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655591/IPOL_STU(2020)655591_EN.pdf). Acesso em: 12 ago. 2024.

⁶ ATAPATTU, S. Climate Change: disappearing states, migration, and challenges for international law. *Washington Journal of Environmental Law & Policy*, v. 4, n. 1, 2014.

⁷ INTERNAL DISPLACEMENT MONITORING CENTER. 2024 Global Report on Internal Displacement. *IDMC*, 2024. Disponível em: <https://www.internal-displacement.org/global-report/grid2024/>. Acesso em: 20 ago. 2024.

⁸ INTERNAL DISPLACEMENT MONITORING CENTER. 2024 Global Report on Internal Displacement. *IDMC*, 2024. Disponível em: <https://www.internal-displacement.org/global-report/grid2024/>. Acesso em: 20 ago. 2024. p. 82.

terço da quantidade total verificada no continente e o maior número registrado no país desde o início da coleta de dados em 2008⁹. Em meio aos desafios crescentes que as mudanças climáticas representam, a resiliência socioambiental brasileira é posta à prova. Todavia, o cenário atual aponta no sentido da vulnerabilidade climática do Brasil.

Em 2024, o Brasil presenciou uma das maiores crises climáticas da sua história contemporânea, juntando-se à lista crescente de países severamente afetados por eventos climáticos extremos¹⁰ decorrentes do aquecimento global¹¹. No final de abril de 2024, o estado brasileiro do Rio Grande do Sul foi atingido por fortes chuvas que provocaram enchentes e desencadearam uma série de calamidades ambientais e humanas. Dos 497 municípios gaúchos, 478 foram atingidos pelas chuvas¹². Cerca 2,4 milhões de pessoas foram afetadas pela catástrofe climática. Destas, 422 mil foram forçadas a se deslocar, somando-se às 43 mil pessoas refugiadas ou em neces-

sidade de proteção internacional que residiam no estado na época do evento¹³.

Todas essas pessoas em mobilidade estão sujeitas a vivenciar situações de vulnerabilidade em razão da catástrofe climática que afetou seu lugar de residência. Esse contexto de mobilidade em razão de alterações repentinas no ambiente devido às mudanças climáticas se insere no fenômeno da migração climática¹⁴, uma subcategoria da migração ambiental. Considerando que não houve cruzamento de fronteiras internacionais, aqueles que se viram forçados a migrar se enquadram mais especificamente no grupo dos “deslocados ambientais”¹⁵, uma categoria que não tem *status* jurídico reconhecido, mas cuja denominação é empregada pelas organizações internacionais que trabalham com o tema para se referir a uma categoria de migrantes ambientais cujo movimento é de natureza claramente forçada. Juridicamente, as pessoas que tiveram de se deslocar forçadamente dentro do território brasileiro passaram a ser enquadradas como “deslocadas internas”¹⁶. A ter-

⁹ INTERNAL DISPLACEMENT MONITORING CENTER. 2024 Global Report on Internal Displacement. *IDMC*, 2024. Disponível em: <https://www.internal-displacement.org/global-report/grid2024/>. Acesso em: 20 ago. 2024. p. 83.

¹⁰ Segundo o glossário do Painel Intergovernamental de Mudanças Climáticas (mais conhecido pela sigla em inglês IPCC), um “evento climático extremo” (extreme climate event) ou simplesmente um “extremo climático” (climate extreme) ocorre quando o valor de uma variável meteorológica ou climática se mostra acima (ou abaixo) de um valor-limite próximo das extremidades superiores (ou inferiores) da gama de valores observados da variável. Quando um padrão de condições meteorológicas extremas persiste por algum tempo, como uma estação, pode ser classificado como um “evento climático extremo”. ANNEX II: Glossary. In: INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. *Climate change 2022: impacts, adaptation and vulnerability: contribution of working group II to the sixth assessment report of the Intergovernmental Panel On Climate Change*. Cambridge: Cambridge University Press, 2022. p. 2897–2930. p. 2902.

¹¹ Entre 2000 e 2019, os países considerados mais afetados pelas mudanças climáticas - em relação ao nível de exposição e de vulnerabilidade - foram nessa ordem: Moçambique, Zimbábue, Bahamas, Japão, Malawi, Afeganistão, Índia, Sudão do Sul, Níger e Bolívia. Em 2019, segundo o Índice Mundial de Riscos Climáticos, os países considerados mais afetados foram: Porto Rico (EUA), Myanmar, Haiti, Filipinas, Moçambique, Bahamas, Bangladesh Paquistão, Tailândia e Nepal. INDICE mondial des risques climatiques 2021: qui souffre le plus des événements météorologiques extrêmes? *Germanwatch*, 2021. Disponível em: <https://www.germanwatch.org/sites/default/files/R%C3%A9sum%C3%A9del%27indicemondialesdesrisquesclimatiques2021.pdf>. Acesso em: 10 jul. 2024.

¹² DEFESA CIVIL atualiza balanço das enchentes no RS – 20/8. *Casa Militar Defesa Civil RS*, 20 ago. 2024. Disponível em: <https://www.defesacivil.rs.gov.br/defesa-civil-atualiza-balanco-das-enchentes-no-rs-10-7-66b67813ba21f-66c4eed627af9>. Acesso em: 12 ago. 2024.

¹³ RIO GRANDE DO SUL, Brasil. *ACNUR*, 10 jun. 2024. Disponível em: <https://www.acnur.org/br/emergencias/rio-grande-do-sul-brasil>. Acesso em: 15 jul. 2024.

¹⁴ Segundo a Organização Internacional para a Migração (OIM), o termo “migração climática” designa “o deslocamento de uma pessoa ou grupos de pessoas que, predominantemente por motivos de mudança repentina ou progressiva no ambiente devido às mudanças climáticas, são obrigados a deixar seu local habitual de residência, ou escolhem fazê-lo, temporária ou permanentemente, dentro de um Estado ou através de uma fronteira internacional”. INTERNATIONAL ORGANIZATION FOR MIGRATION. Glossary on Migration. *International Migration Law*, Geneva, n. 34, 2019. Disponível em: https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/iml_34_glossary.pdf. Acesso em: 12 jul. 2024. p. 31.

¹⁵ De acordo com a OIM, o termo “deslocados ambientais” refere-se a “pessoas deslocadas no interior do seu país de residência habitual ou que tenham atravessado uma fronteira internacional e para quem a degradação, deterioração ou destruição ambiental é uma das principais causas do seu deslocamento, embora não necessariamente a única.” INTERNATIONAL ORGANIZATION FOR MIGRATION. Glossary on Migration. *International Migration Law*, Geneva, n. 34, 2019. Disponível em: https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/iml_34_glossary.pdf. Acesso em: 12 jul. 2024. p. 13.

¹⁶ Conforme os Princípios Orientadores relativos aos Deslocados Internos de 1998, os deslocados internos são “pessoas, ou grupos de pessoas, forçadas ou obrigadas a fugir ou abandonar as suas casas ou seus locais de residência habituais, particularmente em consequência de, ou com vista a evitar, os efeitos dos conflitos armados, situações de violência generalizada, violações dos direitos humanos ou calamidades humanas ou naturais, e que não tenham atravessado uma fronteira internacionalmente reconhecida de um Estado.” NATIONS UNIES. Conseil Economique et Social. *Principes directeurs relatifs au déplacement de personnes à l'intérieur de leur propre*

minologia “refugiado climático/ambiental/ecológico” perdeu valor jurídico reconhecido, sendo, até o presente momento, apenas uma expressão de cunho político¹⁷.

À luz do Direito Internacional, os deslocados internos dispõem, apenas, de um conjunto de normas de *soft law*, isto é, normas não vinculativas, para tutelar a sua proteção¹⁸. No entanto, no ramo do Regime Internacional sobre Mudanças Climáticas, a tutela dos migrantes ambientais constitui uma temática de interesse crescente e que vem sendo desenvolvida de forma transversal em muitos instrumentos jurídicos recentemente adotados.

A Agenda 2030 para o Desenvolvimento Sustentável, por exemplo, ressalta que os deslocados e os migrantes estão entre os grupos mais vulneráveis, fazendo-se necessário empoderá-los¹⁹, bem como afirma que se deve buscar o pleno respeito dos direitos humanos no tratamento dos migrantes, independentemente de qual *status* possuam: migrantes, refugiados ou pessoas

deslocadas²⁰. Outrossim, os deslocados ambientais são particularmente contemplados pela meta 1.5²¹ do Objetivo do Desenvolvimento Sustentável (ODS) 1 e pela meta 13.1 do ODS 13²², assim como pelas demais metas que tratam acerca do processo de mobilidade humana²³.

No caso dos eventos ocorridos no estado do Rio Grande do Sul, faz-se necessário analisar os fatos à luz dos instrumentos sobre perdas e danos. Perdas e danos constituem um dos pilares do regime climático internacional, juntamente com mitigação e adaptação²⁴. Apesar da expressão não ter uma definição jurídica específica²⁵, considera-se que engloba “a manifestação real e/ou potencial de impactos associados com as mudanças climáticas em países em desenvolvimento que afetam negativamente sistemas humanos e naturais”²⁶.

pays: E/CN.4/1998/53/Add.2: annexe du Rapport du Représentant du Secrétaire général, M. Francis M. Deng, présenté conformément à la résolution 1997/39 de la Commission des droits de l’homme. 16 octobre 1998. p. 5.

¹⁷ INTERNATIONAL ORGANIZATION FOR MIGRATION. Glossary on Migration. *International Migration Law*, Geneva, n. 34, 2019. Disponível em: https://environmentalmigration.iom.int/sites/g/files/tmzdbdl1411/files/iml_34_glossary.pdf. Acesso em: 12 jul. 2024.

¹⁸ Segundo a Organização Internacional de Direito do Desenvolvimento (International Development Law Organization - IDLO), “as resoluções, declarações, recomendações e princípios orientadores adotados por Estados, organizações regionais ou órgãos das Nações Unidas, embora de alta autoridade moral, não são geralmente vinculativos para os Estados. Uma exceção a isso é quando um instrumento internacional, ou as disposições dentro dele, são elevadas ao status de direito consuetudinário internacional e, portanto, tornam-se vinculativas em natureza: um bom exemplo é a Declaração Universal dos Direitos Humanos (DUDH) de 1948. Em muitos casos, as disposições dos instrumentos não vinculativos são extraídas de direitos contidos no direito convencional existente. Existem vários instrumentos não vinculativos que são altamente relevantes nas respostas a desastres naturais, incluindo; os Princípios Orientadores sobre Deslocamento Interno [...] de 1998, as Diretrizes Operacionais do Comitê Permanente Inter-Agências de 2006 sobre Direitos Humanos e Desastres Naturais [...] e a Restituição de Habitação e Propriedade para Refugiados e Deslocados Internos de 2007”. INTERNATIONAL DEVELOPMENT LAW ORGANIZATION. *International law and standards applicable in natural disaster situations*. Roma: IDLO, 2009. Disponível em: <https://interagency-standingcommittee.org/sites/default/files/migrated/2014-11/Natural Disasters Manual %28IDLO 2009%29.pdf>. Acesso em: 20 ago. 2024. p. 20.

¹⁹ NAÇÕES UNIDAS. Transformando nosso mundo: a Agenda 2030 para o desenvolvimento sustentável. *UN Brasil*, 2015. Disponível em: <https://brasil.un.org/sites/default/files/2020-09/agenda2030-pt-br.pdf>. Acesso em: 12 ago. 2024.

²⁰ NAÇÕES UNIDAS. Transformando nosso mundo: a Agenda 2030 para o desenvolvimento sustentável. *UN Brasil*, 2015. Disponível em: <https://brasil.un.org/sites/default/files/2020-09/agenda2030-pt-br.pdf>. Acesso em: 12 ago. 2024.

²¹ “1.5 Até 2030, construir a resiliência dos pobres e daqueles em situação de vulnerabilidade, e reduzir a exposição e vulnerabilidade destes a eventos extremos relacionados com o clima e outros choques e desastres econômicos, sociais e ambientais”. NAÇÕES UNIDAS. Transformando nosso mundo: a Agenda 2030 para o desenvolvimento sustentável. *UN Brasil*, 2015. Disponível em: <https://brasil.un.org/sites/default/files/2020-09/agenda2030-pt-br.pdf>. Acesso em: 12 ago. 2024. p. 20.

²² “13.1 Reforçar a resiliência e a capacidade de adaptação a riscos relacionados ao clima e às catástrofes naturais em todos os países”. NAÇÕES UNIDAS. Transformando nosso mundo: a Agenda 2030 para o desenvolvimento sustentável. *UN Brasil*, 2015. Disponível em: <https://brasil.un.org/sites/default/files/2020-09/agenda2030-pt-br.pdf>. Acesso em: 12 ago. 2024. p. 32.

²³ Vide o último relatório da OIM (2024) “Alavancando a mobilidade humana para impulsionar a Agenda 2030” (Leveraging Human Mobility to Rescue the 2030 Agenda, em inglês), lançado em 16 de setembro de 2024, que faz um apelo por compromissos audaciosos e ações transformadoras em favor da mobilidade humana. INTERNATIONAL ORGANIZATION FOR MIGRATION. *Leveraging human mobility to rescue the 2030 agenda IOM, flagship report for the SDG summit*. Geneva: IOM, 2023. Disponível em: <https://publications.iom.int/books/leveraging-human-mobility-rescue-2030-agenda-iom-flagship-report-sdg-summit>. Acesso em: 16 out. 2024.

²⁴ HUQ, S.; ROBERTS, E.; FENTON, A. Loss and Damage. *Nature Climate Change*, v. 11, n. 3, 2013.

²⁵ MALJEAN-DUBOIS, S. Au milieu du gué: le mécanisme de Varsovie relatif aux pertes et préjudices liés aux changements climatiques. In: TABAU, Anne-Sophie (ed.). *Quel droit pour l’adaptation des territoires aux changements climatiques? L’expérience de l’île de la Réunion*. Aix-en-Provence: DICE Éditions, 2018. p. 123-134.

²⁶ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE. Non-economic losses in the context of the work programme on loss and damage: technical paper. FCCC/TP/2013/2. UNFCCC, 9 Oct. 2013. Disponível em: <https://unfccc.int/resource/docs/2013/tp/02.pdf>. Acesso em: 20 ago. 2024. p. 3.

As pessoas migrantes estão entre os grupos mais vulneráveis a perdas e danos²⁷. Essa vulnerabilidade aumenta, crescentemente, quando se considera que migrantes são submetidos a desafios socioeconômicos. No caso dos migrantes climáticos, as perdas e danos causados pelas mudanças climáticas podem levar à redução da habitabilidade de suas cidades ou de seus países de origem, o que levará as pessoas a se moverem ou migrarem permanentemente para fora de seus lares²⁸. Outrossim, o deslocamento é considerado uma perda não econômica relevante, uma vez que elementos não econômicos como segurança e dignidade são amplamente afetados²⁹.

Nesse contexto, a pesquisa proposta neste artigo tem como objetivo investigar e analisar, de que forma, os instrumentos jurídicos, baseados nos conceitos de perdas e danos, contribuem com o avanço da tutela jurídica dos deslocados ambientais, particularmente os oriundos da catástrofe climática ocorrida no Rio Grande do Sul. Realiza-se a análise da problemática, primordialmente, por meio de um estudo teórico-bibliográfico sobre o tema. Quanto à abordagem, a pesquisa é predominantemente qualitativa. A respeito dos objetivos, trata-se de uma pesquisa descritiva e explicativa, mas, igualmente, exploratória, na medida que busca contribuir, por meio da análise de um novo recorte, para o debate sobre o tema.

Para mais, o presente artigo se divide em duas partes. Inicialmente, investigam-se os desafios à tutela jurídica da mobilidade humana no contexto de desastres naturais (seção 2). Posteriormente, analisam-se os elementos do Regime Internacional sobre Perdas e Danos que protegem os deslocados ambientais (seção 3). Por último, apresentam-se as considerações obtidas sobre o estudo realizado.

2 A mobilidade humana em contexto de desastres naturais

A migração é um fenômeno presente na história humana desde o início dos tempos. É natural ao ser humano a mobilidade em busca de melhores condições de existência. Esse processo de mobilidade é ainda mais evidente em situações de perigo ou de ameaça de perigo no contexto de desastres naturais. Desastres naturais são eventos causados por um perigo natural, que pode ser um processo ou fenômeno natural, tais como terremotos, furacões ou secas, e que pode resultar em perda de vidas, danos materiais e impacto ambiental³⁰. Esses fenômenos provocam mudanças violentas, súbitas e destrutivas no ambiente³¹, o que pode desencadear, ou mesmo forçar, a mobilidade humana em busca de condições mais seguras de existência.

No ordenamento jurídico brasileiro, a Lei n. 12.608/12, estabelecendo a Política Nacional de Proteção e Defesa Civil (PNPDEC), define um desastre como o “resultado de evento adverso, de origem natural ou induzido pela ação humana, sobre ecossistemas e populações vulneráveis que causa significativos danos humanos, materiais ou ambientais e prejuízos econômicos e sociais”³².

Em 2023, há, mundialmente, cerca de 7,7 milhões de deslocados internos em razão de desastres³³. Considerando que não cruzaram fronteiras internacionalmente reconhecidas, essas pessoas em mobilidade permanecem majoritariamente na tutela do seu Estado de

²⁷ PERTES et préjudices: une obligation morale d’agir. *Nations Unies Action Climat*, 2022. Disponível em: <https://www.un.org/fr/climatechange/adelle-thomas-loss-and-damage>. Acesso em: 12 ago. 2024.

²⁸ PERTES et préjudices: une obligation morale d’agir. *Nations Unies Action Climat*, 2022. Disponível em: <https://www.un.org/fr/climatechange/adelle-thomas-loss-and-damage>. Acesso em: 12 ago. 2024.

²⁹ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE. Non-economic losses in the context of the work programme on loss and damage: technical paper. FCCC/TP/2013/2. UNFCCC, 9 Oct. 2013. Disponível em: <https://unfccc.int/resource/docs/2013/tp/02.pdf>. Acesso em: 20 ago. 2024.

³⁰ ONYANGO, M. A.; UWASE, M. Humanitarian response to complex emergencies and natural disasters. *In: INTERNATIONAL Encyclopedia of Public Health*. 2. ed. [S. l.: s. n.], 2017. p. 106-116.

³¹ NATURAL Disaster. *In: EUROPEAN ENVIRONMENT AGENCY Glossary*. EEA, 2004. Disponível em: <https://www.eea.europa.eu/help/glossary/eea-glossary/natural-disaster>. Acesso em: 12 ago. 2024.

³² BRASIL. *Lei nº 12.608, de 10 de abril de 2012*. Institui a Política Nacional de Proteção e Defesa Civil - PNPDEC; dispõe sobre o Sistema Nacional de Proteção e Defesa Civil - SINPDEC e o Conselho Nacional de Proteção e Defesa Civil - CONPDEC; autoriza a criação de sistema de informações e monitoramento de desastres; altera as Leis nºs 12.340, de 1º de dezembro de 2010, 10.257, de 10 de julho de 2001, 6.766, de 19 de dezembro de 1979, 8.239, de 4 de outubro de 1991, e 9.394, de 20 de dezembro de 1996; e dá outras providências. Disponível em: https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/112608.htm.

³³ INTERNAL DISPLACEMENT MONITORING CENTER. 2024 Global Report on Internal Displacement. *IDMC*, 2024. Disponível em: <https://www.internal-displacement.org/global-report/grid2024/>. Acesso em: 20 ago. 2024.

origem ou residência. À luz do Direito Internacional, os deslocados internos padecem da falta de desenvolvimento de um regime mais protetor, que reconheça a vulnerabilidade a qual esse grupo de pessoas em movimento está submetido.

Nessa perspectiva, na primeira seção deste artigo, investiga-se a mobilidade humana em contexto de desastres naturais. Inicialmente, exploram-se os principais elementos que constituem a tutela jurídica do fenômeno da mobilidade humana no contexto dos desastres naturais (2.1). Posteriormente, analisam-se, especificamente, os instrumentos aplicáveis à proteção das pessoas deslocadas em razão das enchentes no estado do Rio Grande do Sul (2.2).

2.1 A tutela jurídica da mobilidade humana no contexto dos desastres naturais

Eventos climáticos extremos inviabilizam, muitas vezes, a vida. Os efeitos adversos da degradação ambiental causados por esses tipos de fenômenos combinados com vulnerabilidades preexistentes, tais como desequilíbrios econômicos, pobreza, má governança, recursos naturais escassos, ecossistemas frágeis, mudanças demográficas, desigualdades socioeconômicas, xenofobia e tensões políticas e religiosas, afetam, diretamente, na questão dos fluxos migratórios³⁴. Os seres humanos, nos espaços mais afetados por essa combinação de fatores, são frequentemente forçados a migrar em busca de melhores condições de vida.

Nesse sentido, o Direito tem a função de “fornecer estabilidade pela normatividade”³⁵, tanto para evitar a repetição do desastre, como para responder ao caos trazido por este. Por meio de um processo de “estabilização dinâmica dos desastres”³⁶, o Direito promove expectativas, por meio da regulação, às ações de an-

tecipação e resposta aos desastres. Entretanto, há um descompasso entre o tempo do Direito e a urgência de desenvolver respostas jurídicas adequadas aos desafios trazidos pelas mudanças climáticas³⁷. Particularmente em relação às migrações climáticas, a demora em achar soluções adequadas resulta em uma sobreposição de vulnerabilidades³⁸.

Um dos maiores desafios à regulamentação da mobilidade humana no contexto de mudanças climáticas é o próprio *status* jurídico dos migrantes. A categorização de um migrante não é um feito simples, havendo uma série de situações que se encontram em uma área cinzenta³⁹. Sejam forçados ou voluntários, sejam internos ou internacionais, os fluxos migratórios são um tópico complexo e de difícil normatização, especialmente quando se consideram as limitações do arcabouço jurídico existente quanto à tutela dos que exercem o direito de mobilidade entre os espaços.

A principal categoria de migrante que goza de um estatuto jurídico internacionalmente reconhecido são os refugiados. O refúgio é um instituto jurídico estandardizado que garante proteção a um tipo de migrante forçado que, no decorrer da história, mostrou-se como mais vulnerável, necessitado de proteção dos Estados⁴⁰. Para que se reconheça o *status* de refugiado a um migrante, é indispensável o preenchimento de algumas condições⁴¹,

³⁴ UNHCR. Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters. *UNHCR*, 01 Oct. 2020. Disponível em: <https://www.refworld.org/docid/5f75f2734.html>. Acesso em: 20 jul. 2022.; UNITED NATIONS. General Assembly. *Resolution adopted by the General Assembly on 19 September 2016*: New York declaration for refugees and migrants. A/RES/71/1. New York: UN, 2016.

³⁵ CARVALHO, D. W. de. As mudanças climáticas e a formação do Direito dos desastres. *Novos Estudos Jurídicos*, Itajaí, v. 18, n. 3, p. 397-415, 2013. p. 406.

³⁶ CARVALHO, D. W. de. As mudanças climáticas e a formação do Direito dos desastres. *Novos Estudos Jurídicos*, Itajaí, v. 18, n. 3, p. 397-415, 2013. p. 407.

³⁷ CAVEDON-CAPDEVILLE, F. S.; SERRAGLIO, D. A. Vidas em movimento: os sistemas de proteção dos direitos humanos como espaços de justiça para os migrantes climáticos. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 104-125, 2022.

³⁸ CAVEDON-CAPDEVILLE, F. S.; SERRAGLIO, D. A. Vidas em movimento: os sistemas de proteção dos direitos humanos como espaços de justiça para os migrantes climáticos. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 104-125, 2022.

³⁹ LACERDA, M.; MAURÍCIO JÚNIOR, A. The not so humanitarian dichotomy refugees and economic migrants. *Nomos: Revista do Programa de Pós-graduação em Direito*, Fortaleza, v. 40, n. 2, p. 33-48, 23 fev. 2021.

⁴⁰ SILVA, J. C. L.; REI, F. Invisíveis: a rejeição ao estatuto do refugiado ambiental. *Revista Leopoldiana de Estudos e Comunicações da Universidade Católica de Santos*, Santos, v. 39, n. 107/108/109, p. 105-122, 2013.

⁴¹ Considera-se como refugiado, nos termos da Convenção de 1951 relativa ao Estatuto dos Refugiados, atualizada pelo Protocolo de 1967, toda pessoa que “[...] temendo ser perseguida por motivos de raça, religião, nacionalidade, grupo social ou opiniões políticas, se encontra fora do país de sua nacionalidade e que não pode ou, em virtude desse temor, não quer valer-se da proteção desse país, ou que, se não tem nacionalidade e se encontra fora do país no qual tinha sua residência habitual em consequência de tais acontecimentos, não pode ou, devido ao referido temor, não quer voltar a ele”. CONVENÇÃO relativa ao Estatuto dos Refugiados (1951). ACNUR. Disponível em: <https://www.acnur.org/fileadmin/Documentos/>

as quais nem sempre são necessariamente preenchidas pelos migrantes ambientais.

Os principais instrumentos internacionais que regulam a proteção dos refugiados - a Convenção relativa ao Estatuto dos Refugiados, de 1951, e o seu Protocolo, de 1967 - não incluem as questões ambientais e climáticas em relação ao rol de motivos para o reconhecimento do *status* de refugiado. Assim, considerando o Regime Internacional de Proteção aos Refugiados, migrantes vulnerabilizados por eventos climáticos extremos, dificilmente, podem encontrar proteção jurídica, considerando que os principais instrumentos de Direito Internacional não reconhecem riscos ambientais dentre as razões válidas para o reconhecimento da condição de refugiado e, conseqüentemente, não impõem uma obrigação aos Estados de conceder proteção internacional a essas pessoas⁴². Outrossim, deve-se considerar o fato de que, na maioria dos fluxos migratórios, em razão de desastres naturais, não há o cruzamento de fronteiras internacionais, havendo, apenas, um deslocamento interno⁴³, isto é, está ausente o requisito da extraterritorialidade.

Mesmo sendo um fenômeno cada vez mais frequente, a migração motivada por questões ambientais ainda é uma matéria que carece de tutela à luz do Direito Internacional. Mesmo na doutrina, não há consenso quanto à terminologia a ser aplicada. Embora o termo “refugiado ambiental” tenha se popularizado desde meados da década de 1980⁴⁴, a prática internacional, efetivada pelas

principais organizações internacionais que trabalham com a temática migração, rechaçam o emprego desse tipo de neologismo⁴⁵.

Considerando a situação das pessoas que não cruzam fronteiras internacionalmente reconhecidas, o que constitui uma grande parte dos fluxos migratórios por razões ambientais, o sistema jurídico internacional dispõe de apenas um instrumento regulamentar: os Princípios Orientadores relativos aos Deslocados Internos de 1998. Apesar de serem normas de caráter não vinculativo, isto é, *soft law*,

esses princípios refletem o Direito Internacional existente e são amplamente reconhecidos como provedores de um marco internacional para a proteção dessa categoria de pessoas durante todas as etapas do deslocamento, incluindo o retorno, o reassentamento e a reintegração⁴⁶.

No caso de desastres naturais, as pessoas afetadas e que tiveram que migrar, dificilmente, poderiam ser contempladas pelo estatuto dos refugiados. Primeiramente, não se poderia considerar que o seu deslocamento tenha sido motivado por um dos elementos listados no estatuto dos refugiados, isto é, motivos de raça, religião, nacionalidade, grupo social ou opiniões políticas. Outrossim, por mais controverso que possa ser em alguns casos, dificilmente poderia se considerar que essas pessoas estão completamente destituídas da proteção dos seus Estados de origem ou de residência. A não ser que se possa provar que um agente perseguidor utiliza algum mecanismo de degradação ambiental como meio de perseguição. Nessas circunstâncias, seria possível a compatibilização com o Regime Internacional de Proteção dos Refugiados, visto que a motivação da perseguição estaria prevista no rol, pois, nesse caso, o dano ambiental seria a forma de perseguição⁴⁷.

portugues/BDL/Convencao_relativa_ao_Estatuto_dos_Refugiados.pdf. Acesso em: 28 jul. 2024.

⁴² UNHCR. Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters. *UNHCR*, 01 Oct. 2020. Disponível em: <https://www.refworld.org/docid/5f75f2734.html>. Acesso em: 20 jul. 2022.

⁴³ ACNUR. Deslocados internos. *ACNUR*, 2022. Disponível em: <https://www.acnur.org/portugues/quem-ajudamos/deslocados-internos/>. Acesso em: 15 jul. 2024.

⁴⁴ Um dos primeiros a abordar o tema da migração em razão de causas ambientais, incluindo-a dentro do conceito do instituto do refúgio, foi Lester Brown, do Worldwatch Institute, na década de 1970 (BLACK, 2001). Posteriormente, Essam El-Hinnawi, em 1985, e Jodi Jacobson, em 1988, contribuíram com a popularização do conceito de “refugiado ambiental”. BLACK, Richard. Environmental refugees: myth or reality? *Working Paper: New Issues in Refugee Research*, Brighton, n. 34, mar. 2001. Disponível em: <https://www.unhcr.org/research/working/3ae6a0d00/environmental-refugees-myth-reality-richard-black.html>. Acesso em: 12 jul. 2024. Os três autores convergem de forma geral quanto ao núcleo do conceito de “refugiado ambiental”, à saber, em torno das pessoas afetadas por alterações ambientais que impossibilitam a vida digna. SILVA, J. C.

L.; REI, F. Invisíveis: a rejeição ao estatuto do refugiado ambiental. *Revista Leopoldiana de Estudos e Comunicações da Universidade Católica de Santos*, Santos, v. 39, n. 107/108/109, p. 105-122, 2013.

⁴⁵ INTERNATIONAL ORGANIZATION FOR MIGRATION. Glossary on Migration. *International Migration Law*, Geneva, n. 34, 2019. Disponível em: https://environmentalmigration.iom.int/sites/g/files/tmzbd11411/files/iml_34_glossary.pdf. Acesso em: 12 jul. 2024.

⁴⁶ COMO O DIH protege os refugiados e os deslocados internos? *CICV*, 22 jan. 2015. Disponível em: <https://www.icrc.org/pt/document/como-o-dih-protege-os-refugiados-e-os-deslocados-internos>. Acesso em: 12 ago. 2024.

⁴⁷ APOLINÁRIO, S. M.; JUBILUT, L. A necessidade de proteção internacional no âmbito da migração. *Revista Direito GV*, São Paulo, n. 6, p. 275-294, jan./jun. 2010.

Logo, o elemento da extraterritorialidade é outro ponto sensível, pois ele nem sempre estará presente no caso de desastres naturais, o que faz com que esse grupo de pessoas em mobilidade, ainda que forçada, não se enquadre no conceito internacional de refugiado, por mais que se possa flexibilizar a interpretação da motivação que engendrou o deslocamento.

Nessa perspectiva, o caso dos eventos recentes no estado do Rio Grande do Sul, em que os deslocamentos são realizados no interior das fronteiras brasileiras, parece compreender o fenômeno do deslocamento interno. Assim, na próxima seção, investiga-se, especificamente, a tutela jurídica cabível às vítimas das enchentes no Rio Grande do Sul.

2.2 As enchentes no Rio Grande do Sul e o deslocamento forçado de pessoas

Ao final de abril de 2024, fortes chuvas atingiram o estado brasileiro do Rio Grande do Sul, ocasionando enchentes e outras mazelas. Cerca de 96% dos municípios gaúchos foram atingidos. Das 10,88 milhões de pessoas que residem no estado, estima-se que 2,4 milhões tenham sido afetadas pela catástrofe climática e 422 mil tenham sido forçadas a se deslocar⁴⁸. Considerando-se que a grande maioria dessas pessoas em mobilidade permaneceram em território brasileiro, esse grupo de deslocados ambientais se encontra juridicamente enquadrado como deslocados internos.

Os deslocados internos se encontram em uma situação peculiar, tendo em vista que “sua dimensão internacional não é imediatamente perceptível”⁴⁹. Consequentemente, dispõem de uma proteção jurídica vaga e não vinculativa à luz do Direito Internacional⁵⁰, não existindo um tratado universal que trate especificamente as necessidades de proteção dos deslocados internos⁵¹.

⁴⁸ RIO GRANDE DO SUL, Brasil. *ACNUR*, 10 jun. 2024. Disponível em: <https://www.acnur.org/br/emergencias/rio-grande-do-sul-brasil>. Acesso em: 15 jul. 2024.

⁴⁹ OLIVEIRA, E. C. A proteção jurídica internacional dos deslocados internos. *Revista do Instituto Brasileiro de Direitos Humanos*, v. 5, n. 5, 2004. p. 4.

⁵⁰ Em nível regional, existem, todavia, instrumentos como a Convenção da União Africana para a Proteção e a Assistência de Deslocados Internos na África (Convenção de Kampala), que entrou em vigor em dezembro de 2012, sendo o primeiro tratado internacional a abordar a questão da proteção e da assistência aos deslocados internos.

⁵¹ Embora não exista um corpo normativo vinculante específico para os deslocados internos, na condição de seres humanos, esse

Os deslocados internos permanecem, principalmente, sob a tutela dos Estados de origem ou de residência. Segundo o princípio 3 dos Princípios Orientadores relativos aos Deslocados Internos⁵², “as autoridades nacionais têm o dever e a responsabilidade primária de garantir a proteção e a assistência humanitária aos deslocados internos que se encontrem na sua área de jurisdição”. Nessa perspectiva, os deslocados internos, em razão das chuvas no Rio Grande do Sul, permanecem na tutela do Estado brasileiro.

Ao abrigo do Direito Internacional, os Princípios Orientadores relativos aos Deslocados Internos⁵³ consagram que “todos os deslocados internos têm o direito a um padrão adequado de vida”, devendo as autoridades nacionais

assegurar, de maneira prática, que seja fornecido alojamento adequado aos deslocados e que tais deslocamentos sejam efetuados em condições satisfatórias de segurança, nutrição, saúde e higiene e que não haja separação dos membros da mesma família⁵⁴.

Outrossim, prevê-se que “a deslocação não deve ser feita de maneira a violar os direitos à vida, dignidade, liberdade e segurança dos afetados”⁵⁵, particularmente

grupo de pessoas é contemplado pelas normas consagradas no Direito Internacional dos Direitos Humanos e no Direito Internacional Humanitário. Em vista disso, os Princípios Orientadores relativos aos Deslocados Internos de 1998 agruparam em um mesmo instrumento normas existentes aplicáveis aos deslocados, retiradas das vertentes supramencionadas de proteção dos direitos das pessoas humanas, além de suprir eventuais lacunas. OLIVEIRA, E. C. A proteção jurídica internacional dos deslocados internos. *Revista do Instituto Brasileiro de Direitos Humanos*, v. 5, n. 5, 2004.

⁵² NAÇÕES UNIDAS. Escritório de Coordenação de Assuntos Humanitários. *Princípios orientadores relativos aos deslocados internos*. United Nations publication E/CN.4/1998/53/Add.2. Nova Iorque: Nações Unidas, 2001. Disponível em: https://www.brookings.edu/wp-content/uploads/2016/07/GP_Portuguese.pdf. Acesso em: 28 jul. 2024. p. 2.

⁵³ NAÇÕES UNIDAS. Escritório de Coordenação de Assuntos Humanitários. *Princípios orientadores relativos aos deslocados internos*. United Nations publication E/CN.4/1998/53/Add.2. Nova Iorque: Nações Unidas, 2001. Disponível em: https://www.brookings.edu/wp-content/uploads/2016/07/GP_Portuguese.pdf. Acesso em: 28 jul. 2024. p. 9.

⁵⁴ NAÇÕES UNIDAS. Escritório de Coordenação de Assuntos Humanitários. *Princípios orientadores relativos aos deslocados internos*. United Nations publication E/CN.4/1998/53/Add.2. Nova Iorque: Nações Unidas, 2001. Disponível em: https://www.brookings.edu/wp-content/uploads/2016/07/GP_Portuguese.pdf. Acesso em: 28 jul. 2024. p. 4.

⁵⁵ NAÇÕES UNIDAS. Escritório de Coordenação de Assuntos Humanitários. *Princípios orientadores relativos aos deslocados internos*. United Nations publication E/CN.4/1998/53/Add.2. Nova Iorque: Nações Unidas, 2001. Disponível em: https://www.brookings.edu/wp-content/uploads/2016/07/GP_Portuguese.pdf. Acesso em: 28

em relação ao acesso seguro à alimentação básica e à água potável, ao abrigo básico, à habitação, ao vestuário adequado, aos serviços médicos essenciais e ao saneamento.

Quanto às perdas materiais⁵⁶, estabelece-se que as autoridades competentes têm o dever e a responsabilidade primária de prestar assistência aos deslocados internos a respeito da recuperação das propriedades e aos bens que deixaram ou se viram privados em razão do deslocamento. Quando não for possível recuperar tais propriedades e bens, as autoridades competentes deverão fornecer ou assistir essas pessoas a obterem a devida indenização ou outra forma justa de reparação dos danos⁵⁷.

Diante da ausência de dispositivos vinculantes garantindo uma proteção mais efetiva na esfera internacional, a tutela jurídica dos deslocados internos no Rio Grande do Sul se fundamenta, principalmente, na legislação nacional que esteja em vigor ou que venha a ser adotada em vista da situação de calamidade vivenciada pelo estado.

O deslocamento interno, enquanto fenômeno *per se*, trata-se de um tema ainda pouco explorado pelo ordenamento jurídico brasileiro⁵⁸. Não obstante, adotaram-se medidas para atenuar a situação vivenciada pelas pessoas no contexto do desastre natural no estado do Rio Grande do Sul. Dentre os principais instrumentos jurídicos implementados, menciona-se, em âmbito federal, o Auxílio Reconstrução, um apoio financeiro no valor de R\$ 5.100, destinado às famílias desalojadas ou desabrigadas devido aos eventos climáticos, que foi ins-

tituído pelo governo federal em 15 de maio de 2024 por meio da Medida Provisória n.º 1.219/2024.

Na esfera estadual, estabeleceu-se o Plano Rio Grande — Programa de Reconstrução, Adaptação e Resiliência Climática do Estado do Rio Grande do Sul — cujo objetivo é planejar, coordenar e executar as ações necessárias ao enfrentamento das consequências sociais, econômicas e ambientais decorrentes da enchente histórica no Rio Grande do Sul. Outrossim, igualmente na esfera estadual, pode-se mencionar a criação do Fundo Rio Grande do Sul (FUNRIGS), cujo objetivo é de segregar, centralizar e angariar recursos destinados para o enfrentamento das consequências sociais, econômicas e ambientais, decorrentes dos eventos climáticos ocorridos no território do Estado do Rio Grande do Sul. Ambos os instrumentos estaduais supramencionados foram instituídos pela Lei n.º 16134, de 24 de maio de 2024, e regulamentados pelo Decreto n.º 57.647, de 3 de junho de 2024.

Ademais, considerando os desafios à tutela jurídica das pessoas deslocadas em razão do extremo climático de 2024, o Alto Comissariado das Nações Unidas para os Refugiados (ACNUR) se comprometeu à construção de uma parceria com o Governo do estado do Rio Grande do Sul para o desenvolvimento de planos e protocolos de contingência para situações de risco e emergência. O memorando de entendimento, assinado em 14 de outubro de 2024, é especialmente voltado para o contexto de deslocamento forçado, além do fortalecimento de políticas públicas direcionadas a pessoas com necessidade de proteção internacional e a população atingida por eventos climáticos extremos⁵⁹.

Essas iniciativas em âmbito federal e estadual reafirmam o compromisso brasileiro com a implementação dos objetivos do desenvolvimento sustentável tanto na instância nacional como internacional. Trata-se, nesse sentido, de assegurar a coerência das políticas públicas para que respondam aos objetivos de desenvolvimento sustentável e reforçar a sinergia na implementação da Agenda 2030 e do Acordo de Paris. Outrossim, conforme anunciam as previsões para a 79ª Sessão da Assembleia Geral das Nações Unidas (AGNU 79), que se ini-

jul. 2024. p. 5.

⁵⁶ Nessa oportunidade, ressalta-se que: “a proteção da propriedade é uma das maiores lacunas da proteção jurídica internacional dos deslocados internos. Por sua vulnerabilidade tais pessoas necessitam de normas que protejam a sua propriedade, seja aquela que trazem consigo na deslocação ou aquela deixada no antigo local de residência”. OLIVEIRA, E. C. A proteção jurídica internacional dos deslocados internos. *Revista do Instituto Brasileiro de Direitos Humanos*, v. 5, n. 5, 2004. p. 80-81.

⁵⁷ NAÇÕES UNIDAS. Escritório de Coordenação de Assuntos Humanitários. *Princípios orientadores relativos aos deslocados internos*. United Nations publication E/CN.4/1998/53/Add.2. Nova Iorque: Nações Unidas, 2001. Disponível em: https://www.brookings.edu/wp-content/uploads/2016/07/GP_Portuguese.pdf. Acesso em: 28 jul. 2024. p. 14.

⁵⁸ OLIVEIRA, E. C. A proteção jurídica internacional dos deslocados internos. *Revista do Instituto Brasileiro de Direitos Humanos*, v. 5, n. 5, 2004.

⁵⁹ ACNUR e Governo do Rio Grande do Sul assinam acordo para colaboração em emergências. *ACNUR Brasil*, 15 out. 2024. Disponível em: <https://www.acnur.org/br/noticias/comunicados-imprensa/acnur-e-governo-do-rio-grande-do-sul-assinam-acordo-para-colaboracao>. Acesso em: 16 out. 2024.

cia dia 10 de setembro de 2024, a mobilidade humana se encontra, atualmente, no centro das discussões globais sobre um futuro baseado no desenvolvimento sustentável, uma vez que “enquanto passamos por mudanças globais sem precedentes, como mudança do clima, urbanização e digitalização, a migração deve ser reconhecida como parte crucial da solução”⁶⁰.

Nesse contexto, evidencia-se que o conceito de perdas e danos se correlaciona, diretamente, com os instrumentos adotados no caso brasileiro, haja vista esses instrumentos compartilharem o objetivo de atenuar os impactos associados com o desastre natural ocorrido. Compreender como o Regime Internacional sobre Perdas e Danos concebe a proteção dos migrantes climáticos é, dessa forma, fundamental para a análise da proteção jurídica aplicável na esfera internacional aos deslocados ambientais no Rio Grande do Sul. Em vista disso, na próxima seção, analisa-se o Regime Internacional sobre Perdas e Danos, e a sua insuficiência quanto à proteção dos deslocados ambientais.

3 A insuficiência do regime internacional sobre perdas e danos quanto à proteção dos deslocados ambientais

Dentre os pilares do Regime Internacional para as Mudanças Climáticas, o conceito de perdas e danos é o de mais recente implementação. No entanto, apesar de recente, trata-se de uma noção fundamental à gerência das consequências decorrentes das mudanças climáticas, particularmente no que concerne à mobilidade humana forçada. Nessa perspectiva, embora os deslocados ambientais sejam incluídos entre as partes interessadas do Regime Internacional sobre Perdas e Danos, percebe-se uma insuficiência quanto a medidas concretas que protejam esse grupo vulnerável.

Nesse sentido, nessa segunda parte, investiga-se a insuficiência do Regime Internacional sobre Perdas e Danos quanto à proteção dos deslocados ambientais. Para tanto, explora-se, inicialmente, a emergência da temática

⁶⁰ OIM promove soluções para a migração na 79ª Sessão da Assembleia Geral da ONU. *OIM Brasil*, 23 set. 2024. Disponível em: <https://brazil.iom.int/pt-br/news/oim-promove-solucoes-para-migracao-na-79a-sessao-da-assembleia-geral-da-onu>. Acesso em: 16 out. 2024.

dos migrantes climáticos no Regime Internacional sobre Perdas e Danos (3.1). Posteriormente, analisa-se a insuficiência desse regime para a tutela dos deslocados ambientais no Rio Grande do Sul (3.2).

3.1 A emergência dos migrantes climáticos no Regime Internacional sobre Perdas e Danos

O impacto das mudanças climáticas é prejudicial para os seres vivos e seus meios de subsistência, particularmente quando ocorrem em um contexto de tensões sociais, econômicas ou políticas⁶¹. A evolução desse impacto sobre o clima e as consequências daí decorrentes provocam o que se denomina “perdas e danos”. Os dois termos - “perdas” e “danos” - são presentemente compreendidos como um único conceito, ainda que não seja definido com precisão⁶². No entanto, embora não haja uma definição legal e formal de “perdas e danos” no plano jurídico internacional, o Órgão Subsidiário de Implementação da Convenção Quadro das Nações Unidas sobre as Mudanças Climáticas considera o termo “perdas” como referência a “impactos negativos para os quais a reparação ou restauração é impossível, como a perda de recursos de água doce”⁶³; enquanto danos, por sua vez, incluem

os impactos negativos para os quais reparações ou restaurações são possíveis, tais como os danos causados por tempestades de vento no telhado de um edifício, ou os danos causados a um mangue costeiro pelas ondas de tempestade costeiras⁶⁴.

Ademais, a respeito do órgão da UNFCCC, adota-se uma definição de trabalho que prevê a noção de “perdas e danos” como “a manifestação existente e/ou potencial dos impactos associados às mudanças climá-

⁶¹ ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES. *Gérer les risques climatiques et faire face aux pertes et aux dommages*. Paris: Éditions OCDE, 2022.

⁶² MAIJEAN-DUBOIS, S. Au milieu du gué: le mécanisme de Varsovie relatif aux pertes et préjudices liés aux changements climatiques. In: TABAU, Anne-Sophie (ed.). *Quel droit pour l'adaptation des territoires aux changements climatiques?: l'expérience de l'île de la réunion*. Aix-en-Provence: DICE Éditions, 2018. p. 123-134.

⁶³ UNFCCC. *Subsidiary Body for Implementation, note by the secretariat: a literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change*. FCCC/SBI/2012/INF.14. 15 november 2012. p. 3.

⁶⁴ UNFCCC. *Subsidiary Body for Implementation, note by the secretariat: a literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change*. FCCC/SBI/2012/INF.14. 15 november 2012. p. 3.

ticas nos países em desenvolvimento que afetam negativamente os sistemas humanos e naturais”⁶⁵. O IPCC define o conceito como “danos causados por impactos (observados) e riscos (projetados)”⁶⁶. Considerando uma visão mais global do assunto, pode-se admitir que a expressão engloba “perda de vidas humanas e de meios de subsistência, degradação do território, das terras agrícolas, do patrimônio cultural, do saber indígena, da identidade social e cultural, da biodiversidade e dos serviços ecossistêmicos”⁶⁷.

Os migrantes estão entre os grupos de pessoas mais vulneráveis a perdas e danos⁶⁸. Essa vulnerabilidade pode ser ainda mais exacerbada, quando se considera que os migrantes são frequentemente submetidos a desafios socioeconômicos. No caso dos climáticos, as perdas e danos causados pelas mudanças climáticas podem levar à redução da habitabilidade de suas cidades ou países de origem, o que levará as pessoas a se moverem ou migrarem permanentemente para fora de seus lares⁶⁹.

Os Acordos de Cancún de 2010 - primeiro instrumento no contexto da UNFCCC que adota o conceito de “perdas e danos” - convidam os Estados a reforçar as

medidas para promover a compreensão, coordenação e cooperação em matéria de deslocamento, migração e reassentamento planejado em resposta às mudanças climáticas, conforme necessário, nos níveis nacional, regional e internacional⁷⁰.

Entretanto, apesar do progresso da menção em um dispositivo, nenhuma outra medida é proposta diretamente em relação às circunstâncias vividas pelas pessoas deslocadas. Posteriormente, no âmbito do Acordo de Paris de 2015, embora a temática das perdas e danos tenha sido destacada, nenhum dispositivo diz respeito ao tratamento dos deslocados climáticos ou à reparação dos danos que sofreram.

Apenas na decisão de 2022, para o financiamento destinado à reparação das perdas e dos danos ligados aos efeitos nefastos das alterações climáticas, as migrações ambientais foram incluídas entre os temas que apresentam lacunas no atual cenário das instituições globais, regionais e nacionais, que financiam atividades para remediar perdas e danos⁷¹. Para preencher essas lacunas, criou-se um comitê de transição que será responsável pela implementação das novas modalidades de financiamento, bem como pelo Fundo cujo mandato visará, nomeadamente, remediar essas perdas e danos⁷².

Em relação ao referido Fundo, operacionalizado pela COP seguinte, realizado em Dubai em 2023, reconheceu-se que os Estados, ao tomarem medidas para combater as mudanças climáticas, devem respeitar, promover e considerar as suas respectivas obrigações em relação aos migrantes⁷³. Os migrantes climáticos são reconhecidos como partes interessadas (*stakeholders*) do Fundo para lidar com perdas e danos, assim como de todas as outras atividades financiadas por instituições e fundos multilaterais de financiamento do clima⁷⁴. Nessa perspectiva, os deslocamentos são mencionados como “dificuldades associadas aos efeitos nefastos das alterações climáticas”⁷⁵, as quais o Fundo destina financiamento para o seu enfrentamento uma vez que são considerados desafios para os quais os países precisam de ajuda para enfrentar⁷⁶.

⁶⁵ UNFCCC. *Subsidiary Body for Implementation, note by the secretariat: a literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change*. FCCC/SBI/2012/INF.14. 15 november 2012. p. 3.

⁶⁶ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. *Climate change 2022: impacts, adaptation and vulnerability: contribution of working group II to the sixth assessment report of the Intergovernmental Panel On Climate Change*. Cambridge: Cambridge University Press, 2022. p. 170.

⁶⁷ PERTES et préjudices: une obligation morale d’agir. *Nations Unies Action Climat*, 2022. Disponível em: <https://www.un.org/fr/climatechange/adelle-thomas-loss-and-damage>. Acesso em: 12 ago. 2024.

⁶⁸ PERTES et préjudices: une obligation morale d’agir. *Nations Unies Action Climat*, 2022. Disponível em: <https://www.un.org/fr/climatechange/adelle-thomas-loss-and-damage>. Acesso em: 12 ago. 2024.

⁶⁹ PERTES et préjudices: une obligation morale d’agir. *Nations Unies Action Climat*, 2022. Disponível em: <https://www.un.org/fr/climatechange/adelle-thomas-loss-and-damage>. Acesso em: 12 ago. 2024.

⁷⁰ NATIONS UNIES. Conférence des Parties. *Décision 1/CP.16: les accords de Cancún: résultats des travaux du Groupe de travail spécial de l’action concertée à long terme au titre de la Convention*.

FCCC /CP/2010/7/Add.1. 10 décembre 2010. p. 5.

⁷¹ Cf. artigo 6º, alínea b, da Decisão 2/CMA.4 (FCCC/PA/CMA/2022/10/Add.1), adotada na Conferência das Partes servindo como reunião das Partes do Acordo de Paris em 2022.

⁷² Cf. artigos 4º e 6º da Decisão 2/CMA.4 (FCCC/PA/CMA/2022/10/Add.1), adotada na Conferência das Partes servindo como reunião das Partes do Acordo de Paris em 2022.

⁷³ Cf. considerando 4º da Decisão 1/CP.28 (FCCC/CP/2023/11/Add.1), adotada na COP 28.

⁷⁴ Cf. artigo 28 da Decisão 1/CP.28 (FCCC/CP/2023/11/Add.1), adotada na COP 28, e os artigos 18 e 26 do seu anexo II. (UNITED NATIONS, 2023).

⁷⁵ Cf. artigo 6 do anexo I da Decisão 1/CP.28 (FCCC/CP/2023/11/Add.1), adotada na COP 28.

⁷⁶ Cf. artigo 17 do anexo II da Decisão 1/CP.28 (FCCC/

No mesmo espírito do Fundo para as Perdas e Danos criado na COP 28, o ACNUR anunciou, em abril de 2024, a adoção de um Fundo de Resiliência Climática. Esse Fundo permitirá o financiamento de ações diretas para o clima, a fim de beneficiar, especificamente, os refugiados, os apátridas e as pessoas deslocadas, bem como suas comunidades de acolhimento⁷⁷. As contribuições para o Fundo serão utilizadas para ampliar o alcance e o impacto das atividades relacionadas à mudança climática, permitindo ao ACNUR investir em projetos de fortalecimento da resiliência, mitigação de riscos e promoção de soluções sustentáveis em situações de deslocamento nos quais a mudança climática desempenha um papel preponderante⁷⁸.

Dessa forma, percebe-se que, embora os instrumentos jurídicos existentes sobre perdas e danos tenham passado a incluir os migrantes climáticos entre as partes interessadas (*stakeholders*), os quais devem ser considerados na implementação de medidas de reparação, o conteúdo da proteção estabelecida é incipiente ou esvaziado e, conseqüentemente, ainda ineficaz diante da gravidade das circunstâncias atuais e futuras. Além disso, destaca-se a ausência de definição jurídica precisa do conceito de perdas e danos, tornando complexa a sua identificação e avaliação⁷⁹.

3.2 A insuficiência da proteção dos instrumentos internacionais sobre perdas e danos quanto aos deslocados ambientais no Rio Grande do Sul

A população do Rio Grande do Sul, afetada pelo desastre ambiental recente, certamente sofreu perdas e danos, tenham as pessoas iniciado um processo de mobilidade ou não. Além da perda de vidas humanas - cerca de 183 óbitos confirmados e 27 pessoas desaparecidas⁸⁰ -, houve a degradação dos meios de subsistência, do território, das terras agrícolas, do patrimônio cultural, do saber indígena, da identidade social e cultural, da biodiversidade e dos serviços ecossistêmicos.

Dentre as pessoas afetadas pelo ocorrido, as pessoas em mobilidade estão entre as de maior vulnerabilidade, particularmente quando se considera a existência de fragilidades preexistentes ao extremo climático. Segundo o Painel Intergovernamental de Mudanças Climáticas, o termo “vulnerabilidade” em matéria climática designa “a propensão ou predisposição para sofrer danos e engloba uma variedade de conceitos e elementos, incluindo a sensibilidade ou susceptibilidade ao dano e a falta de capacidade para lidar com e adaptar-se”⁸¹.

Conforme proposto nas seções anteriores, a mobilidade constitui um processo humano pertinente enquanto reação às mudanças climáticas e às catástrofes decorrentes. O Regime Internacional sobre Perdas e Danos reconhece as pessoas em mobilidade como vítimas de processos de perdas e danos. Reconhecer os direitos daqueles que se movem em razão dos impactos climáticos constitui uma estratégia de resiliência fundamental para o alcance dos preceitos da justiça climática⁸². Não obstante, ainda remanescem lacunas quanto às possibilidades de proteção dessas pessoas, principalmente no caso de deslocados ambientais.

CP/2023/11/Add.1), adotada na COP 28.

⁷⁷ THE UNHCR Climate Resilience Fund. *UNHCR Global Focus*, 2024. Disponível em: https://reporting.unhcr.org/spotlight/climate-action/unhcr-climate-resilience-fund?_gl=1%2A18h2w15%2A_rup_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_rup_ga_EVDQJ4LMY%2AMTcyNjgzNzg2NC4zNC4xLjE3MjY4MzgyNzAuMjluMC4w%2A_gcl_au%2AMjAzNzY5OTgzOC4xNzI1NDYyNTg1%2A_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_ga_RDNCXLXWYH%2AMTcyNjgzNzIxMC4xNi4xLjE3MjY4MzgyNzAuNjAuMC4w. Acesso em: 20 ago. 2024.

⁷⁸ THE UNHCR Climate Resilience Fund. *UNHCR Global Focus*, 2024. Disponível em: https://reporting.unhcr.org/spotlight/climate-action/unhcr-climate-resilience-fund?_gl=1%2A18h2w15%2A_rup_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_rup_ga_EVDQJ4LMY%2AMTcyNjgzNzg2NC4zNC4xLjE3MjY4MzgyNzAuMjluMC4w%2A_gcl_au%2AMjAzNzY5OTgzOC4xNzI1NDYyNTg1%2A_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_ga_RDNCXLXWYH%2AMTcyNjgzNzIxMC4xNi4xLjE3MjY4MzgyNzAuNjAuMC4w. Acesso em: 20 ago. 2024.

⁷⁹ LAVOREL, S. Quelle justice climatique pour les pertes et préjudices subis par les petits États insulaires en développement? *Revue Juridique de L'Océan Indien*, n. 31, p. 325-337, 2021.

⁸⁰ DEFESA CIVIL atualiza balanço das enchentes no RS – 20/8. *Casa Militar Defesa Civil RS*, 20 ago. 2024. Disponível em: <https://www.defesacivil.rs.gov.br/defesa-civil-atualiza-balanco-das-enchentes-no-rs-10-7-66b67813ba21f-66c4eed627af9>. Acesso em: 12 ago. 2024.

⁸¹ SUMMARY for Policymakers. *In: INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE. Climate change 2022: impacts, adaptation and vulnerability: contribution of working group II to the sixth assessment report of the Intergovernmental Panel On Climate Change*. Cambridge: Cambridge University Press, 2022. p. 5.

⁸² CAVEDON-CAPDEVILLE, F. S.; SERRAGLIO, D. A. Vidas em movimento: os sistemas de proteção dos direitos humanos como espaços de justiça para os migrantes climáticos. *Revista de Direito Internacional*, Brasília, v. 19, n. 1, p. 104-125, 2022.

A grande maioria dos instrumentos visa promover a resiliência às intempéries climáticas, seja por meio de medidas de mitigação, seja por meio de medidas de adaptação. O conceito de perdas e danos ainda está em processo de integração no Regime Internacional de Mudanças Climáticas, haja vista que os países desenvolvidos “recusam-se a atribuir qualquer responsabilidade jurídica ao conceito de perdas e danos”⁸³. Verifica-se, portanto, uma tendência na direção da persecução de objetivos em longo prazo, isto é, os países preferem procurar resolver o problema na sua raiz, diminuindo a poluição e minimizando as mudanças climáticas⁸⁴.

No entanto, em algumas situações, já é demasiadamente tarde, pois já se sabe que, embora os esforços de mitigação e adaptação tenham aumentado nas últimas décadas e tenham elevado o nível de eficácia, alguns efeitos das alterações climáticas são “esperados” devido às emissões históricas⁸⁵. Portanto, é necessário voltar-se para o conceito de perdas e danos, sendo primordial abordar os impactos que não podem ser evitados por meio de um conjunto mais amplo de ferramentas as quais podem incluir medidas de transferência e retenção de riscos, bem como políticas para promover a migração e facilitar o reassentamento⁸⁶. Ademais, ao desenvolver estratégias de adaptação ou de perdas e danos que incluam o deslocamento humano, deve-se atentar à garantia de respeito aos seus direitos de autodeterminação, a um padrão de vida decente e a herança cultural⁸⁷.

O recente anúncio da criação do Fundo de Resiliência Climática do ACNUR em 2024 representa um avanço na proteção dos deslocados no contexto dos desastres ambientais. Pois uma boa parte do Fundo é direcionada à mitigação de riscos e ao fortalecimento da resiliência climática, atuando no processo antecedente

à ocorrência de desastres naturais. Para mais, o Fundo também possui, entre os seus objetivos, a promoção de soluções sustentáveis para situações de deslocamento nas quais as mudanças climáticas desempenham um papel preponderante⁸⁸.

No entanto, a distribuição dos fundos não contempla a *priori* o Brasil. Com base em dados que demonstram o impacto da crise climática, o ACNUR identificou 22 países como os mais vulneráveis aos efeitos adversos do clima. Esses 22 países são, portanto, prioritários para receber os investimentos. Com exceção do Equador e de Honduras, todos os outros países identificados como vulneráveis estão localizados na África ou na Ásia⁸⁹.

4 Considerações finais

A mobilidade humana é uma das respostas possíveis às mudanças climáticas. Condições de vulnerabilidade socioambientais pré-existentes podem impulsionar a velocidade e a duração dos deslocamentos. Todavia, a resiliência climática é uma questão a ser enfrentada em todas as esferas, pois, embora existam diferentes níveis de exposição ao aquecimento global e aos desastres decorrentes, os principais ecossistemas do planeta Terra serão afetados.

A resposta contempla conceitos como mitigação e adaptação. No entanto, em situações de desastres naturais como o ocorrido no Rio Grande do Sul, não se pode limitar às fases preparatórias de construção de resiliência climática, precisa-se lidar com as perdas e

⁸³ LAVOREL, S. Quelle justice climatique pour les pertes et préjudices subis par les petits États insulaires en développement? *Revue Juridique de L'Océan Indien*, n. 31, p. 325-337, 2021. p. 328.

⁸⁴ APAP, Joanna; HARJU, Sami James. *The concept of 'climate refugee': towards a possible definition*. Brussels: European Parliamentary Research Service, 2023. Disponível em: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI\(2021\)698753_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf). Acesso em: 12 jul. 2024.

⁸⁵ HUQ, S.; ROBERTS, E.; FENTON, A. Loss and Damage. *Nature Climate Change*, v. 11, n. 3, 2013.

⁸⁶ HUQ, S.; ROBERTS, E.; FENTON, A. Loss and Damage. *Nature Climate Change*, v. 11, n. 3, 2013.

⁸⁷ MARY ROBINSON FOUNDATION CLIMATE JUSTICE. *Protecting the rights of climate displaced people*. position paper. Dublin: MRFJ, 2016. Disponível em: <https://www.mrfj.org/wp-content/uploads/2016/07/Protecting-the-Rights-of-Climate-Displaced-People-Position-Paper.pdf>. Acesso em: 03 fev. 2025.

⁸⁸ THE UNHCR Climate Resilience Fund. *UNHCR Global Focus*, 2024. Disponível em: https://reporting.unhcr.org/spotlight/climate-action/unhcr-climate-resilience-fund?_gl=1%2A18h2w15%2A_rup_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_rup_ga_EVDQITJ4LmY%2AMTcyNjgzNzg2NC4zNC4xLjE3MjY4MzgyNzAuMjIuMC4w%2A_gcl_au%2AMjAzNzY5OTgzOC4xNzI1NDYyNTg1%2A_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_ga_RDNCXLXWYH%2AMTcyNjgzNzIxMC4xNi4xLjE3MjY4MzgyNzAuMjIuMC4w. Acesso em: 20 ago. 2024.

⁸⁹ THE UNHCR Climate Resilience Fund. *UNHCR Global Focus*, 2024. Disponível em: https://reporting.unhcr.org/spotlight/climate-action/unhcr-climate-resilience-fund?_gl=1%2A18h2w15%2A_rup_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_rup_ga_EVDQITJ4LmY%2AMTcyNjgzNzg2NC4zNC4xLjE3MjY4MzgyNzAuMjIuMC4w%2A_gcl_au%2AMjAzNzY5OTgzOC4xNzI1NDYyNTg1%2A_ga%2AMjE0NDIyMTkyLjE3MDU5MzYwMjY.%2A_ga_RDNCXLXWYH%2AMTcyNjgzNzIxMC4xNi4xLjE3MjY4MzgyNzAuMjIuMC4w. Acesso em: 20 ago. 2024.

danos ocorridos. Entretanto, esse conceito de perdas e danos ainda se encontra sem uma definição precisa na esfera do Direito Internacional, existindo, portanto, muitas lacunas a colmatar.

Um dos principais déficits do Regime Internacional sobre Perdas e Danos diz respeito à tutela das pessoas migrantes. Os migrantes ambientais, em sua perspectiva *lato sensu*, são contemplados entre os dispositivos dos instrumentos jurídicos sobre perdas e danos. Entretanto, percebe-se uma insuficiência quanto à proteção fornecida: há poucas medidas concretas. Particularmente no caso dos deslocados internos no contexto dos desastres ambientais, a carência de proteção jurídica é ainda mais evidente, uma vez que esse grupo goza de uma proteção jurídica insuficiente tanto no regime geral de normas internacionais, como no regime específico das normas sobre mudanças climáticas.

A tutela desse grupo vulnerável permanece, portanto, amplamente baseada na legislação nacional de cada Estado, assim como na capacidade de cada Estado de executar as medidas necessárias. Essa limitação jurídica pode engendrar ainda mais a vulnerabilidade das pessoas em mobilidade, impondo aos Estados mais vulneráveis — frequentemente os menos desenvolvidos e que contribuem menos com as mudanças climáticas — a responsabilidade de desenvolver e aplicar medidas eficazes que possam atenuar as perdas e danos que seus residentes sofreram.

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Guardian of global health:

examining the responsibility of the World Health Organization during global health crises

Guardião da saúde global:

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Guardian of global health: examining the responsibility of the World Health Organization during global health crises*

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Guardião da saúde global: examinando a responsabilidade da Organização Mundial da Saúde durante crises sanitárias globais

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Abstract

The World Health Organization (WHO) plays a pivotal role as a guardian of global health, tasked with coordinating international efforts to combat infectious diseases. The organization is the central body that disseminates crucial information during global health crises. However, in the past, it has been criticized for its responses to epidemics and pandemics. This paper is a timely study that critically examines the WHO's responsibilities in managing global health crises, analyzing its responses to previous health emergencies. Through qualitative analysis, the study evaluates the effectiveness of the WHO and the possibility of attributing responsibility for its wrongful conduct. The study evaluates the WHO's responses to previous health emergencies, such as Ebola Virus Disease (EVD) and the COVID-19 pandemic, which have fallen short of its mandate, warranting consideration of international responsibility. The authors emphasize the need to introduce and enhance the responsibility of the Director General of the WHO. Moreover, they suggest in the absence of a designated redressal body, seeking an advisory opinion of the International Court of Justice (ICJ) will help navigate the complexities of attributing responsibility. This study contributes to discussions on improving global health governance and accountability mechanisms.

Keywords: international responsibility; World Health Organization (WHO); global health; International Court of Justice (ICJ).

Resumo

A Organização Mundial da Saúde (OMS) desempenha um papel fundamental como guardião da saúde global, sendo responsável por coordenar os esforços internacionais no combate às doenças infecciosas. A organização atua como o principal órgão de disseminação de informações essenciais durante crises sanitárias globais. No entanto, no passado, a OMS foi alvo de críticas por suas respostas a epidemias e pandemias. Este artigo é um estudo oportuno que examina criticamente as responsabilidades da OMS na gestão de crises sanitárias globais, analisando suas respostas a emergências de

saúde anteriores. Por meio de uma análise qualitativa, o estudo avalia a eficácia da organização e a possibilidade de atribuição de responsabilidade por condutas indevidas. A pesquisa examina as respostas da OMS a crises sanitárias passadas, como a epidemia de Doença pelo Vírus Ebola (DVE) e a pandemia de COVID-19, que, em diversos aspectos, não atenderam ao seu mandato, levantando a necessidade de considerar sua responsabilidade internacional. Os autores destacam a importância de reforçar a responsabilização do Diretor-Geral da OMS. Além disso, argumentam que, na ausência de um órgão específico para tratar de reparações, a busca por uma opinião consultiva da Corte Internacional de Justiça (CIJ) pode ajudar a esclarecer a complexidade da atribuição de responsabilidade. Este estudo contribui para os debates sobre o aprimoramento da governança da saúde global e dos mecanismos de responsabilização.

Palavras-chave: responsabilidade internacional; Organização Mundial da Saúde (OMS); saúde global; Corte Internacional de Justiça (CIJ).

1 Introduction

The World Health Organization (WHO) is a prominent global institution playing an indispensable role in the web of global health governance.¹ The organization was established in 1948 as a specialized agency of the United Nations (UN) for global health management with the idea that health is a fundamental right and an essential pillar for unrestricted global development.² The mandate of the WHO encompasses a wide range of health issues that serve as an anchor for international cooperation, coordination, and response in addressing global health crises. As the primary authority on global health management, the WHO navigates a complex landscape of infectious diseases and charts a plan of action to prevent, treat, and educate the states during global health emergencies.

This paper is a critical study of the role of the WHO as guardians of global health, their responses during international health emergencies like pandemics and epi-

demics, and the responsibility imputed on them in case of failure to achieve their mandate. It critically examines the organization's mandate, functions, and responses to past health crises, shedding light on shortcomings that have gained traction over the years against the organization.

The WHO in the past has faced scrutiny for its handling of outbreaks such as the H1N1 influenza, the Ebola Virus Disease (EVD) epidemic in West Africa, and most recently, the COVID-19 pandemic. Criticisms have centered on issues of transparency, timeliness of responses, politicization of health decisions, and the effectiveness of coordination with member states and other stakeholders.

Through a comprehensive analysis of the WHO's controversies, this paper seeks an informed discussion on strengthening international health institutions, enhancing transparency and accountability, and ensuring effective global response to future health crises. The ultimate goal is to advocate for a more resilient, responsive, and accountable WHO that can effectively address the evolving health challenges of today and tomorrow.³

The paper aims to pave the way for establishing responsibility and binding legal obligations on international organizations (IOs). The paper deals with the responsibility of the WHO during public health emergencies, however, the ideas could be made applicable to a broader theme of IOs in future studies which have not been dealt with under this paper.

2 Examining the WHO's mandate

The primary aim of the WHO, as elucidated under Article 1 of its Constitution, is to achieve the highest possible level of health for all humankind. The Constitution articulates the concept of health beyond the mere absence of disease or infirmity, incorporating complete physical, mental, and social well-being.⁴ The

¹ RUGER, Jennifer Prah; YACH, Derek. The global role of the World Health Organization. *Glob Health Gov.*, [s.l.], v. 2, n. 2, p. 1-11, Apr. 2009.

² MEIER, Benjamin Mason. Human rights in the World Health Organization: views of the director-general candidates. *Health and Human Rights*, [s.l.], v. 19, n. 1, p. 293-298, 2017.

³ KARAMAN, Hydar; GÜNEŞ, Burak. The World Health Organization and the COVID-19 pandemic. In: AKILLI, Erman; GÜNEŞ, Burak; GÖKBEL, Ahmet. *Diplomacy, society and the COVID-19 challenge*. London: Routledge, 2023. DOI 10.4324/9781003377597. Cap. 18.

⁴ WHO. *Constitution of The World Health Organization*. Geneva: WHO, 1946. Available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>. Access on: 11 Feb. 2025.

right to health is emphasized as the fundamental right that every human being, irrespective of race, religion, political ideology, or socio-economic status is entitled to the highest attainable levels.⁵ It also emphasizes the importance of health in the promotion of peace and security, contingent upon the full cooperation of both individuals and states.⁶ This part of the paper explores the international obligations of the WHO in maintaining international health.

To understand the duties and obligations of the WHO, we first need to have clarity on whether the WHO enjoys a separate legal identity from that of its members which is essential for the attribution of international obligations.

Art 66 of the WHO Constitution establishes the principle of specialty, recognizing that the organization holds a distinct legal personality separate from its member states to fulfill its functions. This signifies that the WHO enjoys a separate legal identity that allows it to undertake specific functions and responsibilities independently. The WHO can carry out its mandate without conflating its identity with that of its member states.⁷ Moreover, Article 69 of the WHO Constitution designates the organization as a specialized organ of the UN. The separate legal identity of the WHO has also been recognized in the case *Legality of the use by a state of nuclear weapons in armed conflict*.⁸

It may be inferred from the preceding discussion that the WHO enjoys a separate legal identity and is capable of holding rights and fulfilling obligations. It may be concluded that the WHO is a body having a separate independent personality from that of its mem-

bers and is capable of holding rights and fulfilling responsibilities. The organization has been entrusted with many fundamental functions that need to be performed by it. Firstly, the WHO performs normative functions that create international norms and standards⁹ including international conventions, agreements, and regulations both of binding and non-binding character and recommendations.¹⁰ Secondly, it coordinates and directs initiatives such as Health for all, poverty eradication, and other health initiatives. And lastly, it is involved in research and technical cooperation functions, covering areas like disease eradication, pandemic control, handling humanitarian crises, and emergency responses.¹¹

Aligned with the UN Charter's purpose of advancing human rights.¹² The WHO is mandated to respect and promote this purpose. Apart from the UN Charter, there are other international instruments including the International Covenant on Economic, Social, and Cultural Rights (ICESCR)¹³, the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination against Women (CEDAW)¹⁴, and the Convention on the Rights of the Child (CRC), which place an obligation on the WHO to actively promote and uphold human rights.¹⁵ The interconnectedness between WHO and human rights instruments reflects a concerted effort to ensure that health-related policies and actions are consistent with the broader principles of human rights.¹⁶ Apart from

⁵ CLIFT, Charles. *The role of the World Health Organization in the International System*. Londres: Chatham House, 2013. Available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2013-02-01-role-world-health-organization-international-system-clift.pdf>. Access on: 11 Feb. 2025.

⁶ ECCLESTON-TURNER, Mark; MCARDLE, Scarlett. The Law of Responsibility and the World Health Organisation: a case study on the West African ebola outbreak. *SSRN*, [s.l.], p. 1-21, Sep. 2020. DOI 10.2139/ssrn.3673116. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3673116. Access on: 11 Feb. 2025.

⁷ IVÁN SÁNCHEZ, Diego Ernesto. The international responsibility of the World Health Organization in case of pandemics and the role of individual. *Peace & Security*, [s.l.], n. 10, p. 1-28, 2022. DOI 0.25267/Paix_secur_int.2022.i10.1202.

⁸ ICJ. *Advisory opinion of 8 July 1996*. Request of judgments advisory opinions and orders. Legality of the use by a state of nuclear weapons in armed conflict.

⁹ GOSTIN, Lawrence O.; SRIDHAR, D.; HOUGENDBLER, D. The normative authority of the World Health Organization. *Public Health*, [s.l.], v. 129, n. 7, p. 854-863, July 2015. DOI 10.1016/j.puhe.2015.05.002.

¹⁰ WHO Evaluation Office. *Evaluation of WHO's normative function: evaluation brief July 2017*. Geneva: WHO, 2017. Available at: https://www.who.int/docs/default-source/documents/evaluation/evalbrief-normativefunction-15jan18.pdf?sfvrsn=bf320621_21. Access on: 11 Feb. 2025.

¹¹ BURCI, Gian Luca; VIGNES, Claude-Henri. *World Health Organization*. The Hages: Kluwe Law International, 2004.

¹² UNITED NATIONS. [Charter (1945)]. *United Nations Charter*. New York: UN, 1945. art 1.

¹³ UNITED NATIONS. *General Assembly resolution 2200.A (XXI), 16 December 1966*. International Covenant on Economic, Social and Cultural Rights. art 12

¹⁴ CEDAW. *General Recommendation no. 24: article 12 of the Convention (Women and Health)*. Adopted at the Twentieth Session of the Committee on the Elimination of Discrimination against Women, in 1999 (Contained in Document A/54/38/Rev.1, chap. I).

¹⁵ UNITED NATIONS. *General Assembly resolution 44/25, 20 November 1989*. Convention on the Rights of the Child. New York: UN, 1989. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>. Access on: 4 Jan. 2024.

¹⁶ ONZIVU, William. (Re)nvigorating the World Health Organi-

these legally binding instruments, the importance of the human rights approach during the pandemic was emphasized by the UN High Commissioner for Human Rights Michelle Bachelet,¹⁷ the UN Sec-Gen Antonio Guterres also acknowledged the centrality of human rights in the pandemic response across organizations.¹⁸ The WHO Director-Gen Tedros Adnom Ghebreyesus explicitly included calls to protect human rights in the pandemic response.¹⁹

The Constitution of the WHO outlines a set of comprehensive objectives and functions that guide its actions. These include directing and coordinating international health efforts and fostering collaboration with various entities such as the UN, governments, NGOs, and other relevant bodies.²⁰ In emergencies, the organization is mandated to provide technical support and provide aid upon request of the member state. It is also tasked with offering health services, including epidemiological and statistical services, and actively working to combat diseases.²¹

It is evident that the WHO is mandated with important functions concerning the maintenance of international health and the well-being of all mankind. The significance of the right to health has also been recognized in various other international instruments, however, the task of maintaining and overlooking all aspects of health has been entrusted to the WHO. We argue that the WHO Constitution and the other international instruments recognizing the right to health create a bin-

zation's governance of health rights: repositing an evolving legal mandate, challenges and prospects. *African Journal of Legal Studies*, [s.l.], v. 4, n. 3, p. 225-256, 2011. DOI 10.1163/170873811X585592.

¹⁷ CORONAVIRUS: human rights need to be front and centre in response, says bachelet. *UN*, 6 March, 2020. Available at: <https://www.ohchr.org/en/press-releases/2020/03/coronavirus-human-rights-need-be-front-and-centre-response-says-bachelet>. Access on: 11 Feb. 2025.

¹⁸ GUTERRES, António. We are all in this together: human rights and COVID-19 response and recovery. *UN*, 23 Apr. 2020. Available at: <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2765615>. Access on: 11 Feb. 2025.

¹⁹ MEIER, Benjamin Mason; MESQUISTA, Judith Bueno de; WILLIAMS, Caitlin R. Global obligations to ensure the right to health. *Yearbook of International Disaster Law Online*, [s.l.], v. 3, n.1, p. 3-34, 2022. DOI 10.1163/26662531_00301_002.

²⁰ CLIFT, Charles. *The role of the World Health Organization in the International System*. Londres: Chatham House, 2013. Available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2013-02-01-role-world-health-organization-international-system-clift.pdf>. Access on: 11 Feb. 2025.

²¹ Strengthening WHO preparedness for and response to health emergencies WHA 74.7 Agenda 17.3(2021).

ding international obligation on the WHO. In case of violation of these obligations, the organization needs to be circled and attributed with responsibility.

3 Assessing the WHO's international obligations during global health crises

Pandemics are “problems without passports”.²² The world recently witnessed the deadliest attack on humans in the form of the novel coronavirus pandemic. Human survival became the priority, the greatest of nations had turned to the “me first” policy. In these crucial times, the WHO played a central role in the management and handling of the spread of disease. During situations like epidemics and pandemics, the WHO is expected to provide specialized knowledge for a coordinated response.²³ Within the WHO framework, the World Health Assembly (WHA) plays a pivotal role as the decision-making body, consisting of delegates from the member states.²⁴ The body is responsible for the adoption of resolutions within the jurisdiction of the WHO.²⁵ The WHA, through its resolutions, has mandated the WHO with the responsibility to provide comprehensive support to member states in addressing infectious diseases. Resolution 56.19 directs the organization to prevent and control the influence of pandemics and annual epidemics. Another Resolution WHA 58.5 emphasizes the preparation and response to pandemic influenza.²⁶

²² PETRONE, F. The future of global governance after the pandemic crisis: what challenges will the BRICS face? *International Politics*, [s.l.], v. 59, n. 2, p. 244-259, 2021. DOI 10.1057/s41311-021-00301-8.

²³ KAYA, I.; SIMSEK, G. E. World Health Organization and international health regulations: the COVID-19 case and combating epidemics under international law. *Istanbul Law Review*, [s.l.], v. 78, n. 2, p. 983-1007. Available at <https://iupress.istanbul.edu.tr/en/journal/mecmua/article/dunya-saglik-orgutu-ve-uluslararasi-saglik-tuzugu-covid-19-orneginde-uluslararasi-hukukta-salgin-hastaliklarla-mucadele>. Access on: 11 Feb. 2025.

²⁴ WHO. *Constitution of The World Health Organization*. Geneva: WHO, 1946. Available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>. Access on: 11 Feb. 2025. art. 9-10.

²⁵ WHO. *Constitution of The World Health Organization*. Geneva: WHO, 1946. Available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>. Access on: 11 Feb. 2025. art. 19.

²⁶ WHA 58.5, Strengthening pandemic-influenza preparedness and response, May 23 (2005).

In this part, we analyze the international obligations of the WHO during unprecedented global health crises by reviewing legal instruments and fundamentals of international law.

3.1 International Health Regulations(IHR) (2005)

A major effort in the direction to deal with the global spread of diseases was in the form of the adoption of the International Health Regulation, 2005 to create binding legal obligations on member states for diseases having the potential to spread across nations.²⁷ These rules have their roots in the inaugural International Sanitary Conference of 1851. The conference witnessed several European states in attendance, aimed to combat cholera, and resulted in the birth of the first Sanitary Regulations. After the establishment of WHO in 1948, it initially incorporated these rules. However, in 1969, the WHA amended and modernized these rules, renaming them as the International Health Regulations (1969). The first version of IHR (1969) addressed six quarantinable diseases, later reduced to three: cholera, plague, and yellow fever. However, the deficiencies in the IHR 1969 became evident in the times to follow, particularly regarding trans-border communicable diseases. Firstly, numerous communicable diseases were not subject to notification by the WHO. Secondly, the reporting system relied on each state voluntarily reporting disease outbreaks, and many states refrained from doing so.²⁸ Thirdly, there was a lack of formalized and effective tools for internationally coordinating disease prevention. A comprehensive review of IHR(1969) gained traction after the 2003 SARS epidemic, leading to the adoption of the current IHR (2005) by the WHA.²⁹

IHR (2005) is one of the widely endorsed international agreements with 196 states committed to its

implementation.³⁰ Its objective is to “prevent, mitigate, control and respond to the global spread of diseases in a manner proportionate to public health risks while minimizing unwarranted disruption to international traffic and trade.”³¹ Notably, the WHO members commit to notifying the WHO of events that might qualify as “Public health emergency of International concern”(PHEIC).³² In a significant departure from the earlier IHRs, the 2005 rules encompass any event deemed a “PHEIC.”³³ This, in principle, includes outbreaks of communicable diseases. Similar to IHR 1969, IHR (2005) relies on notifications from WHO member states. However, it takes a step forward by introducing the capacity of the WHO to assess potential “events” based on information from sources beyond the state of occurrence, such as media, reports, researchers, or non-governmental organizations. Additionally, IHR (2005) empowers the WHO to collaborate with other states and IOs to address disease outbreaks, even in cases where the originating state is uncooperative.³⁴

Article 5 of the IHR (2005) mandates states to establish and maintain the capacity to detect, assess, and report events that may constitute a PHEIC within their borders. The article also empowers the WHO with the responsibility to collect information on events and evaluate their potential for international disease spread, however, it lacks the authority to conduct inspection within a state or compel states to notify or share information. Article 6 stipulates that state parties are obligated to promptly notify the WHO of any potential PHEIC within their territories within 24 hours of assessing available information. The article also reinforces continuous communication on the infectious disease.

³⁰ WHO. International Health Regulations. *WHO*, [2025?]. Available at: https://www.who.int/health-topics/international-health-regulations#tab=tab_1. Access on: 16 Feb. 2025.

³¹ WHO. *International Health Regulations*. 3rd. ed. Geneva: WHO, 2005. Available at: <https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1>. Access on: 16 Feb. 2025. art. 2.

³² WHO. *International Health Regulations*. 3rd. ed. Geneva: WHO, 2005. Available at: <https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1>. Access on: 16 Feb. 2025. art. 6.

³³ WHO. *International Health Regulations*. 3rd. ed. Geneva: WHO, 2005. Available at: <https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1>. Access on: 16 Feb. 2025. art. 9.

³⁴ WHO. *International Health Regulations*. 3rd. ed. Geneva: WHO, 2005. Available at: <https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1>. Access on: 16 Feb. 2025. art. 10.

²⁷ GOSTIN, Lawrence O.; KATZ, Rebeca The International health regulations: the governing framework for global health security. *The Milbank Quarterly*, [s.l.], v. 92, n. 2, p. 264-313. DOI 10.1111/1468-0009.12186. Available at: <https://onlinelibrary.wiley.com/doi/10.1111/1468-0009.12186>. Access on: 11 Feb. 2025.

²⁸ HARDIMAN, Maxwell Charles. World Health Organization perspective on implementation of international health regulations. *Emerging Infectious Diseases*, [s.l.], v. 18, n. 7, p. 1041-1046, July 2012. DOI 10.3201/eid1807.120395. Available at: https://wwwnc.cdc.gov/eid/article/18/7/12-0395_article. Access on: 11 Feb. 2025.

²⁹ BROBERG, M. A critical appraisal of the World Health Organization’s International health regulations (2005) in times of pandemic: it is time for revision. *European Journal of Risk Regulation*, [s.l.], v. 11, n. 2, p. 202-209, 2020. DOI 10.1017/err.2020.26.

Article 9 of the rules permits WHO to consider reports from “other sources”.³⁵ This may include information received from non-state sources. The IHR imposes on the WHO a duty of surveillance and supervision, outlined in Art 5(4), 9, and 10 IHR. Taking into account the WHO’s ability to collect information from non-state sources, does not permit inaction in the face of potential events if the affected state party fails to notify within the specified time limit. However, under IHR the majority authority remains with the state of inception of disease as without their verification the WHO cannot disseminate information to the other states.³⁶ However, this does not preclude the WHO from fulfilling its responsibility and continuing to act based on information from available non-state sources.³⁷

The IHR (2005), as the *lex specialis*, outlines provisions indicating a direct obligation for the WHO.³⁸ Article 12 of the IHR (2005) mandates the WHO Director-General to decide the designation of the disease as a pandemic and declare it as a PHEIC. Post determination and disease declaration as PHEIC, the WHO under Art 49 IHR (2005) has to formulate temporary recommendations. It is important to note here that Art 12 of the IHR recognizes the Director-Gen as the main representative of the organization which is in line with Art 32 of the WHO Constitution. In the advisory opinion, *Difference Relating to Immunity from the Legal Process of a Special Rapporteur of the Commission on Human Rights*, the ICJ observed that the actions or omission of the main civil servant may lead to the organization’s international responsibility for damages.³⁹ However, the substantive content of Art 12 IHR(2005) is intricately linked to the

obligations of the state parties, as outlined under Art 6(1) and 7 IHR(2005), emphasizing the duty to notify events that may lead to the designation of a PHEIC, this needs to be respected by the DG.

Art 12(1) IHR (2005) in line with the Art 31 Vienna Convention on the Law of Treaties, 1969 clarifies that information provided by state parties does not prevent DG from designating an event as a PHEIC, even if the health authorities of the affected state party disagree.⁴⁰

To determine whether an international obligation exists for the WHO we look at a specific duty outlined in the above provisions. The IHR underwent a significant reform to reduce dependence on the state party’s timing of notification. Therefore, interpreting Art 12 of the IHR (2005) indicates that compliance with the state party’s duty to notify is not solely based on timing, as other mechanisms assign a duty to the WHO. This interpretation may be debated but is reasonable, as there are no circumstances in which this situation would be considered wrongful. The international obligation under Art 12 of the IHR stands alone, following the principle of integration.

3.2 Human Rights obligations

The UN Sec-Gen urged the UN agencies to integrate human rights work following which the WHO actively embraced this approach. The directive emphasizes achieving human rights, focusing on empowering right-holders and ensuring duty-bearers fulfill their obligations. They envisioned human rights principles guiding the entire process, from policy design to implementation, monitoring, and evaluation of development initiatives.

The WHO is an integral body within the UN and has to comply with the UN Charter and its own Constitution, to promote human rights. This aligns with international legal standards such as Art 38(1)(c) of the ICJ statute, and customary international law, which necessitate a “duty of diligence” to prevent the subject’s policies, actions, or potential neglect from undermining

³⁵ BERMAN, Ayelet. The World Health Organization and COVID-19: how much legal authority does the WHO really have to manage the pandemic? *CIL*, [2025?]. Available at: <https://cil.nus.edu.sg/the-world-health-organization-and-covid-19-how-much-legal-authority-does-the-who-really-have-to-manage-the-pandemic-by-dr-ayelet-berman/>. Access on: 16 Feb. 2025.

³⁶ WHO. *International Health Regulations*. 3rd. ed. Geneva: WHO, 2005. Available at: <https://iris.who.int/bitstream/handle/10665/246107/9789241580496-eng.pdf?sequence=1>. Access on: 16 Feb. 2025. art. 9-11.

³⁷ WILDER-SMITH, A.; OSMAN, S. Public health emergencies of international concern: a historic overview. *Journal of Travel Medicine*, v. 27, n. 8, p. 1-13, 2020. DOI 10.1093/jtm/taaa227.

³⁸ ESSAWY, R. M. Closing the doors on health nationalism: the non-emptiness of the legal duty to cooperate in pandemic response under *lex specialis*. *Max Planck Yearbook of United Nations Law Online*, v. 25, n. 1, p. 115-147, 2022. DOI 10.1163/18757413_02501021.

³⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion of 29 Apr 1999*.

⁴⁰ IVÁN SÁNCHEZ, Diego Ernesto. The international responsibility of the World Health Organization in case of pandemics and the role of individual. *Peace & Security*, [s.l.], n. 10, p. 1-28, 2022. DOI 0.25267/Paix_secur_int.2022.i10.1202.

the human rights obligations of other international subjects.⁴¹

It is noteworthy that the obligations of IHR(2005) must comply with international human rights law(IHRL). Art 3 IHR (2005) outlining the international obligations of WHO during pandemics emphasizes that the decision must adhere to IHRL, impacting both the scope of temporary recommendations and the procedure for designating a PHEIC. The language used in the article reflects an imperative character, evident from the use of the words “shall be” in the first three paragraphs. Two important considerations arise from the same:

Any action by the WHO under Art 12 IHR(2005) must observe “dignity, human rights and fundamental freedoms.”

It must take into account the UN Charter and the WHO Constitution and the goal of universal application for the protection of all people from the spread of disease globally.

Therefore, we may conclude the duty resting upon the WHO, outlined in Art 3 IHR(2005), has two-fold considerations:

Any action based on Art 12 IHR(2005) must comply with IHRL.

Any action adopted under Art 12 IHR (2005) must align with the goals of IHRL and the principles outlined in other international instruments.⁴²

In line with the above observations, we argue that the core values embedded in the UN, including those articulated in the Universal Declaration of Human Rights (UDHR), are not only binding on states but also on IOs, including the WHO. Following this principle makes the WHO in conjunction with customary international law, as obligating the WHO to uphold and safeguard human rights in all its policies, programs, and activities. This involves both the promotion of existing standards and the vigorous protection of human rights. The inclusion of human rights in the WHO Constitu-

tion by member states reflects a proactive stance to prevent human rights violations within the organization’s global health mandate. According to scholars, a constitution establishes a political order, delineating the competencies of different institutions and their interrelations. Consequently, laws generated by the UN’s legal order could potentially apply to both institutions and states, contingent on the nature of their activities.⁴³

Human rights obligations are reflective of the shared constitutional traditions of states, and can bind organizations through various means: the terms of their constituent instruments, customary international law, or general principles of law. In this context, the WHO is also expected to observe and uphold international human rights law even during PHEIC.

3.3 Jus Cogens and the WHO

Does the WHO have an international obligation under jus cogens norms concerning its conduct during pandemics?

To answer this question, we need to examine the WHO Constitution and the IHR (2005). Under Art 3 of IHR, the WHO’s objective is defined as achieving “universal application for the protection of all people from the international spread of disease”⁴⁴ Art 3 IHR a binding international legal obligation adopted by the WHA needs to be examined in relation to the right to health. The key question is whether the primary obligation of the WHO under Art 12 of the IHR (2005) qualifies as an erga omnes norm or is a part of the core of jus cogens norms.

The fundamental objective is to determine if Art 26 of the Draft Articles on the Responsibility of International Organizations(DARIO), which excludes any circumstance precluding wrongfulness when a duty arises from jus cogens norm, applies in this context. Although the International Law Commission (ILC) identifies a limited material scope of application of jus cogens norms, including prohibitions such as aggression, genocide, slavery, racial discrimination, torture, crime against humanity, and the right to self-determination, a more

⁴¹ ONZIVU, William. (Re)nvigorating the World Health Organization’s governance of health rights: repositing an evolving legal mandate, challenges and prospects. *African Journal of Legal Studies*, [s.l.], v. 4, n. 3, p. 225-256, 2011. DOI 10.1163/170873811X585592.

⁴² TOEBES, B.; FORMAN, L.; BARTOLINI, G. Toward human rights-consistent responses to health emergencies: what is the overlap between core right to health obligations and core international health regulation capacities? *Health Hum Rights*, [s.l.], v. 22, n. 2, p. 99-111, Dec. 2020.

⁴³ SCHERMERS, H. G.; Blokker, N. M. *International Institutional Law: unity within diversity*. 5th ed. rev. Leiden: Martinus Nijhoff, 2011.

⁴⁴ WHO. *Constitution of The World Health Organization*. Geneva: WHO, 1946. Available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>. Access on: 11 Feb. 2025. art. 1.

expansive interpretation may be warranted.⁴⁵ Analyzing the circumstances surrounding the WHO Constitution, including the IHR, and considering the teleological content of both international instruments under Art 31 of the VCLT(1969), it seems unreasonable to adopt a restrictive perspective.

To get a better insight we need to examine Art 53 of the VCLT and relevant ICJ jurisprudence to determine whether the reference to IHRL in Art 3 of the IHR qualifies as *jus cogens*. The interpretation of conventional and customary norms of general international law, including the force of *jus cogens* norms and their comparison with *erga omnes* norms, has been subject to contradiction and restriction.⁴⁶ Therefore, to ascertain whether Art 3 IHR falls within the category of *jus cogens*, a detailed analysis of the substantive content of the provision is required. To determine if Art 3 IHR establishes a *jus cogens* norm, certain conditions must be met. Firstly, the origin of such norms should be from an international subject toward the global community.⁴⁷ Secondly, it must relate to obligations relating to the basic rights of humans.⁴⁸ Thirdly, it must serve a purely humanitarian and civilizing purpose.⁴⁹ Fourthly, it should create obligations distinct from other provisions.⁵⁰ Lastly, it should stem from a generalized practice or *opinion juris* or be part of an international instrument.⁵¹

Analyzing these criteria, Art 3 IHR fits like a glove to be considered as a *jus cogens* norm. The WHO's duty to act as the authority on global public health implies an obligation to fulfill the objective under Art 1 of the WHO Constitution, ensuring the right to attain

the highest standard of health. There's a functional link between the purpose of the IHR, including the right to health, and other IHRL norms. The IHR aims to prevent the international spread of disease, aligning with the right to health under ICESCR. Art 3 IHR imposes a unique obligation compared to Art 12 IHR, establishing an autonomous duty to act according to the substantive limits of human rights, particularly the right to health. This duty refers to principles and norms in international human rights treaties universally accepted.

In conclusion, the duty of Art 3 IHR concerning WHO's role during the pandemic can be regarded as *jus cogens* norm. This means its adherence is mandatory, and there are no grounds to claim circumstances that would exempt international responsibility.

The IHR requires the WHO to act swiftly in matters relating to disease spread and timely action is the key to effectively combating a disease. Article 12 of the IHR requires the DG of WHO to determine PHEIC. The IHR endows a significant role to the DG of the WHO in deciding whether a situation may be termed as PHEIC. The DG has to consult the state party regarding the determination of disease, however, if they fail to conclude, the matter will be put before the EC for their views,⁵² and the final call for labeling a situation as PHEIC remains with the DG.⁵³ Analyzing these provisions helps to understand the positioning of the WHO during global health emergencies. The authors argue that interpreting Art 12 and 49 of the IHR emphasizes the WHO's responsibility to act independently when required to take crucial steps towards the determination of a PHEIC.

This section of the paper outlines the significant role the WHO plays during global health emergencies. The interpretation of the IHR helps us in navigating the international obligations of the WHO relating to pandemics. Based on the above discussion, we argue there exists an international obligation of the WHO in matters of global health and any preclusion leads to attracting international responsibility by the organization.

⁴⁵ MURPHY, S. D. Peremptory norms of general international law (*jus cogens*) and other topics: the seventy-first session of the international law commission. *American Journal of International Law*, v. 114, n. 1, p. 68–86, 2020. DOI 10.1017/ajil.2019.74.

⁴⁶ DE WET, Erika. *Jus cogens* and obligations *erga omnes*. In: SHELTON, Dinah (ed.). *The Oxford Handbook of International Human Rights Law*. Oxford: Oxford Handbooks, 2013.

⁴⁷ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide

⁴⁸ ICJ. *Judgment of 5 February 1970*. Reports of judgments, advisory opinions and orders. Case concerning the Barcelona Traction, Light and Power Company, Limited (new application: 192. Belgium v. Spain. Second phase). § 33-34.

⁴⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ Report2007, para 161-162.

⁵⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ Report2007, § 161-162.

⁵¹ Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) ICJ Report 2012, § 99.

⁵² WHO. *Constitution of The World Health Organization*. Geneva: WHO, 1946. Available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>. Access on: 11 Feb. 2025. art. 13 §3.

⁵³ WHO. *Constitution of The World Health Organization*. Geneva: WHO, 1946. Available at: <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>. Access on: 11 Feb. 2025. art. 49 §5.

4 WHO in the spotlight: evaluating actions, accountability, and call for reform

In this part of the paper, we evaluate the conduct of the WHO in pandemic prevention and control. The previous section of the paper clarifies the international obligations of the WHO during global health emergencies and in this part, we examine how far they have complied with these obligations with the help of analyzing their responses to real events.

The IHR (2005) helped clarify the roles and responsibilities of the WHO and its member states in preventing and controlling the international spread of diseases, along with providing measures for public health responses.⁵⁴ The regulations established binding international regulations for responding to a pandemic, the WHO has performed an increasingly significant role since its inception in averting disease transmission between nations, demonstrated by its responses to various outbreaks such as the 2009 H1N1 virus, Polio, Zika, and Ebola in 2014, Ebola in 2018, and COVID-19 in 2020.⁵⁵ Apart from the IHR, there are other international instruments like the Global Outbreak Alert and Response Network(2000), the Pandemic Influenza Preparedness Framework(2011), the Public Health Emergency Operations Centre Network(2012), and the Contingency Fund for Emergencies(2015), collectively contributing to the reinforcement of national public health systems by the WHO.⁵⁶ Despite these several mechanisms the trust in the WHO drastically diminished post-COVID-19 pandemic.⁵⁷ This was majorly due to its delayed

response in declaring the outbreak and lapses in investigating the source of the outbreak.⁵⁸

The novel coronavirus knew no border and spread rapidly across the globe.⁵⁹ It adversely impacted all aspects of human life from trade to human rights.⁶⁰ Experts consider it could just be the starting point for many more pandemics that will follow in due course much deadlier than SARS-COV-2.⁶¹

The tryst with the deadly coronavirus began in Dec 2019 when reports of patients with pneumonia of unknown origin were found to have a virus similar to SARS-CoV. The WHO Regional Office in Western Pacific was intimated about the mysterious virus a day after its inception in the Wuhan city, People's Republic of China. On Jan 1st, actions by the WHO were initiated by activating support teams and seeking information from China. By Jan 5th, the WHO was actively dispensing the information globally through the IHR Events Information System. The organization received genome sequences of the new virus on Jan 10th, and Thailand confirmed the first case outside of China on Jan 13th. The WHO acknowledged limited human-to-human transmission on Jan 14th but reported no evidence of such transmission, based on information received from Chinese authorities. However, by Jan 21st evidence of human-to-human transmission was found in Wuhan. As cases swiftly spread globally, the WHO convened the Emergency Committee on Jan 22nd but chose not to designate COVID-19 as a PHEIC. On January 23rd Wuhan City, China was placed under a lockdown to curb the spread of COVID-19.⁶² The WHO on the 30th Jan

⁵⁴ GOSTIN, Lawrence O.; KATZ, Rebeca The International health regulations: the governing framework for global health security. *The Milbank Quarterly*, [s.l.], v. 92, n. 2, p. 264-313. DOI 10.1111/1468-0009.12186. Available at: <https://onlinelibrary.wiley.com/doi/10.1111/1468-0009.12186>. Access on: 11 Feb. 2025.

⁵⁵ HOFFMAN, S. J., SILVERBERG, S. L. Delays in global disease outbreak responses: lessons from H1N1, Ebola, and Zika. *American Journal of Public Health*, v. 108, n. 3, p. 329-333. DOI 10.2105/ajph.2017.304245.

⁵⁶ KUZNETSOVA, L. COVID-19: the world community expects the World Health Organization to play a stronger leadership and coordination role in pandemics control. *Frontiers Public Health*, [s.l.], v. 8, p. 1-6, Sept. 2020. DOI 10.3389/fpubh.2020.00470.

⁵⁷ GUO, C. *et al.* The effect of COVID-19 on public confidence in the World Health Organization: a natural experiment among 40 countries. *Globalization and Health*, v. 18, n. 1, p. 1-10, v. 2022. DOI 10.1186/s12992-022-00872-y.

⁵⁸ ARCHIVED: WHO Timeline - COVID-19. *WHO*, 27 Apr. 2020. Available at: <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>. Access on: 11 Jan. 2024.

⁵⁹ MOHAMED, Kawthar *et al.* Borderless collaboration is needed for COVID-19: a disease that knows no borders. *Infection Control & Hospital Epidemiology*, [s.l.], v. 41, n. 10, p. 1245-1246, Oct. 2020. DOI 10.1017/ice.2020.162.

⁶⁰ HALEEM, A.; JAVAID, M.; VAISHYA, R. (2020, March). Effects of COVID-19 pandemic in daily life. *Current Medicine Research and Practice*, [s.l.], v. 10, n. 2, p. 78-79, 2020. DOI 10.1016/j.cmrp.2020.03.011

⁶¹ SMITHAM, Eleni; GLASSMAN, Amanda. The next pandemic could come soon and be deadlier. *CGDev*, 25 Aug. 2021. Available at: <https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier>. Access on: 11 Feb. 2025.

⁶² SINGH, Sudhvir *et al.* How an outbreak became a pandemic: a chronological analysis of crucial junctures and international obligations in the early months of the COVID-19 pandemic. *The Lancet*, [s.l.], v. 398, n. 10316, p. 2109-2124, Dec. 2021. DOI 10.1016/S0140-6736(21)01897-3.

declared the outbreak as PHEIC.⁶³ After elaborate discussions and debates, the virus was officially named by the WHO as SARS-CoV-2.⁶⁴ At that point, there were 78,811 confirmed cases globally, with 17 deaths outside China and 2,445 within China.⁶⁵ Post declaration as a PHEIC, the Director-General recommended activating the UN crisis management policy on Feb 4th, 2020, fostering collaboration with other IOs. The WHO International Mission began its work in the city of Wuhan on Feb 16th. Later on, the WHO published the first investigation mission report, confirming the highly infectious nature of the novel coronavirus and its potential for significant health, economic, and social impacts.⁶⁶ In March 2020 the COVID-19 virus was declared a pandemic by the WHO considering its spread across the globe.⁶⁷ Post-pandemic declaration the WHO and the International Civil Aviation Organization (ICAO) jointly recommended adopting IHR health measures for international passenger traffic.⁶⁸

The delay in responding to the virus and the catastrophe that unfolded swiftly led to questioning the accountability of the WHO by critics.⁶⁹ The inherent

flaws in the WHO functioning became apparent and the organization was called out by states and non-state actors. We argue that the failure to disclose timely the outbreak of novel coronavirus by the WHO constitutes a breach of its international obligations. It invokes Art 4 of the Draft Articles on Responsibility of International Organization (DARIO) adopted by the International Law Commission (ILC) in 2011.⁷⁰ The principle of that there is a remedy for every wrong, however, it is apparent that the WHO violated many essential rights it was obligated to uphold under its mandate but the current international legal system leaves no effective remedy to states and individuals.

Similar concerns arose with respect to the conduct of WHO in the past during the 2009 swine flu outbreak where the organization was criticized for being inadequate and lacking transparency. Also, during the Ebola outbreak, the organization received a major backlash as the WHO blamed it on the incompetence of the African countries, highlighting the systemic challenges in responding to health crises and the need for global support. Events of biases the institution has towards the global north is another criticism that the WHO had to face, leading to perpetuating perpetual gaps already existing. Critics also suggest the organization should focus on a scientific fact-based approach rather than political rhetoric.⁷¹ At the time of the inception of the COVID-19 pandemic, the organization had to withstand a series of accusations pointing out its closeness with China and its failure to take timely action. In a speech post visiting China on 30 Jan 2020, the Director General of WHO stated: that he was confident about China's commitment to China's transparency and safeguarding

⁶³ NARAIN, J. *et al.* Responding to COVID-19 pandemic: why a strong health system is required. *Indian Journal of Medical Research*, [s.l.], v. 151, n. 2, p. 140-145. Feb./Mar., 2020. DOI 10.4103/ijmr.ijmr_761_20.

⁶⁴ MASTERS-WAAGE, T. C.; JHA, N.; REB, J. COVID-19, Coronavirus, Wuhan Virus, or China Virus? Understanding how to “do no harm” when naming an infectious disease. *Frontiers in Psychology*, [s.l.], v. 11, p. 1-10, Dec. 2020. DOI 10.3389/fpsyg.2020.561270.

⁶⁵ GOPICHANDRAN, Vijayaprasad; SUBRAMANIAM, Sudarshini. Response to Covid-19: an ethical imperative to build a resilient health system in India. *Indian Journal of Medical Ethics*, [s.l.], v. 5, n. 2, p. 89-92, 2020. Editorial. DOI 10.20529/IJME.2020.026. Available at: <https://ijme.in/articles/response-to-covid-19-an-ethical-imperative-to-build-a-resilient-health-system-in-india/?galley=html>. Access on: 11 Feb. 2025.

⁶⁶ WHO. *Report of the WHO-China joint mission on coronavirus disease 2019 (COVID-19)*. Geneva: WHO, 2020. Available at: https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19---final-report-1100hr-28feb2020-11mar-update.pdf?sfvrsn=1a13fda0_2&download=true. Access on: 12 Jan. 2024.

⁶⁷ COVID-19: WHO declares pandemic because of “alarming levels” of spread, severity, and inaction. *BMJ*, 12 Mar. 2020. DOI 10.1136/bmj.m1036.

⁶⁸ ICAO. Declaration adopted by the ICAO Council at the Fourth Meeting of the 219th Session on 9 March 2020 relating to the outbreak of novel coronavirus (COVID-19). *ICAO*, 9 March 2020. Available at: <https://www.icao.int/Security/COVID-19/Pages/Declaration.aspx>. Access on: 12 Jan. 2024.

⁶⁹ JONES, Lee; HAMEIRI, Shahar. Explaining the failure of global health governance during COVID-19. *International Affairs*, [s.l.], v. 98, n. 6, p. 2057-2076, Nov. 2022. DOI 10.1093/ia/iiaa231. Also refer TAYLOR, Allyn L.; HABIBI, Roojin. The collapse of global cooperation under the WHO international health regulations at the out-

set of COVID-19: sculpting the future of global health governance. *American Society of International Law*, [s.l.], v. 24, n. 15, 2020. Available at: <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations>. Access on: 22 Feb. 2025. Also refer GOSTIN, Lawrence O. COVID-19 reveals urgent need to strengthen the World Health Organization. *JAMA Health Forum*, [s.l.], v. 1, n. 4, e200559, 2020. DOI 10.1001/jamahealthforum.2020.0559. Available at: <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2765615>. Access on: 11 Feb. 2025.

⁷⁰ GAL-OR, Noemi; RYNGAERT, Cedric. From theory to practice: exploring the relevance of the Draft Articles on the Responsibility of International Organizations (DARIO): the responsibility of the WTO and the UN. *German Law Journal*, [s.l.], v. 13, n. 5, p. 511-541, 2012. DOI 10.1017/S2071832200020630.

⁷¹ HO, Jing-Mao; LI, Yao-Tai; WHITWORTH, Katherine. Unequal discourses: Problems of the current model of world health development. *World Development*, [s.l.], v. 167, p. 1-5, Jan. 2021. DOI 10.1016/j.worlddev.2020.105176.

the well-being of people worldwide.⁷² China's efforts in controlling the COVID-19 virus spread were applauded by the WHO authorities.⁷³ However, these observations were critically viewed by a range of experts who believed China to be withholding vital information on the spread of the disease and delayed communication to the WHO and the world which impacted the global health governance. The same organization that lauded China's response against coronavirus, blamed poverty, political instability, and cultural traditions for the outbreak of Ebola in West African nations.⁷⁴ The then Director Gen of the WHO, Margaret Chan, in her address to the Regional Committee for Africa in 2014 emphasized historical limitations and cultural barriers, attributing difficulties in Ebola containment to intrinsic issues within affected African countries, potentially reinforcing negative stereotypes.⁷⁵

The response of the WHO in previous health crises reveals a clear dereliction of its mandate and the failure to maintain global health and well-being. The organization has failed to fulfill its international obligations as stipulated under its Constitution and other international instruments. During global health crises, the sufferer is humanity there is a violation of their right to life, health, and other fundamental rights but how would these be remedied? Can we attribute responsibility to the WHO for failing to respond effectively during these instances? This will be discussed further in the next section.

5 Law of responsibility and the WHO

In the preceding sections, we discussed the international obligations of the WHO and instances where it failed to fulfill its mandate in past health crises, thus raising concerns over its responsibility. In this section, we evaluate whether the WHO can attract responsibility for its actions or omissions during global health emergencies.

The responsibility of IOs has been debatable for a long time, and scholars have failed to reach a consensus.⁷⁶ It involves bearing the consequences for breaches of international law. In order to strap accountability to an entity, it entails assigning specific actions to actors within the realm of international law which is a prerequisite for holding them responsible.⁷⁷ This section focuses on the responsibility of the WHO for global health crises. Whether the Draft Articles on Responsibility of International Organization (DARIO) (2011) apply to WHO's conduct during global health emergencies?

The Ebola epidemic and the COVID-19 pandemic highlighted major accountability issues within the WHO. In the case of the Ebola outbreak being notified in March 2014, the WHO did not declare PHEIC until August 2014. Similarly, in the case of the COVID-19 pandemic with widespread knowledge about the transmission of the viruses the organization waited until the end of January 2020 to declare it as a PHEIC. Their delays have been widely criticized in literature and reports including the Ebola Interim Assessment Panel's report commissioned by the WHO, emphasizing the accountability challenges faced by the organization.⁷⁸ Another Independent Panel For Pandemic Preparedness and Response highlighted that the "COVID-19 pandemic was preventable" and that the declaration of PHEIC should have happened a week earlier than it was.

⁷² GILSINAN, Kathy. How China deceived the WHO: U.S. senators are calling for investigations and the president is threatening to cut off funding. What happened? *The Atlantic*, 12 Apr. 2020. Available at: <https://www.theatlantic.com/politics/archive/2020/04/world-health-organization-blame-pandemic-coronavirus/609820/>. Access on: 22 Feb. 2025.

⁷³ CHAN, L. H.; LEE, P. K.; CHAN, G. China engages global health governance: processes and dilemmas. *Global Public Health*, v. 4, n. 1, p. 1–30, 2009. DOI 10.1080/17441690701524471.

⁷⁴ KAMRADT-SCOTT, A. WHO's to blame? The World Health Organization and the 2014 ebola outbreak in West Africa. *Third World Quarterly*, [s.l.], v. 37, n. 3, p. 401-418, 2016. DOI 10.1080/01436597.2015.1112232.

⁷⁵ HO, Jing-Mao; LI, Yao-Tai; WHITWORTH, Katherine. Unequal discourses: Problems of the current model of world health development. *World Development*, [s.l.], v. 167, p. 1-5, Jan. 2021. DOI 10.1016/j.worlddev.2020.105176.

⁷⁶ KLABBERS, J. Reflections on role responsibility: the responsibility of international organizations for failing to act. *European Journal of International Law*, [s.l.], v. 28, n. 4, p. 1133-1161, 2017. DOI 10.1093/ejil/chx068.

⁷⁷ HAFNER, G. Accountability of International Organizations. *American Society of International Law*, [s.l.], v. 97, p. 236–240. Available at: <https://www.jstor.org/stable/25659859/>. Access on: 22 Feb. 2025.

⁷⁸ JONES, Christopher W. *et al.* Delays in reporting and publishing trial results during pandemics: cross sectional analysis of 2009 H1N1, 2014 Ebola, and 2016 Zika clinical trials. *BMC Medical Research Methodology*, [s.l.], v. 21, p. 2-10, 2021. DOI 10.1186/s12874-021-01324-8.

The decision to not designate COVID-19 as a PHEIC by the DG, when reasonable grounds existed, can be attributed to the WHO. This omission in declaring a PHEIC on Jan 23rd falls within the framework of international responsibility. The failure of WHO's response could also be observed from the Ebola epidemic in 2014. Margaret Chan, the then WHO Director-General, severely delayed in declaring the Ebola outbreak as a PHEIC. The time only witnessed the work of NGOs, including Medicines' Sans Frontieres (MSF), Partners in Health, and Samaritan's Purse, in the frontline to combat the EVD.⁷⁹ These organizations persistently raised alarms about the outbreak's severity through media channels. In mid-April 2014, field staff in Guinea and an Ebola expert from the WHO Regional Office for Africa (WHO-AFRO) separately sent numerous emails to the headquarters in Geneva stating, "WE NEED SUPPORT".⁸⁰ Despite this outcry declaration of PHEIC was postponed. The WHO having all the necessary reasons to declare a PHEIC, headquarters hesitated due to concerns over potential political, religious, and severe economic repercussions for the affected countries.^{81,82} The creation of an entirely new global institution also echoed amongst global leaders to avert similar crises.⁸³ The independent panel appointed by the WHO Director-General issued an interim report acknowledging that the organization's response was "surprising". The report highlighted that it remained "still

unclear [...] why early warnings, approximately from May through to July 2014, did not result in an effective and adequate response.⁸⁴

For DARIO to be applicable to any entity, it must be acknowledged as possessing a distinct legal identity, and the actions of that entity must amount to an internationally wrongful act, constituting a breach of international law. Both these conditions seem to be fulfilled in the case of the WHO's legal personality and its conduct during global health crises. However, even if these conditions are met, attributing responsibility is still a far-fetched goal, considering the multiple roadblocks such as the immunity of IOs, lack of legal redressal forum to deal with such issues, and difficulty in securing funds for reparation.⁸⁵

The WHO assumes important functions in guiding and coordinating matters of global health. This includes offering leadership, undertaking research, establishing rules and standards, formulating ethical and evidence-based policy options, delivering technical support, and overseeing and evaluating global health situations. Based on the discussion in the previous sections, it can be concluded that the organization failed to perform its essential functions and the idea of responsibility has to be latched onto the organization to fulfill the principle of *ubi jus ibi remedium*.⁸⁶

6 Navigating responsibility: mechanisms and challenges in holding the WHO responsible for conduct during global health crises

This section of the paper delves into the analysis of resolving challenges related to the accountability of

⁷⁹ HONIGSBAUM, Mark. Between securitisation and neglect: managing ebola at the borders of global health. *Medical History*, [s.l.], v. 62, n. 2, p. 270-294, 2017. DOI 10.1017/mdh.2017.6.

⁸⁰ WENHAM, Clare. What we have learnt about the World Health Organization from the ebola outbreak. *Philosophical Transactions of the Royal Society B: Biological Sciences*, [s.l.], v. 372, n. 1721, p. 3-5, 2017. DOI 10.1098/rstb.2016.0307.

⁸¹ PARK, Chulwoo. Lessons learned from the World Health Organization's late initial response to the 2014-2016 Ebola outbreak in West Africa. *Journal of Public Health in Africa*, [s.l.], v. 13, n. 1, p. 1-6, 2022. DOI 10.4081/jphia.2022.2184.

⁸² KAMRADT-SCOTT, Adam. What Went Wrong? The World Health Organization from Swine Flu to Ebola. In: KRUCK, Andreas; OPPERMAN, Kai; SPENCER, Alexander (ed.). *Political Mistakes and Policy Failures in International Relations*. Cham: Palgrave Macmillan, 2018. p. 193-215. DOI 10.1007/978-3-319-68173-3_9. Also refer BENTON, Adia; DIONNE, Kim Yi. International political economy and the 2014 West African Ebola outbreak. *African Studies Review*, [s.l.], v. 58, n. 1, p. 223-236, 2015. DOI 10.1017/asr.2015.11. Also refer HEYMANN, David L. *et al.* Global health security: the wider lessons from the west African Ebola virus disease epidemic. *The Lancet*, [s.l.], v. 385, n. 9980, p. 1884-1901, May 2015. DOI 10.1016/S0140-6736(15)60858-3.

⁸³ LOUGH, Shannon. Lessons from Ebola bring WHO reforms. *CMAJ*, [s.l.], v. 187, n. 12, e377-378, Sep. 2015. DOI 10.1503/cmaj.109-5125.

⁸⁴ 2014 Ebola virus disease outbreak: current context and challenges; stopping the epidemic; and preparedness in non-affected countries and regions Report by the Secretariat, SIXTY-EIGHTH WORLD HEALTH ASSEMBLY A68/24 (15 MAY 2015).

⁸⁵ ECCLESTON-TURNER, Mark; VILLARREAL, Pedro A. The World Health Organization's emergency powers: enhancing its legal and institutional accountability. *International Organizations Law Review*, [s.l.], v. 19, n. 1, p. 63-89, 2022. DOI 10.1163/15723747-19010003.

⁸⁶ HANNA, Heather jane; HARDING, Alan G. Ubi jus ibi remedium: for the violation of every right, there must be a remedy: the supreme court's refusal to use the Bivens remedy in *Wilkie v. Robbins*. *Wyoming Law Review*, [s.l.], v. 8, n. 1, p. 193-229, 2008. DOI 10.59643/1942-9916.1167.

the WHO for their conduct during global health emergencies. The purpose is to explore how responsibility may be attributed to the WHO and its Director-General (DG) for their conduct during PHEIC within the existing legal framework.

6.1 Director-General of the WHO and responsibility under International Law

The Director-General (DG) of the WHO enjoys extensive powers to control and manage the outbreak of infectious diseases. Despite the considerable authority wielded by the DG, there is a lack of an effective oversight mechanism to supervise DG's actions. During PHEIC the IHR (2005) empowers the DG to establish an Emergency Committee, but there is little supervision of how these powers are utilized. This was glaringly evident in both the Ebola epidemic in 2014 and the COVID-19 pandemic in 2020 contributing to a delayed declaration of a PHEIC.

The DG plays a central role as the head of the Secretariat and plays a pivotal role in appointing Secretariat staff and drafting the organization's budget. The DG has the authority to determine the agendas on which the organization carries out its work. Even the Health Assembly discusses issues based on the proposal of the DG unless there is an emergency. Considering the comprehensive role of the DG, attributing responsibility is particularly relevant. The UN GA Res/64/259 noted that "the Secretariat and its staff members are expected to take full accountability for their actions and decisions, without any room for exemptions."⁸⁷ Despite this, there is no mechanism in place to review or critique the functioning of the DG within the organization. The organization has also not set up an external accountability mechanism to provide justice to those impacted by their actions or omissions. In light of these challenges, pragmatic reforms are called for to enhance accountability within the organization.

The WHO has an accountability framework but does not specifically target oversight mechanisms for the DG. Though it is commendable that the organization has an accountability framework, however, it lacks comprehensiveness.⁸⁸ There is a need for a holistic

approach to ensure answerability on both ends from member states as well as the DG and staff of the organization. To tackle the answerability of the DG an external impartial and transparent oversight mechanism can be particularly beneficial. This will ensure the staff and the DG make decisions cautiously and with utmost sincerity towards fulfilling the mandates of the organization.

6.2 Access to Court

The chief judicial organ of the UN, the International Court of Justice (ICJ) under Art 34 of the ICJ Statute, permits only states to become parties to any contentious proceedings. The article does not allow the IOs to become parties to the dispute leading to a lack of judicial actions against these institutions. The current body of international law fails to provide any dispute settlement mechanism with respect to the wrongful conduct of IOs.

An alternative available to bring attention to the court regarding IO's conduct is through seeking an advisory opinion of the court on the said matter. However, ICJ's advisory opinion is non-binding, however, it holds an important value in the international legal system.

According to Art 96 of the UN Charter, the UN and its specialized agencies can seek the ICJ's advisory opinion on "legal questions arising within the scope of their activities." Under the WHO Constitution Art 75 relates to "divergence or dispute" regarding the interpretation or application of the WHO Constitution. The article aims to settle the disputes surrounding the WHO to be settled peacefully. It requires any dispute regarding the treaty should be settled using negotiation or by a decision of the WHA if the same fails, it could be submitted to the ICJ for consideration upon the authorization of UNGA. Though neither the decision arising out of negotiation nor WHA consideration and ICJ's advisory opinion have a binding character, however the same has never been challenged emphasizing good faith and cooperation among parties. It is yet to unfold how a dispute relating to the functioning of the WHO can be submitted to the dispute settlement mechanism. In this case,

⁸⁷ <https://documents.un.org/doc/undoc/gen/n09/477/37/pdf/n0947737.pdf?token=qIAoIv4lujjaayMqD&fe=true>.

⁸⁸ ECCLESTON-TURNER, Mark; MCARDLLE, Scarlett. Ac-

countability, international law, and the World Health Organization: a need for reform. *Global Health & Social Medicine*, [s.l.], v. 11, n. 1, p. 27-67, 2017.

a matter may either be decided through negotiation or ICJ's advisory opinion as involving WHA will be against the principles of natural justice.

Another aspect to review is whether a question relating to IHR's violation by the WHO can be submitted to the ICJ for its advisory opinion. The dispute resolution process under the IHR involves negotiation, referral to the WHO Director-General, and voluntary arbitration. The mechanism has not been used before, but it aims to provide for a peaceful settlement. The regulations do not provide a recourse for the matter to be submitted to the ICJ. However, the ICJ could still handle violations related to the WHO Constitution. One may argue that the ICJ may decide on IHR violations as they are connected to the WHO Constitution, violating one could be considered a violation of another. The analysis draws parallels with the *Enrica Lexie* case, suggesting that the Court may consider IHR violations incidental to the WHO Constitution's violations. Though these options are not optimum and there is a general lack of effective enforcement mechanisms, exploring all possibilities for effective enforcement is crucial. One while interpreting Article 55(4) of the IHR which includes a conflict clause preserving the rights of the state parties to resort to dispute settlement mechanisms established under any international agreement, may include reference to the ICJ. Though IHRs is silent on whether conflicts arising out of it could be sent to ICJ for advisory opinion we may conclude there are no legal barriers to the same.

Article 76 of the WHO Constitution enunciates an important procedural avenue for the WHO to seek ICJ's advisory opinion on any legal question within the WHO's competence. The article requires authorization from the UN General Assembly or a specific agreement between the WHO and the UN. The article permits questions to be decided relating to the WHO Constitution and the functions performed therein. For a dispute regarding the international obligations of the organization relating to pandemic management aligning with Art 2 of the WHO Constitution, the question can be placed before the ICJ. It can also seek advice on matters relating to the application of international responsibility of the WHO. This will help in establishing a precedent for defining the scope and content of the WHO obligations.

What happens if the state parties are hesitant to initiate such proceedings, can individuals initiate them?

The individuals in general lack the necessary locus standi, however, some scholars suggest that the individuals can influence decision-making by participating through non-governmental organizations (NGOs) recognized by the WHO, especially during discussions of WHA while deciding matters to be submitted to the ICJ advisory opinion. The NGOs representing individual interests, can engage in WHA discussions and seek support from member states to submit the request for advisory opinion to the ICJ. This route though complex, can help in invoking the international responsibility of the WHO in connection to public health crises such as epidemics and pandemics.

The path towards accountability of the WHO for its conduct during global health emergencies is rocky and full of practical obstacles, however, to ensure a robust international health institution it is imperative to attach responsibility for their wrongful conduct. A step toward manifesting the responsibility of the WHO could be through its recognition by way of ICJ's advisory opinion.

In summary, strengthening accountability within the WHO requires a multifaceted approach that involves refining existing frameworks, developing comprehensive mechanisms, and aligning with developments in international law. These efforts are essential for ensuring transparency, responsibility, and effective governance within the organization.

7 Conclusion

The World Health Organization is a guardian of global health, entrusted with multifold responsibilities. It faced a storm of criticisms during its responses to past global health crises like H1N1, Ebola, and COVID-19. The paper examines the WHO mandate, IHR (2005), human rights principles, and international legal instruments to chart the international obligations of the WHO during global health emergencies. The central role played by the organization requires them to use their power cautiously and decisions taken by them should be open to scrutiny. The paper analyses the international obligations of the WHO as stipulated under its Constitution, IHR (2005), IHRL, international instruments, and jus cogens norms. These highlight that the WHO is mandated to respect and promote interna-

tional health and has a primary responsibility to make decisions during global health crises. The organization is intricately woven into the fabric of global health governance with a commitment to safeguard human rights, prevent and control the spread of diseases, and act as an authority during PHEIC. A failure to comply with these obligations not only undermines the purpose of the WHO but also attracts the need to attribute responsibility.

The authors argue that the responsibility must be strapped onto the WHO for violating international obligations during international health emergencies. Though the idea of attributing responsibility to the WHO has many practical challenges, however, to ensure a future-ready health institution it is rather imperative. Moreover, it is crucial to enhance the accountability of the Director-General of the WHO who plays a significant role in decision-making relating to the declaration of PHEIC. The authors also provide a recourse to navigate through the complexity of the responsibility of the WHO by way of seeking an advisory opinion of the ICJ. The ICJ's advisory opinion will open up avenues for accountability of IOs rendered with sole responsibility for the maintenance of international health and well-being. The authors suggest if the states are reluctant to move to ICJ for the advisory opinion NGOs could initiate the process in the WHA and become catalysts in holding the institution accountable for their actions. These solutions may be complex but essential to invoke the accountability of the WHO in cases of global health crises.

The evolution of international health law continues, and the findings of this research will contribute to ongoing discussions on strengthening the WHO's role, refining its institutional framework, and ensuring effective responses to future health crises. The authors call for a proactive and accountable WHO, firmly positioned at the forefront of global health governance.

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Direito penal espanhol e política migratória contemporânea:
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YEARS FROM THE UNGPs

Direito penal espanhol e política migratória contemporânea: uma aproximação direcionada à proteção ou à restrição de direitos de pessoas migrantes?*

Spanish criminal law and contemporary migration policy: an approach directed towards the protection or restriction of the rights of migrant persons

Luciano de Oliveira Souza Tourinho**

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Resumo

Os fenômenos migratórios contemporâneos são complexos e multifacetados, exigindo abordagens interseccionais, a partir de perspectivas distintas, notadamente em razão da diversidade de causas e efeitos dos fluxos de deslocamentos de pessoas para territórios diferentes de sua origem. Nesse sentido, buscou-se analisar a relação entre o Direito Penal espanhol e as diretrizes da política migratória contemporânea da União Europeia. Para tanto, considerou-se uma abordagem exploratória de legislação e diretivas, bem como de produções científicas de investigadores, principalmente, do Direito e das ciências sociais. Trata-se de uma pesquisa qualitativa, com abordagem fenomenológica, que visa à avaliação crítica da construção legislativa correlata. A análise permite observar, particularmente em relação às duas últimas décadas, a crescente tentativa de elaboração de uma política migratória unificada entre os Estados membros da União Europeia. No entanto, não se percebeu um avanço significativo, senão o contato, cada vez mais intenso, entre a política migratória e o sistema penal. Na Espanha, essa abordagem foi refletida na alteração do Código Penal, com destaque ao artigo 318 bis, que apresenta, formalmente, a proteção de direitos de migrantes como bem jurídico, mas que recebe críticas entre investigadores e juristas, em razão da flexibilização de princípios e garantias penais e processuais penais, do esvaziamento de institutos administrativos ou da sobreposição de normas penais e administrativas, bem como da promoção da estigmatização dos migrantes como perigosos ou mesmo criminosos, tendo em vista o contexto de insegurança social, reforçando a sua exclusão. A aplicação de dispositivos penais exigirá proporcionalidade e o seu direcionamento à prevenção de crimes contra migrantes, afastando-se da lógica de fortalecimento do discurso de restrição de direitos e da ampliação das vulnerabilidades por eles suportadas.

Palavras-chave: deslocamento forçado; direito penal simbólico; discurso de ódio; sociedade de risco; direitos humanos; migrações contemporâneas.

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Abstract

Contemporary migratory phenomena are complex and multifaceted, requiring intersectional approaches from distinct perspectives, particularly due to the diversity of causes and effects of people's displacement to territories different from their origin. In this context, the scientific investigation outlined herein aimed to analyse the relationship between Spanish Criminal Law and contemporary migration policy guidelines within the European Union. To this end, an exploratory approach to legislation and directives was adopted, as well as the scientific productions of researchers, primarily from the fields of Law and social sciences. Considered a qualitative study, this phenomenological essay promoted a critical evaluation of the related legislative construction, allowing observation, particularly over the past two decades, of a growing attempt to develop a unifying policy on the subject among the Member States of the European Community. However, no significant progress was noted, except for the increasingly intense contact between migration policy and the criminal justice system. In Spain, this approach was reflected in the amendment of the Penal Code, notably Article 318 bis, which formally presents the protection of migrants' rights as a legal good, but has received criticism from researchers and jurists due to the relaxation of penal and procedural guarantees, the emptying of administrative institutes, or the overlap of penal and administrative norms, as well as the promotion of the stigmatisation of migrants as dangerous or even criminal, given the context of social insecurity, thus reinforcing their exclusion. The application of criminal law rules will require proportionality and a focus on the prevention of crimes against migrants, moving away from the logic of strengthening the discourse of rights restriction and increasing the vulnerabilities they endure.

Keywords: forced displacement; symbolic criminal law; hate speech; risk society; human rights; contemporary migrations.

1 Introdução

A complexidade dos fenômenos migratórios requer investigações com base em perspectivas diversas, impulsionando pesquisas científicas em campos distintos do

conhecimento. Sua análise permite afirmar que não se trata de movimentos recentes na história da humanidade. Todavia, as dinâmicas das migrações contemporâneas postulam estudos interseccionais, em virtude da multiplicidade dos seus fatores causais, como as determinantes econômicas, sociais, políticas, culturais, ambientais e jurídicas. Ademais, tem-se como imperiosa a avaliação dos seus efeitos, o que resultará na postulação de políticas específicas à sua abordagem.

No contexto da União Europeia, é possível verificar tentativas de elaboração de políticas migratórias uníssonas para os seus Estados membros, restando frustrada, no entanto, uma concepção integradora efetiva. Algumas diretrizes sobre essa pauta, nos últimos anos, estão dispostas na Diretiva 2002/90/CE, de 28 de novembro, oportunidade em que são definidas ações de repressão à ajuda à entrada, à circulação e à estadia irregulares. Outro importante marco é a Decisão-Quadro do Conselho, de 28 de novembro de 2002, que, por sua vez, indica a necessidade de estabelecer sanções penais proporcionais, dissuasivas e efetivas, destinadas à ajuda à entrada, à circulação e à estadia irregulares. Seguindo nessa direção, a Espanha tem promovido, nas duas últimas décadas, uma aproximação entre a sua política migratória e o Código Penal, a partir da tipificação de condutas destinadas, à primeira vista, à proteção dos direitos essenciais de pessoas migrantes.

Essas iniciativas legislativas no cenário jurídico penal espanhol, no entanto, exigem uma análise mais contida acerca dos verdadeiros objetivos da criação e da modificação de tipos penais que guardam alguma relação com fenômenos migratórios, bem como da sobreposição ou substituição de institutos e dispositivos administrativos regulamentadores de fluxos de deslocamentos de pessoas *estrangeiras* para o território espanhol por normas que integram o sistema da *ultima ratio*.

Nesse aspecto, a presente incursão científica tem como objetivo balizador a análise daquela aproximação, notadamente com relação às modificações da legislação penal espanhola, a fim de avaliar os seus principais impactos na proteção de direitos dos povos migrantes e os seus efeitos no plano discursivo de etiquetamento do migrante como inimigo. Para alcançar esse desiderato, foram avaliadas condutas tipificadas no Código Penal espanhol que possuem relação com migrações, além de sua influência na construção da imagem do cidadão não espanhol ou não pertencente à comunidade da União

Europeia como pessoa que oferece risco e, de modo consequencial, causa insegurança social.

A persecução dos objetivos indicados foi orientada, no aspecto metodológico, pela pesquisa exploratória, a partir da análise de informações relativas aos fluxos migratórios contemporâneos e à produção legislativa penal espanhola, visitando-se, ainda, a ordem discursiva desses fenômenos. Com uma natureza aplicada, a revisão de literatura proposta foi norteadada pela reunião de posicionamentos teóricos entre autores e pesquisadores, em sua maioria, espanhóis, além da avaliação crítica da produção legislativa correlata.

2 A aproximação entre a legislação penal espanhola e as diretrizes da política migratória contemporânea da união europeia: da proteção de direitos à crimigração

No contexto da União Europeia, desde a década de 90, é possível observar tentativas de definição de políticas migratórias comuns aos seus Estados membros, a exemplo dos compromissos de Tampere em 1999. A partir de então, várias foram as declarações sobre o tema, mas sem resultados efetivos, em razão das divergências entre seus membros¹. No ano de 2007, o Comitê das Regiões Europeu emitiu um Parecer, revelando que, apesar do aumento considerável da imigração e de ser a União Europeia destino de muitos migrantes, “aún no existe una política europea común en materia

de regulación de los flujos migratorios, por lo que los Estados miembros toman decisiones unilaterales que dificultan la adopción de una posición común”². Nesse aspecto, Javier de Lucas Martín afirma que apenas “una verdadera política europea, coordinada y solidaria puede proporcionar los medios adecuados al desafío de la gestión de las manifestaciones de la movilidad humana forzada”³.

Por outro lado, observa-se um interesse comum no sentido de utilização do Direito Penal pelos Estados membros, principalmente com relação à sua utilização como instrumento contra a imigração ilegal. São exemplos dessas iniciativas a Ação Comum 1997/154/JAI, que enfrenta o tema do tráfico de pessoas e a exploração sexual de crianças, a Diretiva 2002/90/CE, de 28 de novembro, que define ação de repressão à ajuda à entrada, à circulação e à estadia irregulares e, ainda, a Decisão-Quadro do Conselho, de 28 de novembro de 2002, cujo conteúdo se reforça a necessidade de estabelecer sanções penais proporcionais, dissuasivas e efetivas destinadas àquelas condutas⁴.

As especificidades dos processos migratórios contemporâneos exigem, de igual modo, a sua leitura pelas lentes dos direitos humanos, do direito internacional e de outros ramos do ordenamento jurídico. Merece destaque o tratamento dispensado a esses fenômenos pelas ciências criminais. Adverte, no entanto, Miró Llinares⁵ que “la relación entre Derecho penal e inmigración está pasando de ser una relación de ignorancia a una relación de exceso”. À primeira vista, as múltiplas situações de vulnerabilidade podem direcionar a sua análise

¹ Para Javier de Lucas “a constante máis destacable na inmensa maioría dos proxectos de xestión do fenómeno migratorio, nas políticas migratorias dos países que somos destinatarios de migracións, é o empeño en esquecer, en ocultar unha verdade evidente: a inevitable dimensión política das migracións, a súa condición de res política, tanto desde o punto de vista estatal como desde as relacións internacionais.” Em: LUCAS MARTÍN, Francisco Javier de. Refugiados e inmigrantes: Por un cambio en las políticas migratorias y de asilo. *Revista de pensamiento contemporáneo*, n. 50, p. 92-113, 2016. Disponível em: <https://roderic.uv.es/items/5860812e-3184-4d71-890f-07ba9b61bad0>. Acesso em: 03 jun. 2024. p. 13. Assevera, ainda, que “definir la inmigración como cuestión política supone primero comprenderla en términos de justicia, entendida no como pretensión abstracta sino en términos de igualdad en la distribución, como una exigencia de la definición de lo justo concreto.” Em: LUCAS MARTÍN, Francisco Javier de. Inmigrantes: Del Estado de Excepción al Estado de Derecho (Immigrants: From the State of Siege to the Rule of Law). *Oñati Socio-Legal Series*, v. 1, n. 3, p. 113, 2011. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739891. Acesso em: 03 jun. 2024.

² UNIÓN EUROPEA. Comité de las Regiones Europeo. *Dictamen del Comité de las Regiones Plan de política en materia de migración legal lucha contra la inmigración ilegal futuro de la Red Europea de Migración*. Disponível em: <https://eur-lex.europa.eu/legal-content/ES/ALL/?uri=CELEX:52006AR0233>. Acesso em: 05 fev. 2024. p. 1.

³ LUCAS MARTÍN, Francisco Javier de. Las ONG frente al dictado de Caín: el debate sobre la lucha contra la muerte en el Mediterráneo. *Cuadernos del Mediterráneo*, n. 28-29, p. 305-310, 2019. p. 319. Disponível em: <https://www.iemed.org/wp-content/uploads/2021/04/Las-ONG-frente-al-dictado-de-Cai%CC%81n-el-debate-sobre-la-lucha-contr-la-muerte-en-el-Mediterra%CC%81neo.pdf>. Acesso em: 02 jun. 2024.

⁴ MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p.05-30, 2008. p. 5-15

⁵ MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p.05-30, 2008. p. 5.

pela perspectiva da vitimologia e seu impacto na criação de tipos penais que apresentam o migrante como sujeito passivo de crimes⁶. Na Espanha, a exemplo do que ocorre em outros países europeus, o Código Penal revela uma aproximação recente entre a migração e determinados delitos: tráfico de seres humanos (artigo 177 bis do Código Penal), favorecimento da imigração clandestina (artigo 318 bis do Código Penal) e crimes de discriminação (artigo. 510, 511 e 512 do Código Penal), sem olvidar da agravante genérica subjetiva, relacionada com a motivação racista ou discriminatória decorrente de etnia, raça ou nação de origem da vítima (artigo 22.4a do Código Penal)⁷.

O Título XV bis do Código Penal espanhol estabelece os delitos contra os direitos de cidadãos estrangeiros. O artigo 318 bis pune com uma pena de multa de três a doze meses ou prisão de três meses a um ano o sujeito que, de forma intencional, ajuda uma pessoa de origem diversa a um Estado membro da União Europeia a ingressar em território espanhol ou transitar, irregularmente, por esse espaço. A mesma sanção será aplicada àquele que, dolosamente e com a intenção de lucro, violar a legislação sobre a estada de estrangeiros, assim considerada a pessoa que não seja nacional de um Estado membro da União Europeia. O mesmo dispositivo legal torna impunível o fato típico nas situações em que o objetivo do autor for destinado, unicamente, à prestação de ajuda humanitária⁸.

Em uma perspectiva de valoração crítica da reforma penal espanhola do ano de 2015, responsável por incorporar novos elementos no artigo 318 bis do Código Pe-

nal espanhol, Esther Pomares Cintas⁹ explica que o tipo penal básico nada mais é do que uma reprodução literal do artigo 1.1 a) Directiva 2002/90/CE, resultando em inconvenientes por algumas razões. Em primeiro lugar, a definição do sujeito objetivo do delito como o “não nacional de um Estado membro da União Europeia” pode ser considerado como um problema para os nacionais que pertencem ao Espaço Econômico Europeu e com os apátridas, assemelhados aos nacionais de países terceiros pelo artigo 67.2 do Tratado de Funcionamento da União Europeia, para fins de aplicação da política comum de imigração, asilo e controle de fronteiras exteriores. Outro aspecto relevante é o vazio conceitual da excludente de punibilidade prevista no parágrafo 2º, “ajuda humanitária”, além de não evitar a instauração de processo penal contra o sujeito que praticar essa conduta, impondo ao acusado o ônus da prova, revelando afronta direta ao Princípio da Presunção de Inocência.

O delito tipificado no apartado 1 do artigo 318 bis é apresentado, em sua forma qualificada, no apartado 3, com pena de prisão de quatro a oito anos, nas hipóteses em que os fatos forem perpetrados em uma organização dedicada à realização dessas atividades, e em relação à colocação em perigo de vida ou da integridade física — risco de lesões graves — das pessoas objeto da infração¹⁰. Destaca-se, ainda, a possibilidade de a pena

⁹ POMARES CINTAS, Esther. Reforma del código penal español entorno al delito de tráfico ilegal de migrantes como instrumento de lucha contra La inmigración ilegal en la Unión Europea. *Revista de Estudios Jurídicos UNESP*, Franca, ano 19, n. 29, p. 1-20, jan./jul. 2015. Disponível em: <http://seer.franca.unesp.br/index.php/estudiosjuridicosunesp/index>. Acesso em: 02 jun. 2024.

¹⁰ Sobre a sanção penal prevista para esse tipo, Pomares adverte que “si la entidad de la pena debe estar ligada a un comportamiento colaborador cuyo injusto gravita esencialmente en torno a la vulneración de la normativa migratoria, la prisión de 4 a 8 años que se aplica si el autor forma parte de una organización sigue siendo desproporcionada porque se asimila al tratamiento punitivo del delito de trata de seres humanos (Art. 177 bis). Téngase en cuenta que la intervención de una organización dedicada a facilitar la operación migratoria ilegal (jno a la trata de seres humanos, que se vincula a una finalidad grave de explotación asimilada a la esclavitud!) no invalida el consentimiento del extranjero desplazado.” Em: POMARES CINTAS, Esther. Reforma del código penal español entorno al delito de tráfico ilegal de migrantes como instrumento de lucha contra La inmigración ilegal en la Unión Europea. *Revista de Estudios Jurídicos UNESP*, Franca, ano 19, n. 29, p. 1-20, jan./jul. 2015. Disponível em: <http://seer.franca.unesp.br/index.php/estudiosjuridicosunesp/index>. Acesso em: 02 jun. 2024. p. 8. Em linhas conclusivas, afirma que “la nueva redacción y estructura del Art. 318 bis CPe sustenta un modelo de tipificación penal actuarial que quebranta principios básicos del Estado democrático de derecho: el recurso al derecho penal como *ultima ratio*, en la medida en que se imposibilita reservar un campo de aplicación propio para el derecho administrativo san-

⁶ O professor Javier García Medina destaca, dentre as múltiplas vulnerabilidades, a condição de gênero, oportunidade em que leciona que “[...] determinados grupos de mujeres, como las mujeres migrantes y las trabajadoras domésticas, son especialmente vulnerables en tiempos de crisis económica. La disminución de las corrientes de remesas tiene efectos negativos en los hogares de los países de origen. Las dificultades económicas y la falta de empleos también pueden aumentar la vulnerabilidad de las mujeres para la trata de personas.” Em: GARCÍA MEDINA, Javier. Sujetos vulnerables en la trata de seres humanos. Los casos de México y España. *Trajectorias Humanas Trascontinentales*, n. 1, 2017. Disponível em: <https://www.unilim.fr/trahs/74>. p. 4.

⁷ CANCIO MELIÀ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. p. 105. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

⁸ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

ser aplicada na metade superior e, ainda, ser elevada ao grau imediatamente superior, quando se tratar dos chefes, administradores ou responsáveis por essas organizações ou associações. Os sujeitos que se prevalecerem de sua condição de autoridade, agente desta ou funcionário público, além de incorrerem nas mesmas penas serão absolutamente inabilitados pelo prazo de seis a doze anos¹¹.

Nesse aspecto, é salutar a consideração de que as normas que foram, em primeira análise, criadas para a proteção dos migrantes, considerados como sujeitos em situação de vulnerabilidade, principalmente social, podem gerar um efeito de etiquetamento, a partir da construção discursiva de ódio contra o estrangeiro, reforçando a sua exclusão. Se, por um lado, há um indicativo de proteção à vida e à integridade física do estrangeiro que ingressa de forma irregular na Espanha, conforme descrito na qualificadora do artigo em análise; por outro, resta evidenciado o objetivo de criação do tipo penal no sentido de coibir a entrada desse sujeito, ou seja, pode-se inferir que a tutela é mais direcionada ao território nacional e suas normas regulamentadoras dos procedimentos migratórios do que da pessoa do migrante, à exceção das situações de ajuda humanitária. Nesse mesmo sentido Manuel Cancio Meliá sustenta que, ao analisar a legislação penal espanhola, a utilização de normas penais direcionadas à proteção dos migrantes é, na verdade, uma regulamentação falaciosa, tendo em vista o principal objetivo da norma que, sob o manto de tutela de direitos de “cidadãos estrangeiros”, salvaguarda a política migratória de exclusão¹².

cionador de la LOEx., el principio de proporcionalidad de las penas aplicables cuando el que colabora en la operación migratoria ilegal forma parte de una organización, y, por último (y no por ello menos importante), la ausencia de un bien jurídico merecedor de tutela penal, porque el solo interés estatal en el control del flujo migratorio no alcanza entidad suficiente para justificar la intervención penal en esta materia.” Em: POMARES CINTAS, Esther. Reforma del código penal español entorno al delito de tráfico ilegal de migrantes como instrumento de lucha contra La inmigración ilegal en la Unión Europea. *Revista de Estudios Jurídicos UNESP*, Franca, ano 19, n. 29, p. 1-20, jan./jul. 2015. Disponível em: <http://seer.franca.unesp.br/index.php/estudiosjuridicosunesp/index>. Acesso em: 02 jun. 2024.

¹¹ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

¹² CANCIO MELIÀ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. p. 109. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

Ressalta-se que, desde o ano de 2013, o projeto de reforma do Código Penal espanhol já traduzia o Direito Penal da perigosidade, alcançando, principalmente, determinados grupos sociais considerados como “coletivos de risco”, como assevera Ana Isabel Pérez Cepeda¹³, ao destacar que aquelas alterações fundamentam maior repressão por meio do uso da força pública, “violência institucional que se despliega con contundencia sobre los ‘colectivos peligrosos’, que lamentablemente son los inmigrantes irregulares, condición frecuentemente asociada a ‘sin trabajo’, ‘sin domicilio legal’, sin acceso a determinados equipamientos y servicios colectivos etc.”, servindo, ainda, ao fortalecimento do paradigma da marginalidade.

Uma tutela penal dos direitos de pessoas estrangeiras é observada, ainda que de forma não exclusiva, no artigo 177 bis do Código Penal espanhol, ao punir, com pena de cinco a oito anos de prisão, o delito de tráfico de pessoas¹⁴. Em seu conteúdo normativo, o dispositivo legal enuncia que o referido crime está descrito nas condutas de capturar, transportar, transferir, acolher ou receber pessoa nacional ou estrangeira, mediante emprego de violência, intimidação ou engano, abusando de uma situação de superioridade, de necessidade ou de vulnerabilidade da vítima, ou mediante a entrega ou recepção de pagamentos ou benefícios para obter o consentimento da pessoa que possuía o controle sobre a vítima, com qualquer das seguintes finalidades: imposição de trabalho ou de serviços forçados, a escravidão ou práticas análogas à escravidão, à servidão ou à mendicância; exploração sexual, incluindo a pornografia; exploração para realizar atividades criminosas; extração de seus órgãos corporais; celebração de casamentos forçados¹⁵.

¹³ PÉREZ CEPEDA, Ana Isabel. Justificación y claves político-criminales del proyecto de reforma del Código Penal de 2013. *Arx Iuris Salmanticensis*, v. 2, n. 1, p. 25-35, 2014. Disponível em: <https://revistas.usal.es/cuatro/index.php/ais/article/view/11966>. Acesso em: 02 jun. 2024.

¹⁴ Sobre o tráfico de pessoas, explica o professor Javier García Medina que “la trata de seres humanos con fines de explotación sexual es la forma más frecuente de explotación humana en la Unión Europea. Es una forma de violencia de género, arraigada en las desigualdades de género a la que se unen varios factores que aumentan la vulnerabilidad de las mujeres y las niñas como, la pobreza, la exclusión social, el origen étnico y la discriminación. Casi las tres cuartas partes (72 %) de todas las víctimas en la UE y el 92 % de las víctimas de la trata con fines de explotación sexual son mujeres y niñas.” Em: GARCÍA MEDINA, Javier. Una Filosofía del Derecho para el presente y para el futuro. *Anuario de filosofía del derecho*, n. 39, p. 145-166, 2023. p. 163-164 Disponível em: <https://dialnet.unirioja.es/servlet/articulo?codigo=9290046>. Acesso em: 03 jun. 2024.

¹⁵ Nesse aspecto, o professor Javier García Medina leciona que

Considera-se sujeito ativo desse delito aquele que pratica o ato em território espanhol, desde a Espanha, em trânsito ou com destino a ela¹⁶. Nesse aspecto, leciona Miró Llinares que o tráfico de pessoas pode ser considerado como a escravidão do século XXI e, independentemente de sua motivação — seja para prostituição, seja para exploração da mão de obra —, “resulta una actividad delictiva que aporta cada vez más beneficios, por lo que empieza a ser monopolizada por las mismas mafias que se dedican también al tráfico de armas, drogas o, incluso al terrorismo internacional”¹⁷.

O Código Penal espanhol estabelece, em seu Capítulo IV, os delitos relativos ao exercício dos direitos fundamentais e liberdades públicas, inaugurando a Seção 1ª com a tipificação dos delitos cometidos em razão do exercício dos direitos fundamentais e das liberdades públicas garantidos pela Constituição espanhola. A exemplo do que acontece com outros países da União Europeia, utiliza-se da norma penal como instrumento de proteção de direitos de fundamentais. Nessa perspectiva, é possível constatar, no artigo 510 do Código Penal espanhol, a punição a crimes de ódio praticados contra estrangeiros, notadamente quando se estabelece a pena de prisão de um a quatro anos, além de multa de seis a doze meses, nas hipóteses de, publicamente ou por meio de materiais, fomentar, promover ou incitar, direta ou indiretamente, o ódio, a hostilidade, a discriminação ou a violência contra um grupo, uma parte dele ou contra uma pessoa determinada por sua pertença a esse grupo, por motivos, dentre outros, antissemitas, antigitanos ou

outros referentes à nação ou origem nacional. A mesma sanção penal é prevista para aqueles que, publicamente, negarem, trivializarem gravemente ou exaltarem os delitos de genocídio. A lesão à dignidade por meio de humilhação, menosprezo ou descrédito, bem como o enaltecimento desses delitos, serão punidos com pena de prisão de seis meses a dois anos e multa de seis a doze meses, salvo nos casos de promoção ou favorecimento de um clima de violência, hostilidade, ódio ou discriminação contra os grupos mencionados, quando o delito será considerado como qualificado, com pena um a quatro anos de prisão e multa de seis a doze meses¹⁸.

Em diversos contextos, observa-se que a prática de crimes de ódio contra determinados grupos decorre de fatos que são criados ou publicizados com a finalidade de comprometer a paz pública, gerando-se um panorama de insegurança social¹⁹ entre os nacionais e as comunidades ou pessoas migrantes vitimizadas²⁰. Ce-

“[...] la trata de seres humanos es un fenómeno global con múltiples caras y que se aprovecha de la situación de vulnerabilidad de las personas siendo ésta determinada por razones diversas. [...] En este punto, se ha de analizar en qué situación se encuentran muchas personas, principalmente mujeres y niñas, para caer en redes de organizaciones criminales que las someten a explotación de distinto tipo. En este sentido hay que introducir dos variables a ser consideradas: la escasez de recursos, cuando no pobreza, y la perspectiva de género, más en concreto la violencia de género. Ser víctima de trata de seres humanos tiene unas causas, no es un destino inexorable de un ser humano.” Em: GARCÍA MEDINA, Javier. Sujetos vulnerables en la trata de seres humanos. Los casos de México y España. *Trayectorias Humanas Transcontinentales*, n. 1, 2017. p. 3. Disponível em: <https://www.unilim.fr/trahs/74>. Acesso em: 03 jun. 2024.

¹⁶ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

¹⁷ MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p. 05-30, 2008. p. 5.

¹⁸ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

¹⁹ Torna-se importante ressaltar, como sinalizou o professor Javier García Medina, “la tensión presente en las actuales sociedades multiculturales, si bien puede estar relacionada con la inmigración, encierra otros elementos, como el miedo y la desconfianza hacia el otro, que ponen de relieve la necesidad de articular nuevas estrategias, nuevas propuestas y nuevos horizontes que posibiliten profundizar las estructuras democráticas al tiempo que las hagan capaces de responder a las demandas de las cambiantes y diversas sociedades actuales.” Em: GARCÍA MEDINA, Javier; SOLANES CORELLA, Ángeles (ed.). *Diversidad cultural y conflictos en la Unión Europea. Implicaciones jurídico-políticas* (Tirant lo Blanch, Valencia: 2015, 1ª Edición; 2016, 2ª Edición). *Cuadernos Electrónicos de Filosofía del Derecho*, n. 34, p. 320–324, 2016. p. 321. Disponível em: <https://turia.uv.es/index.php/CEFD/article/view/9416>. Acesso em: 25 fev. 2025.

²⁰ O professor Miró Llinares corrobora esse entendimento, para quem “los paradigmas que hemos estudiado hasta el momento ejercen su influencia en la multiplicación de la inmigración. El último de ellos, el de que vivimos hoy en una sociedad de riesgos donde la sensación social de inseguridad es cada vez mayor, no influye en los caracteres del fenómeno migratorio, sino en la percepción que de ella tiene la sociedad y en el papel que, conforme a ello, se considere que deba desempeñar el Derecho penal. Efectivamente, hoy la sociedad no sólo tiene una mayor sensación de inseguridad, sino que la centra en determinados focos, en concretos ámbitos o grupos que, independientemente de que realmente den lugar a más delincuencia o no, son temidos por la sociedad. En la actualidad, tanto a nivel popular, como en los medios de comunicación, es frecuente considerar que el crecimiento de la delincuencia es un fenómeno debido en gran parte al aumento de la inmigración.” Em: MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p. 05-30, 2008. p. 5-7. Exemplo desse efeito foi verificado no resultados de uma

nários como esses podem dar origem a graves ofensas aos direitos humanos de povos migrantes e refugiados, iniciando-se pela rotulação desses sujeitos como inimigos e criminosos, passando pelo fortalecimento e pela propagação desse discurso discriminatório e, ao final, resultando na sua desconsideração da categoria de titulares de direitos, como pondera Manuel Cancio Meliá²¹, ao concluir que “o uso do etiquetamento como ‘criminoso’ é essencial para um exitoso processo de exclusão social.” Nesse aspecto, adverte Javier de Lucas²² que os refugiados estão em situação extrema de vulnerabilidade, com privação do exercício de seus direitos políticos, de condição de pertencimento e do título de cidadão de um Estado, “sin el cual esos derechos humanos proclamados como universales en 1789 son papel mojado. Porque los derechos del hombre no son nada si no se es ciudadano. O en todo caso, son muy poco si no se es titular del pasaporte de un Estado que cuenta”²³. Deve-se ter em conta que em situação semelhante estão os

migrantes indocumentados²⁴, considerados como não sujeitos de direitos, como ressalta Javier de Lucas²⁵.

É importante ressaltar, como o faz Miró Llinares²⁶, que não se pode afirmar a existência da relação direta entre criminalidade e imigração. Possivelmente, há uma falsa percepção sobre esse cenário em decorrência de dois fatores: a uma, em decorrência do aumento paralelo de ambos os fenômenos — migração e criminalidade; a duas, pela criminalização de condutas relativas aos fluxos migratórios, como o favorecimento da imigração clandestina.

Na tentativa de prevenir a prática de condutas similares, o Código Penal espanhol, no apartado 4 de seu artigo 510, apresenta uma sanção mais gravosa “cuando los hechos, a la vista de sus circunstancias, resulten idóneos para alterar la paz pública o crear un grave sentimiento de inseguridad”²⁷ o temor entre los integrantes

pesquisa realizada com a população castelano-leonesa, segundo os quais mais de 60% dos cidadãos relacionaram imigração de tráfico de drogas, mais de 75% relacionaram prostituição e imigração, e aproximadamente 60% consideraram a existência de uma relação entre insegurança social e imigração. ANTÓN PRIETO, José Ignacio. *Sociología de la Desviación*. Salamanca: Universidad de Salamanca, 2003. p. 253).

²¹ CANCIO MELIÀ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. p. 107. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

²² LUCAS MARTÍN, Francisco Javier de. Muertes en el Mediterráneo: inmigrantes y refugiados, de infrasujetos de derecho a amenazas para la seguridad. *Cuadernos del Mediterráneo*, n. 22, 2015. p. 2. Disponível em: <https://www.iemed.org/wp-content/uploads/2021/09/Muertes-en-el-Mediterraneo.pdf>. Acesso em: 02 jun. 2024.

²³ LUCAS MARTÍN, Francisco Javier de. Muertes en el Mediterráneo: inmigrantes y refugiados, de infrasujetos de derecho a amenazas para la seguridad. *Cuadernos del Mediterráneo*, n. 22, 2015. p. 2. Disponível em: <https://www.iemed.org/wp-content/uploads/2021/09/Muertes-en-el-Mediterraneo.pdf>. Acesso em: 02 jun. 2024.

²⁴ Para Javier de Lucas “hay que insistir en romper una interpretación tan rígida como falta de fundamento real, la que con frecuencia se establece entre inmigrantes y refugiados, a partir de la precisión jurídica que nos proporcionan los instrumentos del Derecho internacional de refugiados. [...] las leyes de inmigración y extranjería de los países destinatarios de esos movimientos humanos, hablan de inmigrantes, atribuyendo al término una particular significación, como también deciden quién puede tener el derecho a ser reconocido como refugiado o como titular de un tipo de protección de sus derechos que llamamos protección subsidiaria”. Em: LUCAS MARTÍN, Francisco Javier de. La movilidad humana, entre la anomia y el prejuicio. *Revista DIECISIETE*, Madrid, n. 6, 2022. Disponível em: <https://www.plataforma2030.org/es/la-movilidad-humana-entre-la-anomia-y-el-prejuicio>. Acesso em: 02 jun. 2024. p. 4.

²⁵ LUCAS MARTÍN, Francisco Javier de. La movilidad humana, entre la anomia y el prejuicio. *Revista DIECISIETE*, Madrid, n. 6, 2022. Disponível em: <https://www.plataforma2030.org/es/la-movilidad-humana-entre-la-anomia-y-el-prejuicio>. Acesso em: 02 jun. 2024.

²⁶ MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p. 05-30, 2008. p. 5.

²⁷ Em análise sobre o contexto da globalização e a mobilidade internacional, Muñoz Arroyave, López Martínez, Pineda Gómez e Ruiz Arias estabelecem distinções importantes acerca das motivações de deslocamento, como o turismo e a migração. Nesse aspecto, informam que há “un comportamiento de mayor rechazo y aislamiento por parte de los residentes del destino, ya que son vistos como consumidores fallidos, que no son iguales a ellos y que, supuestamente, se apoderan de las oportunidades que deberían ser para los residentes”, sendo esse, portanto, uma das razões de insegurança social da população receptora. Em: MUÑOZ ARROYAVE, Elkin Argiro *et al.* Migración y turismo en territorios de flujo en el contexto de la globalización. *Revista Venezolana de Gerencia*, v. 27, n. 100, p. 1559-1576, 2022. p. 1571. Em escritos específicos sobre o direito humano à segurança, explica a professora María Esther Martínez Quinteiro: “Dado que la inseguridad forma siempre parte ineludible de la vida de todo ente mortal, si bien en grado variable,

del grupo²⁸. A restrição e o impedimento a acesso a direitos, motivados, dentre outras causas, por razão de pertença do sujeito passivo a uma nação ou por sua origem nacional, de igual modo, recebem a atenção da legislação penal espanhola, que prevê uma pena de prisão de seis meses a dois anos, multa de doze a vinte e quatro meses, e inabilitação especial para emprego ou cargo público por um período de um a três anos, no caso do particular encarregado de um serviço público que negar a prestação devida, inabilitação especial para o exercício de profissão, ofício, indústria ou comércio e inabilitação especial para profissão ou ofício educativos, no âmbito docente, esportivo e de tempo livre por um período de um a quatro anos, de acordo com os artigos 511 e 512, do Código Penal²⁹.

Se, por um lado, é possível analisar as disposições jurídico-penais com base na perspectiva da vitimologia, sem perder de vista o senso crítico quanto aos objetivos e efeitos das normas do Código Penal espanhol; por outro, torna-se imprescindível investigar a criminalização das condutas migratórias, fenômeno comumente denominado de “crimigração”. Esse fenômeno é observado não apenas no ordenamento penal, mas também em sua interpretação e aplicação, indicando o reforço da repre-

sentação do Direito penal do autor³⁰ e, de forma consequencial, do Direito penal do inimigo, fundamentado, como lecionou Günther Jakobs, nos pilares da antecipação da punibilidade, que revela uma concepção penal prospectiva, do endurecimento e da majoração de penas de forma desproporcional e com antecipação da tutela penal, a partir da criminalização de atos preparatórios, e da flexibilização ou supressão de garantias processuais penais³¹.

Observa-se, ainda, semelhança com Direito penal de duas velocidades, pela concepção político-criminal do penalista espanhol Silva Sánchez³², a saber: a primeira velocidade consubstanciada na proposta clássica das regras materiais e processuais penais, centrada na previsão da pena de privação de liberdade, e a segunda velocidade, com flexibilização daquelas regras, considerando-se a proporcionalidade com a menor gravidade delitiva e a aplicação de penas restritivas de direito ou de caráter pecuniário. Para Cancio Meliá, o Direito penal do inimigo encontraria sinonímia com a proposta político-criminal de uma terceira velocidade, caracterizada pela previsão de penas privativas de liberdade ao mesmo passo da flexibilização de garantias e das regras de imputação³³.

se comprende que la dificultad de precisar los límites y contornos de la ‘seguridad’ no impida constatar la previsible permanencia en el tiempo y la omnipresencia espacial de la aspiración a disfrutar de lo que cada colectivo entiende por la misma, aun comprobando que cambian las recetas para conseguirla.” Essa abertura conceitual reflete, ainda, na adoção de um conteúdo material para a elaboração de políticas de segurança nacional: “[...] hoy, los esfuerzos por depurar el concepto de ‘seguridad nacional’ de los contenidos fundamentalmente militares que predominaron durante la Guerra Fría, que motivaron el oportunista descarte antedicho, y por ampliarlo, va dotando a esta última de contornos cambiantes, pudiendo modificarse sus significados y objetivos en relación al tiempo y al lugar en que tales términos se empleen, incluso dentro de un mismo país, e incluir entre los objetivos a atender o corregir desde la misma factores condicionantes, socioeconómicos, como la pobreza, la desigualdad, etc. o de otra índole, antes impensables para el caso”. Em: MARTÍNEZ QUINTEIRO, María Esther. La expansividad del discurso sobre el “derecho humano de seguridad”, un “derecho síntesis”. Concreciones y etiología. *Studia Historica. Historia Contemporánea*, v. 36, p. 35–70, 2018. p. 35-70. Disponível em: https://revistas.usal.es/uno/index.php/0213-2087/article/view/shhc_2018363570. Acesso em: 2 jun. 2024.

²⁸ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

²⁹ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

³⁰ Para José Francisco Dias da Costa Lyra, “Nesse processo de “demonização” do criminoso, a criminalidade do imigrante se encaixa no modelo de um verdadeiro Direito Penal do autor, instrumentalizado pelo Direito Penal do inimigo [...]”. Em: LYRA, José Francisco Dias da Costa. A criminalização dos imigrantes irregulares e a edificação do subsistema penal de exceção (ou do inimigo): o triste exemplo da legislação italiana e espanhola. *Revista Brasileira de Ciências Criminas - RBCCRIM*, v. 116, set./out. 2015. p. 10. Disponível em: https://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_boletim_2006/RBCCrim_n.116.13.PDF. Acesso em: 04 fev. 2024.

³¹ JAKOBS, Günther. Derecho penal del enemigo: el discurso penal de la exclusión. *Ir. CANCIO MELIÁ, Manuel; GÓMEZ-JARA, Díez.* (coord.). *Derecho penal del enemigo? Un estudio acerca de los presupuestos de la juridicidad*. Madrid; Buenos Aires, 2006. v. 2, p. 93.

³² SILVA SÁNCHEZ, Jesús María. *La expansión del Derecho penal*. Aspectos de la política criminal en las sociedades postindustriales. 3. ed. Buenos Aires-Montevideo: Civitas, 2011.

³³ Leciona, ainda, Cancio Meliá que “Se se leva em conta o desenvolvimento da legislação penal na Espanha e em outros países do Ocidente, fica claro que este “Direito penal do inimigo” já existe: o papel protagonista do dano social causado pela infração personificado na identificação com a vítima, o amplo consenso social nas soluções maximalistas e a globalização das agendas e das modas políticocriminas, desemboca em uma preeminência indiscutida de uma perspectiva fático-preventiva, sobretudo, no ordenamento penal. É claro que o Direito penal radicalmente antecipado, desproporcionalmente severo e dotado de um acompanhamento processual que suprime o estatuto processual do cidadão, que Jakobs descreve como “Direito penal do inimigo”, já existe em alguma medida —

A interpretação do já mencionado artigo 318 bis do Código Penal espanhol revela duas faces. Como já elucidado, esse dispositivo legal está inserido no Título XV bis, que prevê delitos contra os direitos de cidadãos estrangeiros, transmitindo a ideia de que os bens jurídicos a serem tutelados são titularizados pelo sujeito estrangeiro. No entanto, uma análise mais detalhada dos efeitos da norma permite vislumbrar uma antecipação da tutela penal para a proteção, na verdade, não do sujeito migrante, mas das políticas migratórias espanholas³⁴. Para Cancio Meliá, resta evidente que o bem jurídico tutelado é a política migratória, e encontra, em seu conteúdo normativo, uma regulamentação confusa e, em certo modo, paradoxal, tendo em vista o fato de apresentar o migrante como vítima de um delito, mas criminalizando a conduta consubstanciada na prestação de ajuda, contribuindo para “lançar uma mensagem em certa medida hipócrita que aparentemente se interessa pelo imigrante, mas que, em última instância, converte sua própria presença em uma ameaça de caráter criminoso”³⁵. Em posição semelhante, Esther Pomares Cintas³⁶ leciona que a persecução criminal da ajuda à imigração ilegal se direciona a evitar “la contravención de la legislación administrativa sobre entrada, tránsito o

permanencia de extranjeros en el territorio de los Estados miembros de la UE. Tutela, pues, el interés estatal en el control del flujo migratorio, y, a su vez, el interés supraestatal de control de las fronteras exteriores de la Unión Europea. Es un delito contra el Estado, no contra las personas.”

No âmbito doutrinário, prevalece o entendimento que se trata de um crime de perigo, sem previsão de resultados danosos e identificação dos riscos concretos, alicerçado na incerteza de qual aspecto da política migratória se pretende proteger, com penas desproporcionalmente elevadas, sendo, portanto, reflexo das propostas diretivas do Direito penal do inimigo. A divergência doutrinária apresentada revela a incerteza do legislador, o que pode comprometer, inclusive, a interpretação do texto no ato de aplicação da norma. Por considerar que o bem jurídico tutelado é a dignidade humana, a professora Ana Isabel Pérez Cepeda³⁷ leciona que deve ser considerado como delito de perigo abstrato concreto, uma vez que “aunque no sea necesario que se pruebe que existe un peligro concreto para la dignidad de un extranjero por la conducta de tráfico ilegal o la inmigración clandestina, tampoco es un delito de peligro abstracto porque no basta con realizar una conducta de tráfico ilícito de personas, sino que será preciso que la acción, sin ser peligrosa para efectuar a un determinado extranjero, pueda, en caso hipotético, causar un perjuicio a la dignidad humana de los extranjeros.”

Para Miró Llinares³⁸, há certa complexidade na aplicação de um critério teleológico interpretativo, considerando o fato de que o tipo penal formal se denota de forma clara, mas, em relação à atribuição de um conteúdo material ao tipo, pode ser criada uma situação injusta, isso porque o artigo 318 bis não parece exigir o desvalor de qualquer resultado relacionado com a liberdade e a segurança. Nesse sentido, conclui que “única peligrosidad que integra el ámbito de este tipo, conforme a la redacción que el legislador ha querido dar al mismo, es aquella, muchas veces real, pero presupuesta como siempre real, por el legislador, de que traficar con perso-

trata-se de um tipo ideal, não de uma categoria — em nossos Códigos.” Em: CANCIO MELIÁ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024. p. 110-111.

³⁴ Sobre o bem jurídico tutelado pelo tipo penal em estudo, ensina o professor Miró Llinares que, “en cuanto al bien jurídico protegido, la primera hipótesis sería la de que, tal y como indica el Título en el que se inserta, el mismo estaría formado por los derechos de los extranjeros, habiendo manejado la doctrina otras tesis como la de que el objeto jurídico de protección fuera el orden económico, la política migratoria, el legítimo interés del Estado en controlar la inmigración, la integridad moral, la dignidad humana [...] Se trata de una interpretación que, como por otra parte debe ser, se apoya más en los intentos de dotar de legitimidad material al tipo penal, que en una exégesis gramatical del mismo, dado que el injusto penal no exige que se hayan visto afectados los derechos de los inmigrantes.” Em: MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p. 05-30, 2008. p. 5-15

³⁵ CANCIO MELIÁ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–117, 2015. p. 106. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

³⁶ POMARES CINTAS, Esther. Reforma del código penal español entorno al delito de tráfico ilegal de migrantes como instrumento de lucha contra La inmigración ilegal en la Unión Europea. *Revista de Estudios Jurídicos UNESP*, Franca, ano 19, n. 29, p. 1-20, jan./jul. 2015. Disponível em: <http://seer.franca.unesp.br/index.php/estudosjuridicosunesp/index>. Acesso em: 02 jun. 2024.

³⁷ PÉREZ CEPEDA, Ana Isabel. Delitos contra los derechos de los ciudadanos extranjeros: (Art. 318 bis Reformado por LO 11/2004). In: RODRÍGUEZ MESA, María José; RUIZ RODRÍGUEZ, Luís Ramón. (coord.). *Inmigración y sistema penal: retos y desafíos para el siglo XXI*, Valencia: Tirant lo Blanch, 2006. p. 121.

³⁸ MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p.05-30, 2008.

nas hace peligrar sus derechos como colectivo, esto es, una peligrosidad ex ante en relación con un bien jurídico difuso como sería el de ‘las condiciones necesarias para la libertad y dignidad de los inmigrantes’.”³⁹

A crimigração na Espanha se revela de forma indireta e, de certo modo, com a equívoca justificativa de proteção dos direitos dos estrangeiros. Além da debilidade e da fragilidade das normas penais antidiscriminatórias, principalmente pela dificuldade de produção probatória da intenção do sujeito ativo, as condenações relativas ao favorecimento da imigração clandestina alcançam, em sua maioria, pessoas com condutas delituosas menos expressivas, e não os que ocupam posições de liderança nas organizações criminosas. Acrescenta-se, ainda, a criação de medidas categorizadas como administrativas, mas com conteúdo evidentemente penal, como a internação nos Centros de Internação de Estrangeiros, que possuem características similares ou piores ao cárcere, mas, no plano do ordenamento jurídico, não se confunde com uma sanção penal⁴⁰.

Nesse aspecto, Adriana Jarrín Morán, Dan Rodríguez García e Javier de Lucas⁴¹ explicam que “los CIE, sin ser considerados por la ley como centros penitenciarios, mantienen en cautividad a los migrantes, y lo hacen además en instalaciones no adecuadas en las que sufren todo tipo de vejaciones y vulneraciones de derechos”. Esse cenário se intensifica a partir do efeito discursivo criado e reforçado com o controle migratório, com destaque à criminalização de condutas relacionadas com o favorecimento à imigração irregular. É evidente que a aproximação de um fluxo migratório sem o cumprimento dos requisitos legais com o sistema penal é capaz de conferir ao migrante a adjetivação de inimigo e criminoso, descaracterizando sua posição como cidadão e justificando a sua exclusão⁴² do lugar de titular de di-

reitos garantidos pelo Estado democrático de direito⁴³. Aqui residem, por evidência, os efeitos decorrentes do poder conferido a um Direito penal simbólico^{44, 45}, em que o conceito dogmático de crime encontra um forte fundamento discursivo. Em posição semelhante, explica Javier de Lucas que “se *extranjeriza* al inmigrante, se le estigmatiza, congelándolo en su diferencia, como distinto (extranjero) y sólo como trabajador útil en nuestro mercado formal de trabajo aquí y ahora”⁴⁶.

Nesse linha de intelecção, leciona José Francisco Dias da Costa Lyra⁴⁷ que a legislação espanhola adotou uma orientação criminológica de consideração do sujeito migrante em situação irregular como categoria de risco e de perigo, ao vinculá-lo, no plano discursivo, à clandestinidade e à criminalidade, com o respectivo tratamento jurídico-penal⁴⁸. Desse modo, ampliou-se

erar respuestas violentas y reacciones proteccionistas, en la medida en que se aprovecha la mínima oportunidad para difundir un rechazo etnocéntrico de la diversidad y el rechazo xenófobo frente a los inmigrantes trabajadores, que como capital extranjero amenaza las condiciones de vida.[...] Esto explica porque en la actualidad la inmigración se presenta a la sociedad como un nuevo riesgo, recurriendo a la estrategia de aumentar la obsesión por la seguridad para justificar el tratamiento de dicho fenómeno sólo en clave de orden público, en lugar de intentar seriamente afrontar el reto de mitigar las causas de dicha inmigración y que pase a ser una cuestión social que requiere planificación y amplias actuaciones de los poderes públicos.” Em: PÉREZ CEPEDA, Ana Isabel. Algunas consideraciones político-criminales previas a la incriminación del tráfico de personas. *Revista Electrónica de Derecho de la Universidad de La Rioja (REDUR)*, p. 109–134, 2002. p. 117. Disponível em: <https://publicaciones.unirioja.es/ojs/index.php/redur/article/view/3815>. Acesso em: 02 jun. 2024.

³⁹ CANCIO MELIÀ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. p. 114. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

⁴⁰ HASSEMER, Winfried. *Direito Penal: fundamentos, estrutura, política*. Porto Alegre: Editora Sérgio Antonio Fabris, 2008.

⁴¹ SANTOS, Juez Cirino dos. *A Criminologia Crítica e Reforma da Legislação Penal*. ICPC, 2013. Disponível em: http://icpc.org.br/wpcontent/uploads/2013/01/criminologia_critica_reforma_legis_penal.pdf. Acesso em: 05 fev. 2024.

⁴² LUCAS MARTÍN, Francisco Javier de. Inmigración y globalización acerca de los presupuestos de una política de inmigración. *Revista Electrónica de Derecho de la Universidad de La Rioja (REDUR)*, n. 1, p. 43–70, 2003. Disponível em: <https://publicaciones.unirioja.es/ojs/index.php/redur/article/view/3830>. Acesso em: 3 jun. 2024.

⁴³ LYRA, José Francisco Dias da Costa. A criminalização dos imigrantes irregulares e a edificação do subsistema penal de exceção (ou do inimigo): o triste exemplo da legislação italiana e espanhola. *Revista Brasileira de Ciências Criminais - RBCCRIM*, v. 116, set./out. 2015. Disponível em: https://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RBCCrim_n.116.13.PDF. Acesso em: 04 fev. 2024.

⁴⁴ Para Javier de Lucas, a legislação espanhola não apresenta como

³⁹ MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p.05-30, 2008. p. 5.

⁴⁰ CANCIO MELIÀ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. p. 106. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

⁴¹ JARRÍN MORÁN, Adriana; RODRÍGUEZ GARCÍA, Dan; LUCAS, Javier de. Los Centros de Internamiento para Extranjeros en España: una evaluación crítica. *Revista CIDOB d’afers internacionals*, n. 99, sep. 2012. p. 213. Disponível em: <https://raco.cat/index.php/RevistaCIDOB/article/view/258775>. Acesso em: 02 jun. 2024.

⁴² Sobre esse fenômeno, acrescenta a professora Ana Isabel Pérez Cepeda que essa exclusão estrutural “no puede por menos gen-

e priorizou-se o controle dos fluxos migratórios como um problema de segurança, inserindo-os no contexto do sistema penal, ao lado de crimes graves, como o tráfico de drogas, o terrorismo e o crime organizado⁴⁹, como reflexo da expansão do Direito Penal como instrumento de controle na denominada sociedade do risco e nos contextos de insegurança social⁵⁰.

O tratamento discriminatório conferido ao migrante está presente, ainda, na Seção 2ª, do Código Penal espanhol, em relação à proposição de substituição de penas privativas de liberdade, no artigo 89, pela sanção de expulsão do estrangeiro, uma sanção notadamente administrativa, com o pretexto de se tratar de uma medida alternativa humanizada. Em análise específica sobre essa punição, Adela Asúa Batarrita⁵¹ assevera que

objetivo primeiro a construção de política migratória, “sino una ley de policía de extranjería, una ley en clave nacional, cuyos destinatarios auténticos son los ciudadanos españoles a los que se transmite el mensaje de que el gobierno quiere defender la sociedad española, su nivel de vida, su bienestar (por eso asegurar el mercado de trabajo con el mínimo coste y ahí es donde juega el viejo argumento de que los derechos sociales son derechos caros), y su seguridad (por eso necesita el fobotipo: el irregular, la mafia que le permita reafirmar la apuesta por la ‘cultura de la legalidad’) que no reconoce que España es un país de inmigración. Y es así porque no se quiere tomar en serio la presencia de los inmigrantes, o, para ser más exactos, no se quiere ser consecuente con lo que ello exige. Preocupa el ‘tráfico’, no su estancia entre nosotros que no se quiere aceptar. Por eso los inmigrantes son extranjeros.” Em: LUCAS MARTÍN, Francisco Javier de. Sobre las garantías de los derechos sociales de los inmigrantes. *Cuadernos Electrónicos de Filosofía del Derecho*, n. 4, 2001. p. 6. Disponível em: <https://www.uv.es/cefd/4/Delucas.html>. Acesso em: 02 jun. 2024.

⁴⁹ LYRA, José Francisco Dias da Costa. A criminalização dos imigrantes irregulares e a edificação do subsistema penal de exceção (ou do inimigo): o triste exemplo da legislação italiana e espanhola. *Revista Brasileira de Ciências Criminas - RBCCRIM*, v. 116, set./out. 2015. Disponível em: https://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RBCCrim_n.116.13.PDF. Acesso em: 04 fev. 2024.

⁵⁰ A professora Ana Isabel Pérez Cepeda e o professor Ignacio Berdugo Gómez de la Torre e Pérez Cepeda explicam que, nos últimos anos, o Direito Penal passou a ser reclamado, com maior intensidade, como instrumento de controle em contexto de transformação autoritária do direito, a partir da expansão do poder punitivo estatal, da aceitação da excepcionalidade legislativa reforçada pela ampliação da sensação de perigo e pelo fortalecimento da concepção de inimigo do ordenamento. Em: GÓMEZ DE LA TORRE, Ignacio Berdugo; PÉREZ CEPEDA, Ana Isabel. Derechos humanos y Derecho penal. Validez de las viejas respuestas frente a las nuevas cuestiones. *Revista Penal México*, n. 1, jan./jun. 2011. Disponível em: https://rabida.uhu.es/dspace/bitstream/handle/10272/14193/derechos_humanos.pdf?sequence=2. Acesso em: 03 jun. 2024.

⁵¹ BATARRITA ADELA, Asúa. La expulsión del extranjero como alternativa a la pena: incongruencias de la subordinación del Derecho Penal a las políticas de control de la inmigración. In: LAU-

não se trata de uma verdadeira pena, mas de um método administrativo sancionatório de política de controle migratório. Em perspectiva crítica, a professora Ana Isabel Pérez Cepeda⁵² adverte que a sanção de expulsão não está de acordo com as diretrizes da prevenção geral, “sino que además se aplica a todos los extranjeros, con independencia de la valoración jurídica de su situación de residencia en España, comportando una ampliación indiscriminada de la expulsión judicial, incompatible con las exigencias constitucionales.”

O artigo 89 inaugura essa Seção, com a previsão de comutação da pena de prisão superior a um ano em expulsão do território espanhol. A substituição parcial será possível nas hipóteses em que o julgador considerar a necessidade de cumprimento de até dois terços da pena de prisão como forma de assegurar a defesa da ordem jurídica e restabelecer a confiança na vigência da norma infringida pelo delito, ou mesmo quando a pena, ou a soma das penas, exceder o limite de cinco anos. Na tentativa de estabelecer limitação jurídica à sanção de expulsão, o legislador utiliza de conceitos jurídicos abstratos e de conteúdo indeterminado, para prever, no apartado 4, o seguinte: “La expulsión de un ciudadano de la Unión Europea solamente procederá cuando represente una amenaza grave para el orden público o la seguridad pública en atención a la naturaleza, circunstancias y gravedad del delito cometido, sus antecedentes y circunstancias personales”⁵³.

Para os estrangeiros que residiram na Espanha durante os dez anos anteriores, a expulsão ficará condicionada à ocorrência de qualquer das situações seguintes: a) hubiera sido condenado por uno o más delitos contra la vida, libertad, integridad física y libertad e indemnidad sexuales castigados con pena máxima de prisión de más de cinco años y se aprecie fundadamente un riesgo grave de que pueda cometer delitos de la misma naturaleza; b) hubiera sido condenado por uno o más delitos de terrorismo u otros delitos cometidos en el seno de

RENZO COPELLO, Patricia. (org.). *Inmigración y Derecho penal: bases para un debate*. Valencia: Tirant lo Blanch, 2002. p. 17-96.

⁵² PÉREZ CEPEDA, Ana Isabel. Justificación y claves político-criminales del proyecto de reforma del Código Penal de 2013. *Arx Iuris Salmanticensis*, v. 2, n. 1, p. 25-35, 2014. p. 34-35. Disponível em: <https://revistas.usal.es/cuatro/index.php/ais/article/view/11966>. Acesso em: 02 jun. 2024.

⁵³ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

un grupo u organización criminal. Ademais, o Código Penal establece efectos secundários decorrentes dessa substituição, inviabilizando o regresso do estrangeiro no prazo de cinco a dez anos a contar de sua expulsão, e a retirada de solicitações administrativas para autorização de residência ou trabalho na Espanha⁵⁴.

3 Considerações Finais

Em linhas conclusivas, e de acordo com as lições do professor Miró Llinares, é possível afirmar que a aproximação do Direito penal espanhol com os fatos relacionados com a migração, principalmente a imigração ilegal, ocorreu a partir de uma abordagem repressiva excessiva, atribuindo ao sistema jurídico penal uma função principal de controle, contrariando importantes princípios garantistas, como a intervenção mínima e a proporcionalidade⁵⁵. Verifica-se, ainda, uma sobreposição de normas administrativas e penais, bem como o desvirtuamento de institutos administrativos, criando um cenário de relativização de direitos e garantias, com a justificativa de tutela dos migrantes, quando, na verdade, pretende-se proteger a política migratória espanhola⁵⁶.

⁵⁴ ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível em: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. Acesso em: 03 jun. 2024

⁵⁵ Nesse sentido, pondera Ana Isabel Pérez Cepeda que “La situación de irregularidad en la que vive el inmigrante tiene su origen no sólo en el agravamiento de los factores expulsivos, sino también en los respectivos marcos legales de los países desarrollados que regulan las condiciones de ingreso legal, en la medida en que son excesivamente restrictivas. De esta forma, se determinan las condiciones estructurales para la consolidación de un grupo social, constantemente marginalizado, permanentemente bajo control y socialmente precario, además al estar continuamente amenazado del espectro de la exclusión y la clandestinidad: al inmigrante no le quedan muchas alternativas: el trabajo clandestino, la microcriminalidad y la nueva esclavitud. Parece que, en esta económica global guiada por la búsqueda de los beneficios, el peso de la dignidad de los individuos disminuye hasta la pérdida de derechos.” Em: PÉREZ CEPEDA, Ana Isabel. Algunas consideraciones político-criminales previas a la incriminación del tráfico de personas. *Revista Electrónica de Derecho de la Universidad de La Rioja (REDUR)*, p. 109–134, 2002. p. 115. Disponível em: <https://publicaciones.unirioja.es/ojs/index.php/redur/article/view/3815>. Acesso em: 02 jun. 2024.

⁵⁶ Assinal, ainda, o professor Miró Llinares: “la política criminal migratoria en España se está realizando a costa de algunos de los principios penales básicos tales como los de exclusiva protección de bienes jurídicos, principio de intervención mínima, el principio de taxatividad, el principio de proporcionalidad entre el mal causado y la pena a aplicar e, incluso, el principio de igualdad. Finalmente, y mientras la política comunitaria pone especial acento en la lucha

Não se reclama o afastamento das normas de Direito penal para contextos migratórios, mas uma adequada e proporcional tutela de bens jurídicos com conteúdo estabelecido e de acordo com a proteção dos direitos humanos das pessoas migrantes⁵⁷. Noutro dizer, o ponto de interseção entre Direito penal e política migratória deve estar restrito à proteção da pessoa em situação de vulnerabilidade, e não como ferramenta de etiquetamento e de intensificação das iniciativas de criminalização da migração, tampouco como instrumento de controle dos fluxos migratórios.

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CANCIO MELIÀ, M. Migração e Direito Penal na Espanha. *Revista Eletrônica de Direito Penal e Política Criminal*, v. 3, n. 1/2, p. 105–116, 2015. Disponível em: <https://seer.ufrgs.br/index.php/redppc/article/view/61286>. Acesso em: 03 jun. 2024.

ESPAÑA. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. *BOE*, n. 281, 24 nov. 1995. Disponível

contra las mafias ilegales, pero empieza a hacerlo también en la integración del inmigrante, España ha decidido utilizar el Derecho penal como elemento de exclusión del irregular: Primero apartando aún más socialmente al inmigrante por medio de la penalización de cualquier posible apoyo a su estancia en el Estado; y segundo fomentando su expulsión cuando se inicie un proceso penal y aun sin demostrarse su culpabilidad por los hechos.” Em: MIRÓ LLINARES, Fernando. Política Comunitaria de Inmigración y Política Criminal en España: ¿Protección o “exclusión” penal del inmigrante? *Revista Electrónica de Ciencia Penal y Criminología*, v. 10, n. 5, p.05-30, 2008. p. 5-21.

⁵⁷ Conforme lições de Ana Isabel Pérez Cepeda, “el interés de la administración por controlar la movilidad de los extranjeros no puede ser elevado a la categoría de bien jurídico en sentido tradicional, dado que estaríamos legitimando la tutela de objetivos de organizaciones políticas, sociales y económicas, por lo que el Derecho penal no tutelaría ya víctimas, sino funciones”. Em: PÉREZ CEPEDA, Ana Isabel. Delitos contra los derechos de los ciudadanos extranjeros: (Art. 318 bis Reformado por LO 11/2004). In: RODRÍGUEZ MESA, María José; RUIZ RODRÍGUEZ, Luís Ramón. (coord.). *Inmigración y sistema penal: retos y desafíos para el siglo XXI*. Valencia: Tirant lo Blanch, 2006. p. 117.

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Chinese foreign direct investment in Chile: between announcements, diversification and structural challenges*

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Abstract

Despite strong diplomatic and commercial ties, Chinese foreign direct investment (FDI) in Chile remains relatively limited compared to other Latin American countries. This study examines the evolution and overall impact of Chinese FDI on employment, technology transfer, and domestic politics, focusing on three case studies: Sky Solar, BYD, and China Railway Construction Corporation (CRCC). While high-profile project announcements have been made, findings indicate that Chinese FDI has primarily created low-skilled jobs, technology transfer has faced significant obstacles, and its influence on Chile's political landscape remains marginal. Using government reports, legal frameworks, corporate documents, news sources, and macro-economic data, this study underscores the need to reassess the long-term implications of Chinese FDI for Chile's economic development and strategic sectors.

Keywords: Chile-China relations; foreign direct investment; infrastructure and energy investment; technology transfer.

Resumo

Apesar dos fortes laços diplomáticos e comerciais, o investimento estrangeiro direto (IED) chinês no Chile continua relativamente limitado em comparação com outros países latino-americanos. Este estudo examina a evolução e o impacto geral do IED chinês sobre o emprego, a transferência de tecnologia e a política interna, concentrando-se em três estudos de caso: Sky Solar, BYD e China Railway Construction Corporation (CRCC). Embora tenham sido feitos anúncios de projetos de alto nível, os resultados indicam que o IED chinês criou principalmente empregos de baixa qualificação, a transferência de tecnologia enfrentou obstáculos significativos e sua influência no cenário político do Chile continua marginal. Usando relatórios governamentais, estruturas legais, documentos corporativos, fontes de notícias e dados macroeconômicos, este estudo ressalta a necessidade de reavaliar as

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implicações de longo prazo do IED chinês para o desenvolvimento econômico e os setores estratégicos do Chile.

Palavras-chave: Relações Chile-China; investimento estrangeiro direto; investimento em infraestrutura e energia; transferência de tecnologia. Resumo em outro idioma

1 Introduction

Chinese foreign direct investment (FDI) in Chile has expanded significantly since the mid-2010s, albeit later than the rapid growth of bilateral trade. This increase is part of a broader diplomatic relationship spanning 54 years¹. Traditionally, the Chilean government has presented the country as the ideal hub for international companies in Latin America due to its reputation for legal certainty and economic stability, even though other countries in the region receive larger volumes of Chinese investment. Since 2018, Chinese FDI in Chile has surged, coinciding with its participation in the Belt and Road Initiative (BRI) and more than a decade after the enactment of the Chile-China Free Trade Agreement (FTA)². Historically, the economic relationship between China and Chile has been dominated by copper and agricultural exports. However, in recent years, Chinese investments have extended to infrastructure, mining, electricity distribution, renewable energy, and even sectors like agribusiness and salmon farming³.

This diversification has garnered increasing attention from policymakers, businesses, and the media, though the different views remain superficial as China's presence in the country is not a political cleavage in contrast to Brazil or Argentina⁴.

Academic research on China-Latin America economic relations has evolved, shifting from a focus on trade to an emphasis on Chinese FDI patterns and its environmental and political effects⁵. Institutions such as the Núcleo Milenio ICLAC and the Library of the National Congress of Chile (BCN) have played a key role in documenting the scope and impact of Chinese FDI through databases, policy briefs, and case studies⁶.

This article examines the evolution and impact of Chinese FDI in Chile, focusing on regulation, employment, technology transfer, and domestic political effects. It investigates how Chile's political and regulatory landscape shapes the characteristics and outcomes of Chinese investments, distinguishing them from those in other Latin American countries. The analysis centres on three case studies—Sky Solar, BYD, and China Railway Construction Corporation (CRCC)—which operate in solar energy, public infrastructure, and lithium processing. These sectors can potentially enhance Chile's productive capacity but also raise concerns about economic dependence and strategic sector control.

The core research question of this study is whether Chinese FDI fosters productive capacity in Chile or merely reinforces a core-periphery relationship, as

¹ BÓRQUEZ, Andrés; LÓPEZ, Dorotea; MUÑOZ, Felipe. *Relaciones entre Chile y China: un enfoque integral*. Santiago: Ril Editores, 2021. SERRANO-MORENO, Juan Enrique; PEREZ, Alejandra; ABREU, María Gabriela de. Beyond copper: China and Chile relations. *Asian Education and Development Studies*, [s. l.], v. 10, n. 3, p. 359-373, 2021. DOI: <https://doi.org/10.1108/AEDS-08-2019-0132>. Available at: <https://www.emerald.com/insight/content/doi/10.1108/aeds-08-2019-0132/full/html>. Accessed on: 6 Dec. 2024.

² SERRANO-MORENO, Juan Enrique. Latin America and the Caribbean: how the belt and Road Initiative Diminished the United States Influence. In: REGILME, S. S. (ed.). *The United States and China in the era of global transformations: geographies of rivalry*. Bristol: Bristol University Press, 2024. p. 138-159. SERRANO-MORENO, Juan Enrique; TELIAS, Diego; URDINEZ, Francisco. Deconstructing the belt and Road initiative in Latin America. *Asian Education and Development Studies*, [s. l.], v. 10, n. 3, p. 337-347, 2021. Available at: <https://doi.org/10.1108/AEDS-01-2020-0021>. Accessed on: 14 Nov. 2024.

³ FUNDACIÓN ANDRES BELLO. *China's presence in Chilean business increases by 1,300%*. 2024. Available at: <https://fundacionandresbello.org/en/news/chile-%F0%9F%87%A8%F0%9F%87%B1->

[news/chinas-presence-in-chilean-business-increases-by-1300/](https://www.fundacionandresbello.org/en/news/chinas-presence-in-chilean-business-increases-by-1300/). Accessed on: 12 June 2024.

⁴ BÓRQUEZ, Andrés; MUÑOZ, Felipe; LEIVA, Diego. The growing Chinese economic presence in Chile: opinions among the Chilean elite. *China Review*, [s. l.], v. 23, n. 3, p. 131-154, 2023; MONTE, María; SERRANO-MORENO, Juan Enrique; CHAN, Carol. Empresas e inversión de China en Chile: aportes para una discusión balanceada. *Policy Paper ICLAC*, [s. l.], n. 1, 2023. Available at: <https://iclac.cl/uncategorized/empresas-e-inversion-de-china-en-chile-aportes-para-una-discusion-balanceada/>. Accessed on: 23 July 2024.

⁵ JENKINS, Rhys. *How China is reshaping the global economy: development impacts in Africa and Latin America*. Oxford: Oxford University Press, 2018.; WISE, Carol. *Dragonomics: how Latin America is maximising (or missing out on) China's international development strategy*. New Haven: Yale University Press, 2020.; LÓPEZ, Dorotea; BÓRQUEZ, Andrés; SERRANO-MORENO, Juan Enrique. Impacts of Chilean exports to China on the cherry global value chain. In: DUSSEL-PETERS, Enrique (ed.). *The impact of China in Latin America and the Caribbean exports: global value chains and territories*. Ciudad de México: Red ALC-China, 2025.

⁶ Consult at <https://iclac.cl/> and <https://www.bcn.cl/observatorio/asiapacifico/noticias>

suggested by specialised literature⁷. The cases analysed illustrate how Chinese firms have adapted to Chile's legal framework, particularly in public procurement processes traditionally dominated by Western companies. However, the expansion of Chinese investment has also sparked political and media debates regarding its long-term implications. This study employs a qualitative approach, relying on government documents, corporate reports, macroeconomic data, and local media sources to comprehensively assess the opportunities and challenges posed by Chinese FDI in Chile.

2 Chile's Political and Economic System

The state's role in Chile is to correct market deficiencies resulting from a neoliberal-leaning constitution inherited from the dictatorship. This has led to a presidential system that, despite changes in power, keeps its central macroeconomic definitions and foreign policy guidelines the same. The main issues that have shaped Chile's political and economic agenda have primarily focused on economic reforms, social development, economic institutions, political institutions, and the resulting business environment that the country has built. The state takes on a "subsidiary" role within this framework, addressing social and market failures only in specific situations when the private sector cannot correct them by itself⁸. With the country highly integrated into international trade through its 34 trade agreements – including USA, UE and China –, the total value of foreign investments in Chile is nearly equal to the total value of all goods and services the country produces annually⁹.

⁷ AHUMADA, José Miguel. *The political economy of peripheral growth: Chile in the global economy*. Switzerland: Palgrave Macmillan Cham, 2019. Available at: <https://link.springer.com/book/10.1007/978-3-030-10743-7>. Accessed on: 28 Aug. 2024.; GALLAGHER, Kevin P. *The China triangle*. Oxford: Oxford University Press, 2016.; HUNG, Ho-Fung. *The China boom: why China will not rule the world*. New York: Columbia University Press, 2015.

⁸ SAAVEDRA, Ernesto. El modelo económico-político de Chile: desarrollo institucional en la encrucijada. *Economía y Política*, [s. l.], v. 1, n. 1, p. 117–148, 2014. Available at: <https://www.economiaypolitica.cl/index.php/eyp/article/view/7>. Accessed on: 1 Dec. 2024.

⁹ OECD. *FDI Qualities review of Chile: boosting sustainable development and diversification*. Paris: OECD Publishing, 2023. DOI: <https://doi.org/10.1787/98bf1829-en>. Available at: https://www.oecd.org/en/publications/fdi-qualities-review-of-chile_98bf1829-en.html. Accessed on: 20 Oct. 2024.

According to The Economist's Democracy Index, 2023, Chile ranked 25th with a total score of 7.98, classifying it as a "flawed democracy." However, it is the highest-ranking country in this classification, dropping from the "full democracy" category the prior year, falling short by only 0.02 points¹⁰. Nevertheless, it remains one of the highest-ranked countries in Latin America, after Costa Rica and Uruguay¹¹. The lowest score among the five categories was political participation, which dragged down the overall classification. This score is associated with political disaffection due to corruption scandals, historical inequality, and frustration with unmet public demands, which the political system has not adequately addressed.

After the military dictatorship (1973-1990), the country transitioned to democracy under a subsidiary, non-corporate state, led by the centre-left coalition "Concertación de Partidos por la Democracia", which governed from 1990 to 2010 and reformed the neoliberal political-economic model inherited from the dictatorship¹². Furthermore, this subsidiary state model has led to Chile ranking 21st in the 2024 Index of Economic Freedom globally and second in the Americas, only behind Canada. The country has a population of 19.2 million, an average per capita growth of 2.6% over the past five years, and 34 trade agreements, covering 88% of the world's GDP¹³. These factors make Chile one of the most competitive countries for FDI, supported by reliable and autonomous institutions such as the Central Bank, whose mission is to control inflation, encourage investment, and uphold fiscal responsibility¹⁴.

en.html. Accessed on: 20 Oct. 2024.

¹⁰ MARCA CHILE. *Chile: democracia plena aún en tiempos difíciles*. 2024. Available at: <https://www.marcachile.cl/chile-democracia-plena-aun-en-tiempos-dificiles/>. Accessed on: 3 Sept. 2024.

¹¹ ECONOMIST INTELLIGENCE UNIT. *Democracy index 2023: age of conflict*. 2023. Available at: <https://pages.eiu.com/rs/753-RIQ-438/images/Democracy-Index-2023-Final-report.pdf?version=0>. Accessed on: 23 June 2024.

¹² SAAVEDRA, Ernesto. El modelo económico-político de Chile: desarrollo institucional en la encrucijada. *Economía y Política*, [s. l.], v. 1, n. 1, p. 117–148, 2014. Available at: <https://www.economiaypolitica.cl/index.php/eyp/article/view/7>. Accessed on: 1 Dec. 2024.

¹³ CHILE. Ministerio de Relaciones Exteriores. *Economía*. Santiago, 2024. Available at: <https://www.chile.gob.cl/chile/economia#:~:text=Chile%20posee%20la%20red%20de,65%25%20de%20la%20poblaci%C3%B3n%20mundial>. Accessed on: 17 Aug. 2024.

¹⁴ KIM, Anthony B. *2024 Index of economic freedom*. Washington: The Heritage Foundation, 2024. Available at: https://static.heritage.org/org/index/pdf/2024/2024_indexofeconomicfreedom.pdf. Ac-

Chile favours business activities, with open market policies attracting investments. Despite the rise in crime, stagnation in some productive areas, and attempts to reform the Constitution in 2022 and 2023, the country's ranking in the democracy index was only slightly affected, with the current neoliberal-focused Constitution remaining in place¹⁵.

3 China-Chile Relations

As Chile and China celebrate 54 years of diplomatic relations, it is relevant to highlight how political transformations have shaped their commercial relations with the world, particularly with China. These clearly defined periods allow for the division of phases that characterise the current state of relations, the growing presence of Chinese companies in Chile, and the comprehensive strategic partnership that positions Chile as a vital partner for China¹⁶.

The “friendship” between Chile and China is frequently mentioned in government documents, official speeches, and academic analyses. According to Claudia Labarca, the “discourse of the firsts” emphasises Chile as a leading and pioneering nation in its relationship with China, at least discursively, in Latin America. This perception projects leadership and reliability, which are crucial for Chile's export-based economy. The “four firsts” are:

i) Chile was the first South American country to establish diplomatic relations with the People's Republic of China in 1970; ii) Chile was the first country to recognise China as a market economy in 2004; iii) Chile was the first country to support China's entry into the WTO in 2001; iv) Chile was the first individual country to sign a free trade agreement with China in 2006¹⁷.

This discourse aligns with a “common narrative of economic cooperation [...] which serves as the foundation upon which the bilateral relationship can be built [...] and official documents routinely reference it in their introductions.”¹⁸

Following this, the recent history of relations between Chile and China began with the formal establishment of diplomatic relations during the government of Salvador Allende between 1970 and 1973¹⁹. From 1973 to 1990, the relationship was described as pragmatic, as diplomatic ties were maintained despite the anti-communist stance of the Pinochet dictatorship in Chile while continuing commercial relations with China. Between 1990 and 2004, commercial relations were strengthened through platforms such as APEC, and the future economic relationship with China began to take shape through the Free Trade Agreement (FTA) established at the beginning of the 21st century. Finally, from 2004 to the present, the performance of the FTA has been evaluated in terms of linking the two countries, more reflective analyses have been incorporated, and the economic presence of Chinese companies in Chile has been characterised. These phases can be defined as i) an initial cultural link, ii) a moderately pragmatic approach, iii) an expansion towards global openness, and iv) the establishment of comprehensive relations²⁰. The FTA began negotiations in 2002 to reach a trade agreement. Four rounds of negotiations were held at the APEC Leaders' Summit in 2004. Finally, the Free Trade Agreement on Goods came into effect in 2006. It was later expanded with a trade-in services agreement in 2008, which has been in force since 2010, and a supplementary investment agreement signed in 2012, which has been in effect since 2014.

In 2016, Chile achieved the status of Comprehensive Strategic Partnership with China, which implies a collaboration strategy developed by China that, although not

cessed on: 13 Dec. 2024.

¹⁵ ECONOMIST INTELLIGENCE UNIT. *Democracy index 2023: age of conflict. 2023*. Available at: <https://pages.eiu.com/rs/753-RIQ-438/images/Democracy-Index-2023-Final-report.pdf?version=0>. Accessed on: 23 June 2024.

¹⁶ QINGBAO, Niu. Sin ninguna duda ¡la amistad entre China y Chile continuará floreciendo y prosperando! *La Tercera*, 2024. Available at: <https://www.latercera.com/ediciones-especiales/noticia/sin-ninguna-duda-la-amistad-entre-china-y-chile-continuara-floreciendo-y-prosperando/B3RXCZELTVH3XGNSJIWPQQL65E/>. Accessed on: 25 Nov. 2024.

¹⁷ LABARCA, Claudia. DF conexión a China: el discurso de los primeros. *Diario Financiero*, jul. 2020. Available at: <https://www.dfi.cl/opinion/columnistas/df-conexion-a-china-el-discurso-de-los-primeros>. Accessed on: 16 Nov. 2024.

¹⁸ LABARCA, Claudia. *Ni Hao Mr. Pérez, Buenos Días Mr. Li. Chile y China: cultura, negocios y confianza en la era global*. Santiago: Ediciones UC, 2015.

¹⁹ AHUMADA, Mónica. Chile y China: una mirada retrospectiva a 50 años de relaciones diplomáticas y de amistad. *Sino-Iberoamerican Interaction*, [s. l.], v. 1, n. 1, p. 19-41, 2021. Available at: <https://www.degruyter.com/document/doi/10.1515/sai-2021-2007/html>. Accessed on: 19 Apr. 2024.

²⁰ BÓRQUEZ, Andrés; LÓPEZ, Dorotea; MUÑOZ, Felipe. *Relaciones entre Chile y China: un enfoque integral*. Santiago: Ril Editores, 2021.

necessarily responding to the commercial terms of the FTA regulated by organisations such as the WTO, aims to expand cooperation platforms in regional initiatives for Non-Traditional Strategic Initiatives (NSIs), such as the Regional Center of Confucius Institutes for Latin America, the South American Astronomy Center, and the regional platform for the Chinese currency²¹. The following year, in 2017, the 2006 FTA was renegotiated for modernisation²², incorporating two new chapters on Environment and Electronic Commerce, in addition to updating chapters on Trade in Goods, Rules of Origin, Customs Procedures and Trade Facilitation, Competition Policy, Economic and Technical Cooperation, and Trade in Services, with these modifications coming into force in 2019²³. Finally, given the deepening and diversification of economic relations, the South American country joined the Belt and Road Initiative (BRI) in 2018, seeking to provide a new extended cooperation framework with its leading trading partner, China²⁴.

At that time, media and official discourse presented Chile frequently as a gateway and “hub” for Chinese investment projects in South America due to the trust and friendship between Chile and China, which refer not only to formal agreements but also to diversified relationships²⁵. For example, through a parliamentary ex-

change between 2002 and 2006, during the years of the FTA negotiations, the Chile-China Political Dialogue Committee was created and has been active since 2005, with at least 14 parliamentary sessions held to discuss topics of provincial, scientific, and cultural cooperation, university collaboration, and the development of all the agreements mentioned earlier, as well as the Chile-China Friendship Group, which invites parliamentarians to visit the Asian country and explore areas of cooperation²⁶. Agreements between Chilean and Chinese universities, the creation of the South American Astronomy Center (CASSACA), and projects like BYD electric buses reflect advances in the bilateral relationship regarding knowledge creation. Additionally, initiatives such as the Confucius Institutes, academic programs on China, the Chile-China Demonstrative Agricultural Farm, and agreements on Antarctic matters strengthen technology, education, trade, and agriculture cooperation²⁷.

4 Overview of FDI in Chile

The FDI regulations in Chile are mainly market-oriented, and only the topical restrictions of competition law are recognised. For instance, Law 20.848, enacted in 2015, only establishes a framework to attract FDI in Chile through the government agency “Invest Chile” and does not refer to specific or strategic sectors or international initiatives. In 2019, Decree 40 adopted several strategies to encourage and promote foreign investment, including China, which has a macro-region classification differentiating it from North America, Asia, and Europe. It also emphasises the role of Invest Chile as a proactive agent for the installation of foreign companies in the country, including the concept of “quality investment” that generates product linkages and technology transfer and creates quality employ-

²¹ BÓRQUEZ, Andrés; BRAVO, Carlos. Who are China’s strategic economic partners in South America? *Asian Education and Development Studies*, [s. l.], v. 10, n. 3, p. 445-456, 2021. DOI: <https://doi.org/10.1108/AEDS-09-2019-0153>. Available at: <https://www.emerald.com/insight/content/doi/10.1108/aeds-09-2019-0153/full/pdf?title=who-are-chinas-strategic-economic-partners-in-south-america>. Accessed on: 10 Aug. 2024. BÓRQUEZ, Andrés. Iniciativas estratégicas no-tradicionales en las relaciones chino-chilenas: ¿un caso de poder blando de China en América del Sur? *Estudios Internacionales*, [s. l.], v. 51, n. 194, p. 95-110, 2019. Available at: <https://doi.org/10.5354/0719-3769.2019.55677>. Accessed on: 10 Aug. 2024.

²² CHILE y China modernizan tratado de libre comercio. *MINREL Chile*, marzo 2019. Available in: <https://www.minrel.gob.cl/minrel/noticias-antteriores/chile-y-china-modernizan-tratado-de-libre-comercio>. Accessed on: 7 Sept. 2024.

²³ SERVICIO NACIONAL DE ADUANAS. *Tratado de libre comercio Chile - China*. 2024. Available at: <https://www.aduana.cl/tratado-de-libre-comercio-chile-china/aduana/2007-02-28/100917.html>. Accessed on: 12 Dec. 24.

²⁴ XINHUA EN ESPAÑOL. *Comentario: Chile se postula como pionero de la Franja y la Ruta en América Latina y el Caribe*. 2019. Available at: https://spanish.xinhuanet.com/2019-04/22/c_137998031.htm. Accessed on: 14 Oct. 2024.; RODRIGUES, Flávio Bruno; RIBEIRO, Marilda Rosado de Sá. One Belt, one road: novas interfaces entre o comércio e os investimentos internacionais. *Revista de Direito Internacional*, Brasília, v. 14, n. 2, p. 192-213, 2017.

²⁵ CHILE: la plataforma que busca China para insertarse en América Latina. *El mostrador*, agosto, 2021. Available at: [https://www.elmostrador.cl/destacado/2021/08/16/chile-la-plataforma-que-](https://www.elmostrador.cl/destacado/2021/08/16/chile-la-plataforma-que-busca-china-para-insertarse-en-america-latina/)

[busca-china-para-insertarse-en-america-latina/](https://www.elmostrador.cl/destacado/2021/08/16/chile-la-plataforma-que-busca-china-para-insertarse-en-america-latina/). Accessed on: 14 Dec. 2024.

²⁶ MORALES, Pablo. Cooperación Chile-China: ciencia, tecnología, investigación y cultura. *BCN*, jun. 2023. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/34455/1/Cooperacion_Chile_China_CyT_investigacion_y_cultura.pdf. Accessed on: 1 July 2024.

²⁷ MORALES, Pablo. Cooperación Chile-China: ciencia, tecnología, investigación y cultura. *BCN*, jun. 2023. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/34455/1/Cooperacion_Chile_China_CyT_investigacion_y_cultura.pdf. Accessed on: 1 July 2024.

ment²⁸. In addition to this, in Chile, long-term political strategies can direct FDI, with a focus on sustainable development and energy transition, as is the case of the National Lithium Strategy with its selection of specialised lithium producers and the Green Hydrogen Action Plan 2023-2030 with its axis of investments, incentives and institutional framework to invite foreign companies.²⁹

Junior and Heringer point out that China has used its access to the WTO to expand its FDI, which has also allowed it to access foreign markets with less stringent anti-dumping measures.³⁰ Also, Wei and Hongling argue that China is an advocate of investment facilitation at the global level and agreements that expedite the insertion of Chinese companies abroad³¹. The evolution of Chinese FDI in Chile aligns with these theses.

According to the 2024 World Investment Report by UNCTAD, Chile is the third Latin American country that received more FDI in 2022, behind Brazil and Mexico. This trend is due to a post-pandemic recovery that has attracted significant greenfield and merge and acquisitions (M&A) investments to the region, even though flows are lower than pre-pandemic levels³². Unlike the top 20 economies that receive the most FDI, in Chile,

the trend went from \$17 billion in 2022 to \$21 billion in 2023, representing a 19.2% increase³³.

Investments in sectors linked to the Sustainable Development Goals (SDGs) fell by 10% globally in 2023, reducing flows in this sector. Nevertheless, many projects in Latin America are related to infrastructure and renewable energy, particularly relevant in Chile, with critical mineral extraction and solar and wind energy projects. Additionally, Chile is one of the three most attractive places to invest in energy, along with China and India³⁴. Furthermore, Chile accounts for 80% of the region's installed capacity in renewable energy, along with Brazil, Mexico, Argentina, and Venezuela, according to BloombergNEF's *Climatoscope*³⁵. An example is the National Lithium Strategy, which seeks a significant role for the state in the lithium industry's exploration, exploitation, and development, inviting international investors to participate, provided they promote environmental and social development criteria in the country³⁶.

Canada (\$36.216 billion), the United States (\$25.189 billion), the Netherlands (\$21.221 billion), the United Kingdom (\$20.005 billion), and Spain (\$18.921 billion) are the primary FDI sources in Chile by stock until 2022, according to the Central Bank of Chile³⁷. FDI in Chile has decreased dramatically since the repeal of Decree Law 600 in 2015, which allowed foreign investors to bring in capital and goods, obtaining a contract with the state that established rights and obligations without the possibility of unilateral modification³⁸. The repeal was

²⁸ RAMÍREZ, Pedro. Huawei, 5G y el cable transpacífico: las claves de la visita de Piñera a China. *Interferencia*, 2019. Available at: <https://interferencia.cl/articulos/huawei-5g-y-el-cable-transpacifico-las-claves-de-la-visita-de-pinera-china>. Accessed on: 28 May 2024.; MONTT, María; SERRANO-MORENO, Juan Enrique; CHAN, Carol. Empresas e inversión de China en Chile: aportes para una discusión balanceada. *Policy Paper ICLAC*, [s. l.], n. 1, 2023. Available at: <https://iclac.cl/uncategorized/empresas-e-inversion-de-china-en-chile-aportes-para-una-discusion-balanceada/>. Accessed on: 23 July 2024.; OECD. *FDI Qualities review of Chile: boosting sustainable development and diversification*. Paris: OECD Publishing, 2023. DOI: <https://doi.org/10.1787/98bf1829-en>. Available at: https://www.oecd.org/en/publications/fdi-qualities-review-of-chile_98bf1829-en.html. Accessed on: 20 Oct. 2024.

²⁹ CHILE. Gobierno de Chile. *Medidas de impulso al plan de acción de Hidrógeno Verde 2023-2030*. Santiago, 2023. Available at: <https://energia.gob.cl/sites/default/files/documentos/documento-medidas-de-impulso-h2v.pdf>. Accessed on: 8 July 2024.

³⁰ AMARAL JÚNIOR, Alberto; HERINGER, Aline Pereira de Carvalho. A hermeneutical analysis on the recognition of China as a market economy after 2016. *Revista de Direito Internacional*, Brasília, v.15, n. 1, p. 221-237, 2018.

³¹ WEI, Dan; HONGLING, Ning. Is investment facilitation a substitute or supplement? a comparative analysis of China and Brazil practices. *Revista de Direito Internacional*, Brasília, v. 19, n. 2, p. 325-342, 2022.

³² FOREIGN INVESTMENT PROMOTION AGENCY. *Foreign investment in Chile 2022*. Santiago, 2023. Available at: <https://www.investchile.gob.cl/wp-content/uploads/2023/05/informe-preliminar-ied-eng-pdf-2023.pdf>. Accessed on: 26 Jan. 2024.

³³ UNCTAD. *World investment report 2024: investment facilitation and digital government*. 2024. Available at: https://unctad.org/system/files/official-document/wir2024_en.pdf. Accessed on: 14 Dec. 2024.

³⁴ CHILE es el país más atractivo para la inversión en energías renovables. *In: Blog InvestChile*. Santiago, nov. 2022. Available at: <https://blog.investchile.gob.cl/bloges/chile-el-pais-mas-atractivo-para-invertir-en-energias-renovables>. Accessed on: 14 Dec. 2024.

³⁵ MITRI, Marcelo; MAIA, Sílvia; FONSECA, Ana Paula; FORONI, Luiza. *Climatoscope 2023: power transition factbook*. 2023. Available at: <https://www.global-climatescope.org/downloads/climatescope-2023-report-en.pdf>. Accessed on: 16 Dec. 2024.

³⁶ LAS OCHO claves de la nueva estrategia nacional del litio. *In: Blog InvestChile*. Santiago, 23 enero 2023. Available at: <https://blog.investchile.gob.cl/bloges/las-ocho-claves-de-la-nueva-estrategia-nacional-del-litio>. Accessed on: 20 Dec. 2024.

³⁷ IED 2022: Canadá se ratifica como principal inversionista en Chile. *Blog InvestChile*, Santiago, oct. 2023. Available at: <https://www.investchile.gob.cl/es/canada-principal-inversionista-chile-2022/>. Accessed on: 29 July 2024.

³⁸ CHILE. Cámara de Diputados de Chile. *Reforma tributaria permitió modificar sistema de incentivos para la inversión para extranjeros*. 2015.

justified by the Free Trade Agreements (FTAs) mechanisms that ensure a reliable institutional framework for promoting FDI in Chile. Despite this, FDI has increased in the region and the country since 2018. Between 2014 and 2017, 40% of FDI was related to M&A, marking a future trend³⁹.

5 China-Chile Trade

China has been a significant player in Chile's trade for at least two decades, mainly through the purchase of Chilean copper, which accounts for 14.6% of the national GDP⁴⁰ and comprises more than 40% of Chile's export basket. Of Chile's \$95 billion in annual goods exports in 2023 and \$9.9 billion in services, 39.4% went to China, making it the top export destination. China is also the primary source of Chile's manufactured imports; of the \$85 billion in goods imported by Chile, 23.2% came from China. Chile mainly exports copper products, commodities, and agricultural goods to China⁴¹.

The total trade between Chile and China (Free on Board or FOB) in 2023 amounted to \$56.84 billion, with an average annual growth of 6.0% from 2018 to 2023. Breaking this figure down, Chile's FOB exports to China totalled \$37.017 billion, while FOB imports from China were \$18.549 billion, leaving a trade balance of \$18.468 billion in favour of Chile. Although services exports remain low, they grew exponentially in 2023, from \$7 million in 2018 to \$33 million in 2023, representing a 36.3% increase⁴².

Available at: https://www.camara.cl/prensa/sala_de_prensa_detalle.aspx?prmid=125175#:~:text=El%20DL%20600%20es%20un,ambas%20partes%20y%20que%20no. Accessed on: 17 Oct. 2024.

³⁹ UGARTE, Gonzalo. Inversión en Chile: cómo volver a encender el motor de la economía. *CEP Chile*, [s. l.], jun. 2024. Available at: <https://www.cepchile.cl/investigacion/voces-del-cep-06-junio-2024/>. Accessed on: 17 Oct. 2024.

⁴⁰ CARDEMIL, Matías. Impactos socioeconómicos de la minería en Chile. *BCN*, 2023. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/34140/1/Informe_N_04_23_Impactos_socioeconomicos_de_la_mineria_en_Chile.pdf. Accessed on: 17 Dec. 2024.

⁴¹ THE OBSERVATORY OF ECONOMIC COMPLEXITY. *Chile (CHL): exports, imports and trade partners*. 2024. Available at: <https://oec.world/en/profile/country/chl>. Accessed on: 12 Dec. 24.

⁴² SUBREI. *Ficha país: Chile-China*. 2023. Available at: https://www.subrei.gob.cl/docs/default-source/estudios-y-documentos/fichas/china-anual10c2b0cc88be48bca8b90595a01e5f11.pdf?sfvrsn=69595d55_5. Accessed on: 7 Feb. 2024.

6 Chinese Foreign Direct Investment

The OECD reports that Chinese investments in Chile have grown spectacularly over the last five years, aligning with the presented data⁴³. According to the China Cross Border Monitor, 86.48% of Chile's most extensive Chinese FDI operations were acquisitions, while 13.52% were greenfield investments⁴⁴. This reflects the high value of acquisitions within the Chinese FDI landscape in Chile but also indicates that Chinese investments often involve the purchase of already existing companies.

Chinese FDI in Chile is a relatively recent phenomenon, as it has yet to represent a significant share of the FDI Chile has historically received despite China being its largest trading partner. In 2023 China ranks 22nd among the countries investing in Chile with an investment stock of US\$ 701 million, according to the Central Bank of Chile ranking of FDI, while Chile's investments in China totalled \$1.371 billion according to SUBREI⁴⁵. Nevertheless, the economic relationship between China and Chile has been dynamic, linked to their solid diplomatic ties, leading to key investments in mining, energy, and infrastructure⁴⁶.

According to the 2024 Monitor of Chinese Outward Foreign Direct Investment in Latin America and the Caribbean, published by the Latin American and Caribbean Academic Network on China based in Mexico, employment coefficients per transaction show an upward trend in greenfield investments compared to M&A, suggesting that new investments would create more jobs. Between 2020 and 2023, Chinese FDI in

tos/fichas/china-anual10c2b0cc88be48bca8b90595a01e5f11.pdf?sfvrsn=69595d55_5. Accessed on: 7 Feb. 2024.

⁴³ OECD. *Foreign Direct Investment (FDI) quality Review in Chile*. 2024. Available at: https://www.oecd.org/es/publications/examen-de-la-calidad-de-la-inversion-extranjera-directa-ied-en-chile_86336809-es.html. Accessed on: 4 July 2024.

⁴⁴ CHINA CROSS-BORDER MONITOR. *Chile*. 2024. Available at: <https://cbm.rhg.com/data/latin-america/chile>. Accessed on: 11 Dec. 2024.

⁴⁵ SUBREI. *Ficha país: Chile-China*. 2023. Available at: https://www.subrei.gob.cl/docs/default-source/estudios-y-documentos/fichas/china-anual10c2b0cc88be48bca8b90595a01e5f11.pdf?sfvrsn=69595d55_5. Accessed on: 7 Feb. 2024.

⁴⁶ TRONCOSO, Jorge. Banco Central: Canadá es el principal inversionista en Chile y Brasil el que recibe mayor cantidad de capitales nacionales. *Ex Ante*, 2023. Available at: <https://www.ex-ante.cl/banco-central-canada-es-el-principal-inversionista-en-chile-y-brasil-el-que-recibe-mayor-cantidad-de-capitales-nacionales/>. Accessed on: 25 Sept. 2024.

the region generated 283,343 jobs. The total number of transactions during this period was 149, marking a decline compared to the previous period, which saw 254 projects between 2015 and 2019⁴⁷.

Table 1 - LAC: Chinese OFDI by Major Countries (2000-2023)

(Millions of dollars)

Country	2000-2004	2005-2009	2010-2014	2015-2019	2020-2023	2000-2023 Total
Argentina						
Number of transactions	0	1	12	23	29	65
OFDI amount (millions)	0	4	10,422	2,998	10,411	23,834
Employment (number of employees)	0	200	6,075	13,748	16,94	36,963
Brazil						
Number of transactions	5	9	45	76	53	188
OFDI amount (millions)	1,665	25,815	21,938	15,623	65,608	131,648
Employment (number of employees)	3,303	6,657	49,024	74,191	27,891	161,074
Chile						
Number of transactions	0	4	10	22	16	53
OFDI amount (millions)	0	2,789	13,111	18,432	4,034	20,599
Employment (number of employees)	0	628	1,114	3,433	5,226	25,4
Colombia						
Number of transactions	2	4	9	8	5	28
OFDI amount (millions)	298	2,316	1,146	1,567	6,406	11,733

⁴⁷ PETERS, Enrique Dussel. *Monitor de la infraestructura china en América Latina y el Caribe 2024*. Ciudad de México: Red ALC-China, 2024. Available at: <https://www.dusselpeters.com/398.pdf>. Accessed on: 25 Sept. 2024.

Country	2000-2004	2005-2009	2010-2014	2015-2019	2020-2023	2000-2023 Total
Employment (number of employees)	382	899	2,214	2,028	103,875	109,048
Mexico						
Number of transactions	3	11	25	54	66	159
OFDI amount (millions)	500	601	1,554	12,854	6,961	24,47
Employment (number of employees)	5,721	7,113	9,835	87,332	112,657	222,68
Peru						
Number of transactions	0	11	19	19	16	65
OFDI amount (millions)	0	4,835	11,093	10,651	5,242	31,82
Employment (number of employees)	0	9,605	8,982	12,629	11,55	42,766
Venezuela						
Number of transactions	1	4	9	10	5	29
OFDI amount (millions)	138	382	1,152	867	5,176	7,715
Employment (number of employees)	350	1,251	3,898	6,214	11,673	23,386
Caribbean						
Number of transactions	0	0	11	14	31	56
OFDI amount (millions)	0	0	4,439	1,146	2,789	8,374
Employment (number of employees)	0	0	6,533	14,35	23,891	44,774
Central America						
Number of transactions	0	3	3	4	7	17

Country	2000-2004	2005-2009	2010-2014	2015-2019	2020-2023	2000-2023 Total
OFDI amount (millions)	0	135	272	1,195	1,195	2,798
Employment (number of employees)	0	275	778	6,895	7,945	15,893
TOTAL LAC						
Number of transactions	14	64	99	258	242	663
OFDI amount (millions)	2,639	16,447	59,885	68,645	46,209	193,235
Employment (number of employees)	10,104	34,769	93,983	241,277	283,343	663,476

Source: PETERS, Enrique DUSSEL. *Monitor de la infraestructura china en América Latina y el Caribe 2024*. Ciudad de México: Red ALC-China, 2024. Available at: <https://www.dusselpeters.com/398.pdf>.

For the case of Chile, as shown in Table 1, between 2020 and 2023, there were 16 transactions totalling \$4.034 billion, a much smaller amount compared to the previous period of 2015-2019, one of the most prosperous periods for Chinese FDI in Chile, where significant investments such as Tianqi Lithium individually accounted for \$4.070 billion. However, it also reveals that greenfield investments have become more predominant in this new cycle. Regarding total FDI, it is noted that from 2005 to 2023, Chinese FDI flows in Chile amounted to \$20.599 billion, positioning it as the fifth-largest destination for investment in the region⁴⁸.

As for the amount by type of investment and its value, the Regional Repository of Chinese Investments in Latin America from the Millennium Nucleus on the Impacts of China in Latin America ICLAC (2023) provides information on Chinese investments in Chile from 2006, with the joint venture between Codelco and Minmetals Group, to the renewal of trains for the Santiago-Curicó line by CSR Sifang. This repository provides results such as investment amounts by sector and the number of projects China has invested in Chile⁴⁹.

⁴⁸ PETERS, Enrique Dussel. *Monitor de la infraestructura china en América Latina y el Caribe 2024*. Ciudad de México: Red ALC-China, 2024. Available at: <https://www.dusselpeters.com/398.pdf>. Accessed on: 25 Sept. 2024.

⁴⁹ URDINEZ, Francisco; MYERS, Margaret. *Regional repository of*

Table 2 -Chinese Investments in Chile by Sector

Sector	Total Amount	Number of Projects
Energy	US\$ 8.379 billion	15
Mining	US\$ 6.955 billion	5
Infrastructure	US\$ 4.294 billion	9
ICT (Information and Communications Technology)	US\$ 1.744 billion	2
Agribusiness	US\$ 1.096 billion	7
Real Estate	US\$ 649 million	11
Manufacturing	US\$ 5 million	1
Total Investments	US\$ 23.122 billion	50

Source: URDINEZ, Francisco. MYERS, Margaret. *Repositorio Regional de Inversiones Chinas en América Latina*. ICLAC and Inter-American Dialogue, 2024. Available at: <https://china-latam.iclac.cl/InvestmentCountry>.

Table 1 aligns with regional investment trends in “New Infrastructure,” which includes 5G, data centres, artificial intelligence, industrial internet, ultra-high voltage electricity transmission, electric vehicles, renewable energy, and urban rail transport⁵⁰. The infrastructure deficit affecting the region hampers social development and allows for a complementary relationship based on the connectivity rhetoric outlined in the Belt and Road Initiative (BRI)⁵¹.

As shown in Table 2, the Regional Repository of Chinese Investments in Latin America by ICLAC reports that since 2008, 15 acquisitions have been made in Chile with varying degrees of participation (minority, majority, and full ownership) in private companies, mainly in the agribusiness, energy sectors, and two significant investments in mining. The mining investments by Shunde Rixin Development and Chengdu Tianqi total US\$ 6.17 billion, making them the highest-value in-

chinese investments in Latin America. 2024. Available at: <https://china-latam.iclac.cl/InvestmentCountry>. Accessed on: 25 Sept. 2024.

⁵⁰ MYERS, Margaret; MELGUIZO, Angel; WANG, Yifang. Nueva infraestructura emerging trends of chinese foreign direct investment in Latin America and the Caribbean. *The Dialogue*, 2024. Available at: <https://www.thedialogue.org/wp-content/uploads/2024/02/Tendencias-emergentes-de-la-inversion-extranjera-directa-de-China-en-América-Latina-y-el-Caribe.pdf>. Accessed on: 25 Sept. 2024.

⁵¹ SERRANO-MORENO, Juan Enrique. La retórica de la conectividad de la iniciativa de la Franja y la Ruta en América Latina. In: SAHD, Jorge (ed.). *China y América Latina: claves para el futuro*. Santiago: Centro de Estudios Internacionales Universidad Católica (CEIUC); Konrad Adenauer Stiftung, 2021. p.151-173.

dividual operations. Furthermore, these six operations exceeding US\$ 1 billion are consistent with BRI-type energy, mining, and infrastructure investments⁵².

Table 3 - Highest-Value Chinese Investments in Chile (Expressed in USD)

Project Name	Investor	Year	Sector	Amount
<i>Second acquisition of minority interest in lithium concession from SQM</i>	Chengdu Tianqi	2018	Mining	US\$ 4.07 billion
<i>Acquisition of a majority interest in Naturgy's electricity supply company</i>	State Grid	2020	Energy	US\$ 3.03 billion
<i>Construction of the first section of Line 7 of the Santiago subway system</i>	China Railway 16th Bureau Group	2021	Infrastructure	US\$ 2.50 billion
<i>Acquisition of a majority interest in the electricity transmission company Chilquinta Energía from Semptra</i>	State Grid	2019	Energy	US\$ 2.23 billion
<i>Acquisition of majority interest in Codelco's iron ore mine</i>	Shunde Rixin Development	2009	Mining	US\$ 2.10 billion

⁵² MORALES, Pablo. Inversiones chinas en Chile: principales ámbitos y desafíos. BCN, 2024. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/35904/1/Inversiones_chinas_en_Chile_principales_a_ambitos_y_desafi_os_2024.pdf. Accessed on: 9 Oct. 2024.

Project Name	Investor	Year	Sector	Amount
<i>Acquisition of a minority stake in the Trans-Andean power transmission company from Canadian Pension Plan Investment</i>	China Southern Power Grid	2018	Energy	US\$ 1.30 billion

Source: MORALES, Pablo. Inversiones chinas en Chile: Principales ámbitos y desafíos. BCN, 2024.

The previous tables show that the Chinese FDI boom in Chile began around 2015-2016, depending on the source. Chile did not receive the initial wave of Chinese capital into the Southern Cone from 2005 to 2016, which was focused on investing in natural resources such as minerals, forestry, and oil. In the case of Chile, there was already participation through the CODELCO-MINMETALS joint venture⁵³. China was not among the top FDI sources in Chile between 2012 and 2020, unlike Canada, the United States, Spain, Italy, the Netherlands, and the United Kingdom. By 2020, the accumulated investment from China was US\$1.652 billion, compared to the United States US\$35.464 billion⁵⁴. This created a paradox with Chile's theoretical position as a privileged "hub" for China in the region and the deep diplomatic ties shared for 50 years.

Chile is an interesting case study in FDI, as it has become a key destination for Chinese investments, particularly in energy transition and lithium mining, following the 2006 Free Trade Agreement. A study on Chinese FDI in Chile highlights factors such as differences in business models, lack of understanding of bureaucracy, limited knowledge of Chile among Chinese investors, and administrative barriers in China initially slowed investments. However, these intensified during a second wave in Latin America beginning in 2017⁵⁵. Chi-

⁵³ BÓRQUEZ, Andrés; MUÑOZ, Felipe; LEIVA, Diego. The growing chinese economic presence in Chile: opinions among the chilean elite. *China Review*, [s. l.], v. 23, n. 3, p. 131-154, 2023.

⁵⁴ CALVO, Sofía. *Inversión de China en Chile: análisis de IED de China en la última década*. BCN, 2022. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/32890/1/Inversion_de_China_en_Chile.pdf. Access on: 16 Jan. 2024.

⁵⁵ CABRERA, Fabiola. La inversión China en Chile y América Latina: la inversión extranjera directa como herramienta de política

nese FDI projects must receive approval from the central government and submit annual reports on overseas operations. This framework may align with the central government's short—and long-term economic development agenda and foreign policy projects such as the 2007 Ecological Civilization initiative.

Between 2003 and 2022, China's regional investments totalled US\$187.5 billion, lower than those of the U.S. or Europe but diversified across infrastructure, energy, and mining sectors. These investments address China's economic challenges by exporting its industrial overcapacity and taking advantage of complementarities with countries like Chile. The China-LAC Report by The Dialogue notes a shift in focus from raw material acquisition to industries involved in metal extraction, ICT, sustainable development, and securing resources. Investment has decreased, averaging US\$14.2 billion annually between 2010-2019, US\$7.7 billion in 2020-2021, and US\$6.4 billion in 2022. In Argentina, Peru, and Chile, extractive industries and energy generation have been vital. Argentina concentrates the most energy activity, primarily on hydroelectric and solar projects. In Peru and Chile, mining, especially copper and lithium, remains China's main focus, as critical metals and minerals are a global priority for Chinese companies. The prominent Chinese investors in these countries are significant energy, mining, and construction companies and dozens of smaller companies, including some from Chinese provinces⁵⁶.

7 Companies Case Studies

This section focuses on Sky Solar, BYD, and China Railway Construction Corporation (CRCC), which operate in solar energy, public infrastructure, and lithium. These projects could enhance Chile's productive capacity in terms of employment and technology transfer. We excluded M&A and portfolio operations because they

industrial. *BCN*, 2022. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/33499/2/Inversion_China_en_Chile_y_AL_como_poli_tica_industrial_FINAL.pdf. Accessed on: 18 Feb. 2024.

⁵⁶ MYERS, Margaret; MELGUIZO, Angel; WANG, Yifang. Nueva infraestructura emerging trends of chinese foreign direct investment in Latin America and the Caribbean. *The Dialogue*, 2024. Available at: <https://www.thedialogue.org/wp-content/uploads/2024/02/Tendencias-emergentes-de-la-inversion-extranjera-directa-de-China-en-America-Latina-y-el-Caribe.pdf>. Accessed on: 25 Sept. 2024.

do not directly impact domestic productive capacities, as seen in the cases of Tsingshan (2023), Joyvio (2012), and Jiangsu Distillery Valley (2012). Tsingshan stands out for its investment in the National Lithium Plan, Joyvio for new technologies in salmon processing, and Jiangsu for attempting to introduce the baijiu industry in Chile⁵⁷.

8 BYD

Build Your Dreams (BYD) is a manufacturing company that produces automobiles, parts, electronic assemblies, and batteries for electric vehicles. Founded in 1995, it has established more than 30 industrial parks worldwide and is one of the leading companies in electric vehicle manufacturing. It operates in three key business areas: automobiles, cellphone parts, and lithium and photovoltaic-powered batteries⁵⁸. BYD set up operations in Chile in 2014 as BYD Company Ltd. In addition to its automotive business, it gained prominence as one of the leading manufacturers of electric buses alongside Yutong, as highlighted in the China-CELAC Report No. 2. BYD is positioned as a critical player in the technological transformation of the public transportation system, promoting a more environmentally friendly model⁵⁹. In 2018, the Chilean Ministry of Transport noted that this would reduce operational and maintenance costs by up to 70% compared to conventional buses. BYD became the leading supplier of electric buses for

⁵⁷ Consult LIU, Ting. Una inversión millonaria de Tsingshan impulsa la revolución del vehículo eléctrico en Chile. *Seneca ESG*, 2023. Available at: <https://senecaesg.com/es/insights/tsingshans-multi-million-dollar-investment-powers-chiles-electric-vehicle-revolution/>. Accessed on: 23 July 2024.; CÁRDENAS, Leonardo. Joyvio, matriz de Australis, pide su reorganización en China: acreedor dice que firma no puede pagar sus deudas a tiempo. *La Tercera*, 2023. Available at: <https://www.latercera.com/pulso/noticia/joyvio-matriz-de-australis-pide-su-reorganizacion-en-china-creedor-dice-que-firma-no-puede-pagar-sus-deudas-a-tiempo/H3AAI6HM25HP7IAK2DJNBHKD2E/>. Accessed on: 25 July 2024.; JIANGSU YANGHE DISTILLERY CO. *Jiangsu Yanghe Distillery Co., Ltd. 2022 annual report*. 2023. Available at: <https://www.chinayanghe.com/uploads/2023/08/161555097929.pdf>. Accessed on: 25 July 2024.

⁵⁸ WANG, Zheng. Analysis of business strategies for the development of new energy industry: a case study of BYD Auto Company. *Advances in Economics, Management and Political Sciences*, [s. l.], v. 62, p. 264-270, 2023.

⁵⁹ RIAL. *Informe China-CELAC: avances hacia el 2021*. Santiago: Consejo de Relaciones Internacionales de America Latina, 2021. Available at: <https://chinayamericalatina.com/wp-content/uploads/2019/10/InfCELAC2.pdf>. Accessed on: 6 Dec. 2024.

the RED public bus system in the Metropolitan Region of Santiago⁶⁰.

By 2021, the fleet of electric buses had grown to around 800, one of the most significant outside of China, with BYD, Yutong, Foton, and King Long being the leading manufacturers. The initial purchase of 100 buses from BYD occurred in 2018, and subsequently, through public-private financing models, it was established that BYD Chile would manage the electric buses of the RED transport system⁶¹.

By 2022, BYD's role as a significant player became more evident with the award of one of five lithium exploitation quotas tendered by Chile, for which BYD offered US\$61 million⁶².

BYD's involvement in electric buses is complemented by its entry into the lithium processing chain in Chile. In 2022, BYD Chile obtained one of five Special Lithium Operation Contracts, with exploration and exploitation rights for 80,000 tons through 2050 for US\$61 million. Additionally, the company announced plans for a Lithium Cathode Plant in Antofagasta with a US\$290 million investment after receiving the status of specialised lithium producer from CORFO, granting it preferential access to lithium carbonate quotas and supplies from SQM Salar at preferential prices⁶³. Moreover, in 2023, the company added 10 double-decker electric buses and 146 single-decker electric buses, aiming to

reach 2,044 in the country, with BYD accounting for 45% of the total and plans to reach 2,400 vehicles⁶⁴.

In May, BYD announced delays in its lithium cathode plant due to government uncertainties regarding the operationalisation of the National Lithium Plan. In response, CORFO indicated that five potential sites had been offered for the plant and that if production began in 2025, BYD would retain its preferential contract⁶⁵.

Additionally, during Chile Week in China, President Gabriel Boric announced the inclusion of a second specialised lithium producer, Yongqing Technology Co. Ltd., with a US\$233 million investment for a lithium iron phosphate plant in Antofagasta, expected to create 668 jobs, with 90% of the workforce being Chilean. Moreover, ten professionals will be sent to China for training. BYD has transitioned from car sales to extractive industries, aiming for vertical lithium battery supply chain integration⁶⁶.

Compared to Argentina, lithium projects in Chile have been more declarative than executed due to factors such as CORFO permits, strategic considerations for setting up operations, and meeting KPIs related to energy transition and sustainable development, which companies, including Chinese ones, have had to adapt to⁶⁷.

⁶⁰ MORALES, Pablo. Inversiones chinas en Chile: principales ámbitos y desafíos. *BCN*, 2024. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/35904/1/Inversiones_chinas_en_Chile_principales_a_ambitos_y_desafios_2024.pdf. Accessed on: 9 Oct. 2024.

⁶¹ RAMÍREZ, Daniel. Impacto y evolución de la flota de buses eléctricos en Chile. *Enerlink*, 2024. Available at: <https://blog.enerlink.com/impacto-y-evolucion-de-la-flota-de-buses-electricos-en-chile>. Accessed on: 19 Dec. 2024.

⁶² PEÑA, Karen. BYD una de las ganadoras en la licitación del litio: agregamos valor a los procesos de extracción y producción. *Diario Financiero*, 2022. Available at: <https://www.df.cl/empresas/mineria/byd-una-de-las-ganadoras-en-licitacion-del-litio-agregaremos-valor->. Accessed on: 23 Aug. 2024.

⁶³ CORFO. *BYD Chile es el primer seleccionado por CORFO en el llamado para productores especializados en litio para impulsar iniciativas de valor agregado en Chile*. 2023. Available at: https://www.corfo.cl/sites/Satellite?c=C_NoticiaNacional&cid=1476735036931&d=Touch&pagename=CorfoPortalPublico%2FC_NoticiaNacional%2FCorfoDetalleNoticiaNacionalWeb. Accessed on: 12 Aug. 2024.; BROWNE, Vicente. Las cifras detrás de Tsingshan Holding, el grupo chino que construirá baterías de litio en Mejillones. *Ex Ante*, 2023. Available at: <https://www.ex-ante.cl/las-cifras-detras-de-tsingshan-holding-el-grupo-chino-que-construira-baterias-de-litio-en-mejillones/>. Accessed on: 13 Aug. 2024.

⁶⁴ MONROY, Mauricio. Conoce el ranking que tiene a Chile liderando la electromovilidad en Latinoamérica. *La Tercera*, 2023. Available at: <https://www.latercera.com/mtonline/noticia/conoce-el-ranking-que-tiene-a-chile-liderando-la-electromovilidad-en-latinoamerica/7GVXYE6M2FAFNM3GHFNC6TC73Y/>. Accessed on: 24 Aug. 2024.

⁶⁵ Review in GUILLOU, Vicente. Polémica con BYD escala: Corfo afirma que si no empieza a producir en 2025, la firma china perderá cuota asignada de litio. *La Tercera*, mayo 2024. Available at: <https://www.latercera.com/pulso/noticia/polemica-con-byd-escala-corfo-afirma-que-si-no-empieza-a-producir-en-2025-la-firma-china-perdiera-cuota-asignada-de-litio/576SWMGZRJBYPFHLQS2F7X7HY-Y4>. Accessed on: 26 Aug. 2024.; BROWNE, Vicente. La molestia de la empresa china BYD detrás de su decisión de retrasar la producción de planta de litio en Chile. *Ex Ante*, 2024. Available at: <https://www.ex-ante.cl/la-molestia-de-la-empresa-china-byd-detras-de-su-decision-de-retrasar-la-produccion-de-una-planta-de-litio-en-chile/>. Accessed on: 27 Aug. 2024.

⁶⁶ AMPUERO, Pablo. Pablo Ampuero y sus interesantes hallazgos sobre electromovilidad en Shenzhen. *BCN*, 2024. Available at: <https://www.bcn.cl/observatorio/asiapacifico/noticias/pablo-ampuero-investigacion-eletrmovilidad-shenzhen>. Accessed on: 28 Aug. 2024.

⁶⁷ CABRERA, Fabiola. Explotación del litio en Argentina, Bolivia y Chile: antecedentes económicos, régimen de explotación y la generación de recursos públicos. *BCN*, 2023. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/34111/2/Explotacion_n_del_Litio_antecedentes_para_Bolivia_Argentina

9 China Railway Construction Corporation

China Railway Construction Corporation (CRCC) is a state-owned company specialising in infrastructure projects. Its main business areas include construction, surveying, design and consulting, manufacturing, and additional activities such as logistics and real estate services. CRCC opened its commercial offices in Chile in 2017. In 2020, the company submitted the best bid for the remodelling of Route 5 South on the Talca-Chillán section, with an investment of US\$804 million, marking the first time a Chinese company won a Public-Private Partnership (PPP)⁶⁸. This infrastructure project has been classified as key under the Belt and Road Initiative (BRI) framework because it applies the Belt and Road Reinsurance Pool in cases of political violence, providing stability to such projects despite national unrest⁶⁹. At the beginning of 2022, CRCC won the tender for the new Coquimbo Hospital, which involves an investment of approximately US\$274 million to build a facility on an area of 129,000 m². The new hospital will be more than four times larger than the current one and triple the available beds. Construction is expected to begin in mid-2023 and be completed by 2027⁷⁰. In addition to this project, CRCC was awarded the construction of the Neurosurgery Institute and the hospitals of Rengo and Pichilemu⁷¹.

10 SkySolar

Sky Solar was the first Chinese investment in Chile in the renewable energy sector. Sky Solar Chile is a

subsidiary of Sky Solar Group, a private Chinese solar energy company headquartered in Hong Kong. It develops renewable energy assets as an Independent Power Producer (IPP), with global coverage and local support in North America, Latin America, Europe, Asia, and Africa. It has had a presence in Chile for three years. In 2013, it signed a framework agreement with Sigdo Koppers and China Development Bank to construct several solar photovoltaic power plants with a capacity of 300 MW, which will be developed in multiple stages⁷².

Sky Solar has followed an investment strategy supported by lobbyists who accompany them in presentations to Congress. According to its Executive Director for Latin America, Hong Chen, the high energy demand and Chile's legal stability justify its presence in the country with projects that do not rely on subsidies⁷³.

In 2016, Sky Solar obtained a concession for developing non-conventional renewable energy (NCRE) projects in Atacama⁷⁴. In 2018, Sky Solar acquired the Silva Solar photovoltaic plant for US\$150,000. With Eactiva, it agreed to build a solar park in O'Higgins, with a total investment of US\$5 million. This project could include three photovoltaic plants acquired in 2017 from the Italian company Renegergetica, totalling 24 MW in Small Distributed Generation projects⁷⁵.

Sky Solar Holding received large loans from the China Development Bank for its renewable energy investments in 2012, with a credit of US\$1.6 billion divided among several solar project initiatives in Chile and another loan of US\$900 million for Sky Solar Chile's operations that same year. Then, in 2021, they received a US\$120 million loan for the Arica Solar project,

Peru_y_Chile_FINAL.pdf. Accessed on: 2 May 2024.

⁶⁸ WU, Lunting. *Belt and Road initiative in South America: explaining the varying responses*. Londres: Palgrave Macmillan, 2024.

⁶⁹ XINHUA NEWS. 中国“一带一路”再保险共同体为智利5号公路提供政治暴力险保障. 2021. Available at: <https://www.cnfn.com/news-xh08/a/20210429/1985030.shtml>. Accessed on: 10 Mar. 2024.

⁷⁰ INVESTCHILE. *Casos de éxito: China railway*. 2024. Available at: <https://www.investchile.gob.cl/es/casos-de-exito/crcc/>. Accessed on: 06 Nov. 2024.

⁷¹ CÁRDENAS, Leonardo. Desde la minería a la salud: el intenso lobby de empresas chinas en Chile durante marzo. *La Tercera*, 2024. Available at: <https://www.latercera.com/pulso-pm/noticia/desde-la-mineria-a-la-salud-el-intenso-lobby-de-empresas-chinas-en-chile-durante-marzo/5XFJ2ALV2ZHXFDCN4HLZ7BS2NY/>. Accessed on: 6 Nov. 2024.

⁷² FIRMA china Skysolar invertirá US\$900 millones en Chile para proyectos energéticos. *Diario Financiero*, jun. 2013. Available at: <https://www.df.cl/empresas/energia/firma-china-sky-solar-invertira-us-900-millones-en-chile-para-proyectos>. Accessed on: 10 Nov. 2024.

⁷³ SKY solar y su experiencia invirtiendo en Chile. *Observatorio Parlamentario*, enero, 2013. Available at: <https://www.bcn.cl/observatorio/asiapacifico/noticias/sky-solar-experiencia-en-chile>. Accessed on: 11 Nov. 2024.

⁷⁴ CHILE. Ministerio de Bienes Nacionales de Chile. *Autoriza nuevo plazo para suscribir escritura pública de concesión onerosa de inmueble fiscal en la región de Atacama, a "Sky Solar Chile Limitada"*. Santiago, 2016. Available at: <https://www.bcn.cl/leychile/navegar?idNorma=1091147>. Accessed on: 2 Dec. 2024.

⁷⁵ SKY Solar Chile adquiere la planta fotovoltaica Silva-Sola. *DLA Piper*, oct. 2018. Available at: <https://www.dlapiper.cl/2018/10/10/sky-solar-chile-adquiere-la-planta-fotovoltaica-silva-solar/>. Accessed on: 3 Dec. 2024.

and the Chinese Fund contributed US\$13.9 million to the same project⁷⁶. However, upon reviewing China's Global Power Database, I found that this project was no longer under construction, unlike other solar energy projects currently in operation, planning, or construction by China Three Gorges Corporation and State Power Investment⁷⁷. The only recent follow-up document is the 2016 Environmental Supervision Report from the Environmental Superintendency, which noted that the project had not yet begun construction⁷⁸. For this reason, its impact on job creation or technology transfer has not been recorded. Still, it is representative of the projects funded by Chinese entities in Chile, for which little information is available. Moreover, the first large solar power plant in Arica is reported to be owned by the Spanish company Grenergy, meaning Sky Solar's project did not materialise⁷⁹.

11 Employment

Chinese OFDI in Chile generated 10,721 jobs between 2000 and 2017 and 5,226 jobs between 2020 and 2023, one of the lowest figures compared to countries like Mexico, Colombia, Brazil, Argentina, and Peru. According to a 2018 ILO report, trade with China created 93,280 net jobs in Chile between 1995 and 2011, mainly in mining, trade, and transportation. Due to Chinese imports, job losses were concentrated in textiles, footwear, trade, and computers. Regarding employment created by OFDI, this report is based on the same data from the Monitor of Chinese Investments, and the updated 2024 report indicates 25,400 jobs created by Chinese investments in Chile.

⁷⁶ SEEGER, Maia. *China en Chile: inversiones, transparencia y gobernanza socioambiental*. Santiago: Sustentarse ONG, 2024. Available at: https://sustentarse.cl/images/China_en_Chile_Inversiones_transparencia_y_gobernanza_socioambiental.pdf. Accessed on: 14 Nov. 2024.

⁷⁷ Consult CHINAL GLOBAL POWER DATABASE. Available at: <https://www.bu.edu/cgp/>.

⁷⁸ PASTORE, Claudia; ROJO, Cristián. *Informe de fiscalización ambiental: inspección ambiental Planta Fotovoltaica Arica II María José DFZ-2016-885-XV-RCA-IA*. Santiago: Superintendencia del Medio Ambiente, 2016. Available at: <https://snifa.sma.gob.cl/v2/General/Descargar/1104010575>. Accessed on: 12 Dec. 2024.

⁷⁹ MENA, Carolina. Un hito para Arica y Parinacota: primera planta solar ya es un realidad en la región. *El Morrocotudo*, mayo 2023. Available at: <https://www.elmorrocotudo.cl/noticia/economia/un-hito-para-arica-y-parinacota-primera-planta-solar-ya-es-un-realidad-en-la-region>. Accessed on: 18 Aug. 2024.

No official figure details the total number of jobs created by Chinese companies in Chile. Recent announcements are still in the implementation phase, meaning these jobs must be created. Announcements such as Tsingshan Holding Group's plan to generate 700 jobs in Antofagasta and BYD's goal of creating 668 jobs with 90% Chilean workers This has led to criticism from parliamentarians, who point to excessive bureaucracy in these large projects, which could discourage Chinese investment and lead it to relocate to other countries in the region⁸⁰.

As for Sky Solar, despite more than ten years of operations in Chile, there are no specific data on the employment generated, which raises an issue in recording the impact of COFDI in this regard. On the other hand, China Railway Construction created an average of 350 jobs per month during the remodelling of Route 5 South in the Talca-Chillán section and expects to generate 500 jobs per month by 2027. Its other projects, such as the construction of Line 7 of the Santiago Metro, also generate employment, although exact figures are not reported⁸¹.

The project aims to create 500 direct and indirect jobs and develop a technology training plan for local workers in northern Chile. This plan includes sending 50 people to China for two months of training, with the goal of promoting medium-term technology transfer through R&D initiatives⁸².

12 Technology Transfer

Since COFDI is a relatively recent phenomenon, technology transfer is reflected in public-private cooperation through memorandums of understanding (see

⁸⁰ REYES, Verónica. BYD tiene detenido su proyecto de litio en Chile: diputados critican al gobierno y apuntan a Grau. *Radio Cooperativa*, 2024. Available at: <https://www.biobiochile.cl/noticias/economia/negocios-y-empresas/2024/05/20/byd-tiene-detenido-su-proyecto-de-litio-en-chile-diputados-critican-al-gobierno-y-apuntan-a-grau.shtml>. Accessed on: 12 Dec. 2024.

⁸¹ INVESTCHILE. *Casos de éxito: China railway*. 2024. Available at: <https://www.investchile.gob.cl/es/casos-de-exito/crc/>. Accessed on: 06 Nov. 2024.

⁸² CORFO. *BYD Chile es el primer seleccionado por CORFO en el llamado para productores especializados en litio para impulsar iniciativas de valor agregado en Chile*. 2023. Available at: https://www.corfo.cl/sites/Satellite?c=C_NoticiaNacional&cid=1476735036931&d=Touch&pagename=CorfoPortalPublico%2FC_NoticiaNacional%2FCorfoDetalleNoticiaNacionalWeb. Accessed on: 12 Aug. 2024.

Table 4) and joint projects, particularly with Huawei, the leading player in technology transfer in IT⁸³. This telecommunications company has led key digitalisation milestones such as launching Latin America’s first public cloud, constructing the Southern Austral Submarine Fiber Optic Cable (FOA) to bring 5G to the southernmost regions of Chile, and inaugurating two data centres, one in 2019, the second in 2021, and announcing a third in 2022⁸⁴.

Table 4 - Main instruments signed by S&T cooperation areas between China and Chile (2010-2024)

Areas	Agreements
Astronomy	<p>Establishment of the South American Astronomy Center of the Chinese Academy of Sciences - CASSACA (2013).</p> <p>Inauguration of astronomy data centre between CASSACA, Huawei Chile and Universidad Técnica Federico Santa María (2015).</p> <p>Agreement to build China’s first astronomy centre in Latin America - Cerro Ventarrones (2016)</p> <p>Establishment of CAS-CONICYT Chile-China Fund in Astronomy (2015-2018)</p>
Geology	<p>Signing of Memorandum of Understanding for the exchange of knowledge and scientific and technical capabilities in geological matters between SERNAGEOMIN and the China Geological Survey (CGS) (2022)</p>
Maritime	<p>Agreement on the transport of fruit goods from Chile to China through third countries by sea (2017).</p>

Areas	Agreements
Antarctica	<p>Memorandum of Understanding between the Chilean Antarctic Institute (INACH) and the China Polar Research Institute (2010)</p> <p>Memorandum of Understanding between INACH and the First Institute of Oceanography of China (FIO) for joint scientific research in Antarctica (2018)</p> <p>Memorandum of Understanding between the Republic of Chile and the Government of the People’s Republic of China on Antarctic Cooperation (2018 - 2022)</p>
Telecommunications	<p>Memorandum of cooperation and technology transfer and consulting in information and communications technology (ICT) matters between the Undersecretariat of Telecommunications and Huawei (2016).</p>

Source: MORALES, Pablo. Cooperación científica e intercambio experiencias: Chile-China. *BCN*, 2024.

Technology transfer in Chile has focused on developing Advanced Human Capital (AHC). Examples include the “Mineduc-Huawei Scholarships” program, which will allow ten students to travel to China for training in artificial intelligence. BYD will send 50 professionals to China for two months for training in lithium cathodes, and R&D. Tsingshan, in its investment announcement, also committed to sending 10 Chilean professionals annually to China to support the national lithium strategy⁸⁵. Tianqi Lithium was the first to send 20 young professionals to Chengdu to train in energy transition and electromobility to support the National Lithium Plan. However, the impact has been limited to the travel itself, though strategies are being considered to reinforce and follow up on such programs⁸⁶.

Recent technology transfer initiatives include projects by China Railway Construction Corporation (CRCC), where, for the first time in Chile’s subway his-

⁸³ MORALES, Pablo. Cooperación científica e intercambio experiencias: Chile-China. *BCN*, 2023. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/36180/1/Cooperacio_n_cienti_fica_e_intercambio_experiencias_Chile_China.pdf. Accessed on: 16 Dec. 2024.

⁸⁴ REYES REYES, Valentina. Gigante chino Huawei confirma instalación de tercer data center en Chile: estaría operativo en 2023. *Bio-Bio Chile*, 2022. Available at: <https://www.biobiochile.cl/noticias/economia/negocios-y-empresas/2022/09/21/el-gigante-chino-huawei-anuncia-que-nuevamente-eligio-a-chile-para-instalar-un-data-center.shtml>. Accessed on: 16 Dec. 2024.

⁸⁵ CHILE. Ministerio de Economía, Fomento y Turismo. *Gobierno anuncia en China segunda empresa seleccionada como productor especializado de litio*. Santiago, 2023. Available at: <https://www.economia.gob.cl/2023/10/16/gobierno-anuncia-en-china-segunda-empresa-seleccionada-como-productor-especializado-de-litio.htm>. Accessed on: 18 Dec. 2024.

⁸⁶ ARANEDA, Hernán. Movilidad de talento, clave para la innovación y transferencia de tecnología. *Radio Cooperativa*, 2024. Available at: <https://cooperativa.cl/noticias/corporativo/efecto-china/efecto-china-opinion/movilidad-de-talento-clave-para-la-innovacion-y-transferencia-de/2024-02-23/154029.html?efectochina?efectochina>. Access on: 19 Apr. 2024.

tory, a Tunnel Boring Machine (TBM) was used to excavate 6.6 kilometers of the future Line 7 of the subway. This project is being carried out by the China Railway 16th Bureau Group Co consortium, led by CRCC, along with the participation of China Railway Tunnel Group (CRTG), which won a new tender for the six sections of Metro's Line 7, with an investment of US\$2.528 billion⁸⁷.

These milestones mark the beginning of China's plans in Chile, especially in the Energy, Mining, and Infrastructure sectors. According to the report *Chile Creates Future: Asia and China* by CTCI, it is estimated that Latin America and the Caribbean will need US\$300 billion annually in infrastructure between 2019 and 2029. This positions China as a critical player in tenders and concessions for infrastructure projects such as bridges, railways, ports, and urban transport, aligned with the BRI's vision of connectivity as a development driver⁸⁸. This has been promoted through maritime, air, and digital connectivity⁸⁹.

Many projects, such as bi-oceanic corridors, ports, electric bus manufacturing (BYD), vaccine centers (Sinovac), road infrastructure, trains, electric distribution (State Grid), and digital connectivity, have been announced at the China-CELAC forum⁹⁰. Technological cooperation is evident in investment and researcher exchange, especially with Huawei. However, there is still potential to strengthen ties in technology transfer in areas such as agriculture, astronomy, and disaster prevention⁹¹.

⁸⁷ SEEGER, Maia. *China en Chile: inversiones, transparencia y gobernanza socioambiental*. Santiago: Sustentarse ONG, 2024. Available at: https://sustentarse.cl/images/China_en_Chile_Inversiones_transparencia_y_gobernanza_socioambiental.pdf. Accessed on: 9 Aug. 2024.

⁸⁸ ARAYA, Ignacio. *Chile crea futuro: Asia y China: consideraciones para los escenarios de futuro*. Santiago: CTCI, 2023. Available at: <https://docs.consejoctci.cl/wp-content/uploads/2023/03/FINAL-Informe-Asia-y-China.pdf>. Accessed on: 10 Aug. 2024.

⁸⁹ GRUPO DE MEDIOS DE CHINA. La franja y la ruta: el mega proyecto de infraestructura que impulsa China del cual Chile forma parte. *La Tercera*, enero 2020. Available at: <https://www.latercera.com/conexion-china/noticia/la-franja-la-ruta-mega-proyecto-infraestructura-impulsa-china-del-chile-forma-parte/956856/>. Accessed on: 7 Jan. 2024.

⁹⁰ RIAL. *Informe China-CELAC: avances hacia el 2021*. Santiago: Consejo de Relaciones Internacionales de America Latina, 2021. Available at: <https://chinayamericalatina.com/wp-content/uploads/2019/10/InfCELAC2.pdf>. Accessed on: 6 Dec. 2024.

⁹¹ ENTREVISTA: intercambio de investigadores e inversión entre China y Chile es una relación "consolidada", afirma ministra chilena. *Xinbua Español*, jun. 2024. Available at: <https://spanish.xinhuanet.com/20240606/7fde9dca9ac241d7bf79272b7f84a79d/c.html>. Accessed on: 6 Dec. 2024.

13 Domestic Political Effects

M&A operations led by Chinese companies have grown exponentially over the last five years, with investments from 2016 to 2021 being ten times larger than those made between 2010 and 2015. While other countries tend to focus on services, China is investing heavily in the energy sector, raising concerns about Chile's energy sovereignty. Although Chinese foreign direct investment (FDI) remains relatively small, its media influence is significant. It prompts academic analyses on whether Chile is prepared to meet China's demands and effectively regulate its companies' operations⁹².

The debate around M&A in Chile focuses on foreign control of strategic sectors, which is common in the country's subsidiary model. The National Economic Prosecutor's Office (FNE) has intervened in cases like the purchase of CGE by State Grid, which was noted for increasing China's energy dependence, and the purchase of 25% of SQM by Tianqi, where the FNE imposed limits to avoid monopolies in the lithium industry⁹³.

Chilean economic administrative law does not restrict competition to protect strategic sectors or national security, keeping the debate open. Unlike tenders, Chinese acquisitions are evaluated for their impact on communities, regional development, and the environment. This has caused delays and uncertainty in current projects, without significant changes in domestic policy but with attention to the impact on the economic ecosystem, such as in the case of copper.

14 Conclusion

The analysis of Chinese FDI in Chile reveals a landscape of moderate growth, with progress in strategic sectors such as energy, infrastructure, and mining, but

[xinhuanet.com/20240606/7fde9dca9ac241d7bf79272b7f84a79d/c.html](https://www.xinhuanet.com/20240606/7fde9dca9ac241d7bf79272b7f84a79d/c.html). Accessed on: 6 Dec. 2024.

⁹² OECD. *Examen de la calidad de la Inversión Extranjera Directa (IED) en Chile*. 2024. Available at: https://www.oecd.org/es/publications/examen-de-la-calidad-de-la-inversion-extranjera-directa-ied-en-chile_86336809-es.html. Accessed on: 6 Dec. 2024.

⁹³ FNE. *Acuerdo extrajudicial entre la Fiscalía Nacional Económica y Tianqi Lithium Corporation*. 2018. Available at: <https://www.fne.gob.cl/wp-content/uploads/2018/09/Acuerdo-Extrajudicial-FNE-Tianqi-con-firma-27.08.18.pdf>. Accessed on: 6 Dec. 2024.

with limited impacts on employment and technology transfer. Despite favourable diplomatic discourse and strengthened economic integration through agreements such as the FTA and the Belt and Road Initiative, Chinese investment remains marginal compared to other global actors and faces regulatory and legal and bureaucratic barriers in Chile.

While some projects have generated jobs and promoted the adoption of new technologies, most positions created are low-skilled, and learning processes between Chinese and Chilean companies remain incipient. Politically, Chinese investment has sparked debate, particularly in strategic sectors such as energy and lithium, without leading to significant changes in regulation or Chile's stance toward China.

The three case studies analysed—Sky Solar, BYD, and China Railway Construction Corporation (CRCC)—illustrate different trajectories of Chinese investment in Chile. Sky Solar was the first Chinese investment in the renewable energy sector, but its impact on job creation and technology transfer has been minimal, with some projects facing delays. BYD has played a key role in the electrification of public transportation in Santiago and has expanded into lithium processing, though uncertainty regarding the National Lithium Plan has hindered progress. CRCC has established itself in Chile's infrastructure sector, winning public contracts for major projects such as highway remodelling and hospital construction, introducing new construction technologies and generating employment, though its long-term impact remains to be fully assessed.

In a context of increasing geopolitical competition between the United States and China, Chile must decide whether to deepen its integration with China through active investment attraction policies or maintain a more cautious and regulated approach. The central question remains: Can Chile capture greater benefits from Chinese investment without compromising its economic and political autonomy? The future of this relationship will depend both on the strategies of Chinese investors and on the Chilean state's ability to formulate policies that maximise benefits while minimising the externalities of this growing but still incipient economic presence.

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Conceptual principles of stimulating the attraction of investments in reconstruction projects of Ukraine*

Princípios conceituais para estimular a atração de investimentos em projetos de reconstrução da Ucrânia

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Abstract

The article's purpose is to develop the conceptual basis for the formation of a complex investment mechanism combining legal, economic, and organizational investment stimulation tools for the reconstruction of Ukraine in the post-war period. Methods: system-structural, logical, dialectical, and dogmatic methods of scientific knowledge were applied, which enabled a thorough study of the regulatory framework, theoretical concepts, and empirical data in the field of investment activity regulation. Conclusions: the need for a comprehensive approach to stimulating investment in the post-war period through the simultaneous application of legal, economic, and organizational mechanisms on the basis of the formation of a favorable investment climate is indicated. The importance of priority stimulation of investments in the restoration of certain sectors of the economy and affected regions, balanced attraction of foreign capital and support of domestic economic entities, and stimulation of "green" and innovative investments for sustainable development was emphasized. The expediency of decentralization of powers in the field of investment policy, activation of international cooperation, and formation of a positive image of Ukraine as an investment-attractive state is substantiated. Originality or value: complex conceptual frameworks were defined to stimulate the attraction of investments in reconstruction projects in Ukraine after the war, considering the scale of infrastructure destruction. Specific mechanisms and principles that must be applied to ensure effective investment and recovery of the economy are proposed.

Keywords: investment; post-war reconstruction; investment promotion; investment climate; stimulating legal regime of business; commercial mediation.

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Resumo

O objetivo do artigo: desenvolver a base conceptual para a formação de um mecanismo de investimento complexo que combine ferramentas jurídicas, económicas e organizacionais de estimulação do investimento para a reconstrução da Ucrânia no período pós-guerra. Método: foram aplicados métodos sistema-estruturais, lógicos, dialéticos e dogmáticos de conhecimento científico, que permitiram um estudo aprofundado do quadro regulamentar, dos conceitos teóricos e dos dados empíricos no domínio da regulação da atividade de investimento. Conclusões: é indicada a necessidade de uma abordagem abrangente para estimular o investimento no período pós-guerra através da aplicação simultânea de mecanismos legais, económicos e organizacionais com base na formação de um clima de investimento favorável. Foi enfatizada a importância do estímulo prioritário de investimentos na restauração de determinados setores da economia e regiões afetadas, da atração equilibrada de capital estrangeiro e do apoio às entidades económicas nacionais, bem como do estímulo a investimentos “verdes” e inovadores para o desenvolvimento sustentável. A oportunidade de descentralização de poderes no domínio da política de investimento, a ativação da cooperação internacional e a formação de uma imagem positiva da Ucrânia como um Estado atraente para o investimento é fundamentada. Originalidade ou valor: foram definidos quadros conceptuais complexos para estimular a atração de investimentos em projetos de reconstrução da Ucrânia após a guerra, tendo em conta a escala da destruição de infra-estruturas. São propostos mecanismos e princípios específicos que devem ser aplicados para garantir o investimento eficaz e a recuperação da economia.

Palavras-chave: investimento; reconstrução pós-guerra; promoção de investimentos; clima de investimento; estímulo ao regime jurídico dos negócios; mediação comercial.

1 Introduction

Russia's military aggression against Ukraine dealt a devastating blow to the country's civilian infrastructure, energy sector, and production capacity. The large-scale destruction of residential buildings, schools, hospitals,

roads, bridges, power plants, and other critically important objects created an unprecedented situation that required the involvement of colossal investment resources for the reconstruction of the state. Restoring the destroyed infrastructure, reviving the economy, and ensuring sustainable development are among the biggest challenges that Ukraine has faced during its years of independence. That is why the development of effective conceptual frameworks for stimulating the attraction of investments in reconstruction projects acquires considerable relevance and significance.

The data presented by the Kyiv School of Economics (KSE) testify to the large-scale damage caused to the infrastructure of Ukraine as a result of the military aggression of the Russian Federation. As of January 2024, the amount of direct damage has reached almost 155 billion US dollars, including the destruction caused by the explosion of the Kakhovska Hydro Power Plant in June 2023. According to experts, the country's housing stock suffered the greatest destruction - more than 250,000 buildings were damaged or destroyed, including 222,000 private houses, more than 27,000 apartment buildings, and 526 dormitories. Direct damage to the housing stock is estimated at \$58.9 billion¹.

The energy infrastructure was also significantly affected, as about 50% of its facilities were hit by Russian shelling. The total amount of losses in the specified sector is \$12.5 billion US, and only during the two weeks from April 23 to May 7, 2024, losses to Ukraine's energy system exceeded \$1 billion US².

The Ukrainian agro-industrial complex suffered serious losses of \$8.7 billion US. In addition, significant losses were recorded in the areas of housing and communal services, \$4.5 billion US, and health care, \$3.1 billion US, which is \$1.4 billion more than at the beginning of the year³.

¹ THE TOTAL amount of damage caused to the infrastructure of Ukraine has increased to almost \$155 billion — KSE Institute estimate as of January 2024. *Київська школа економіки*, 12 fev. 2024. Available at: <https://kse.ua/ua/about-the-school/news/zagalna-suma-zbitkiv-zavdana-infrastrukturui-ukrayini-zroslo-do-mayzhe-155-mlrd-otsinka-kse-institute-stanom-na-sichen-2024-roku/>. Access on: 16 May 2024.

² BOIARCHUK, Tetiana. Russia caused almost 155 billion dollars worth of damage to Ukraine's infrastructure. *LB.ua*, 12 fev. 2024. Available at: https://lb.ua/society/2024/02/12/598044_rosiya_zavdala_zbitkiv.html. Access on: 16 May 2024.

³ THE TOTAL amount of damage caused to the infrastructure of Ukraine has increased to almost \$155 billion — KSE Institute estimate as of January 2024. *Київська школа економіки*, 12 fev. 2024.

According to estimates by the UN Development Program and the World Bank, as of April 2023, the damage caused to Ukraine's energy, gas, and heat infrastructure exceeded \$10 billion US⁴.

The above statistics show the catastrophic consequences of military aggression on Ukrainian infrastructure and the urgent need to attract significant investment resources for its restoration. Therefore, determining the conceptual basis for stimulating investment in post-war reconstruction projects in Ukraine is extremely important to ensure the effective implementation of the mentioned process.

2 Results and discussion

Investment activity in Ukraine is based on an extensive system of normative legal acts, the foundation of which is Law of Ukraine No. 1560-XII "On Investment Activity" dated September 18, 1991⁵. This law defines the general framework of the investment process in the country, establishing economic, legal, and social foundations for investors, as well as guaranteeing the protection of their rights. In addition, a number of other legislative and by-laws regulate specific aspects of attracting, stimulating, and protecting investments. However, in view of the large-scale destruction caused by the war and the challenges associated with the reconstruction of the country, the existing legal framework needs a thorough review and adaptation to new realities.

According to Art. 1 of the Law, investments are considered to be all types of property and intellectual values that are invested in objects of business and other types of activity with the aim of obtaining profit or

achieving a social and environmental effect⁶. This wording indicates the target orientation of investment activity, which consists in expecting a certain positive result from the investment of funds or other resources.

In addition to the above, a number of other legislative and by-laws regulate specific aspects of attracting, stimulating and protecting investments. However, in view of the large-scale destruction caused by the war and the challenges associated with the reconstruction of the country, the existing legal framework needs a thorough review and adaptation to new realities.

John Maynard Keynes considered investment as a key element of economic growth and development. According to his definition, investments are a part of accumulated income aimed at accumulating capital and increasing the stock of resources, that is, the formation of potential investment demand. In addition, the scientist interpreted investment as a current increase in the value of capital assets created as a result of production activities during a certain period⁷.

At the international level, investment activities are regulated by a number of important regulatory and legal acts, among which the Seoul Convention on the Establishment of the Multilateral Investment Guarantee Agency (1985)⁸, which lays the foundations for protecting investors' rights and promoting international investment flows. In addition, mention should be made of the Agreement on Trade-Related Investment Measures (1994)⁹ within the framework of the World Trade Organization, which establishes certain standards and rules for member countries in the field of investment policy.

Available at: <https://kse.ua/ua/about-the-school/news/zagalna-suma-zbitkiv-zavdana-infrastrukturi-ukrayini-zrosla-do-mayzhe-155-mlrd-otsinka-kse-institute-stanom-na-sichen-2024-roku/>. Access on: 16 May 2024.

⁴ САМУСЬ, Юлія. The damage caused to the energy, gas and heat infrastructure of Ukraine exceeds 10 billion US dollars, according to the results of a new joint assessment of the United Nations Development Program and the World Bank. *Організація Об'єднаних Націй в Україні*, 05 abr. 2023. Available at: <https://ukraine.un.org/uk/226425-zbitki-zavdani-energetichnij-gazovij-ta-teplovij-infrastrukturi-ukrayini-perevnitsyuyot-10>. Access on: 16 May 2024.

⁵ UKRAINE. The Verkhovna Rada of Ukraine. *Law of Ukraine No.1560-XII on September 18, 1991*. About investment activity. Available at: <https://zakon.rada.gov.ua/laws/show/1560-12#Text>. Access on: 16 May 2024.

⁶ UKRAINE. The Verkhovna Rada of Ukraine. *Law of Ukraine No.1560-XII on September 18, 1991*. About investment activity. Available at: <https://zakon.rada.gov.ua/laws/show/1560-12#Text>. Access on: 16 May 2024.

⁷ KEYNES, John Maynard. *The General Theory of Employment, Interest, and Money*. New York: Macmillan Cambridge University Press, 1935. *Electronic book*. Available at: <https://www.marxists.org/reference/subject/economics/keynes/general-theory/>. Access on: 19 May 2024.

⁸ THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT. *Convention of the International Bank for Reconstruction and Development No.26012, on October 11, 1985*. Seoul Convention of 1985 on the establishment of a multilateral investment guarantee agency. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201508/volume-1508-I-26012-English.pdf>. Access on: 16 May 2024.

⁹ WORLD TRADE ORGANIZATION. *Agreement of the World Trade Organization on April 15, 1994*. Agreement on trade-related investment measures. Available at: https://zakon.rada.gov.ua/laws/show/981_009#Text. Access on: 16 May 2024.

From a theoretical and legal point of view, investing can be characterized as a purposeful activity associated with the investment of resources (material, financial, intellectual) with the aim of obtaining a certain economic or social effect in the future. Such activity involves spending available funds or assets in the current period to achieve expected benefits in the long term.

In our opinion, the key features of investment activity are targeted nature, long time period, riskiness, and expectation of a positive effect. Targeted nature is when investing is carried out with a clearly defined goal, such as making a profit, expanding production, introducing innovations, creating social infrastructure, etc. A long period of time means that the investment process is usually designed for the medium or long term, as it involves the implementation of projects and the receipt and reinvestment of income during a certain period. Riskiness is an integral part of investment activity because it is always associated with risks that may arise due to the uncertainty of the market situation, political and economic instability, technological changes, etc. The expectation of a positive effect is the main driving force of investing since the specified activity is aimed at obtaining a certain economic or social effect, which can be expressed in the form of profit, an increase in the value of assets, the creation of new infrastructure, an increase in the standard of living of the population, etc.

It should be added that the theoretical and legal characteristics of investing are based on a clear distinction between the concepts of “investment” and “investment activity”. According to the definitions established in Art. 1 and Art. 2 of the Law of Ukraine “On Investment Activities”, investments should be interpreted as resources invested in investment objects, while investment activities cover the entire range of activities related to the attraction, placement and use of investment funds. The objects of investment activities can be various types of property, in particular, fixed assets, working capital in various sectors of the economy, securities (except promissory notes), targeted cash deposits, scientific and technical products, intellectual property, and other property objects, as well as property rights. Subjects (investors and participants) of investment activities can be citizens and legal entities of Ukraine and foreign countries, as well as the state¹⁰.

¹⁰ UKRAINE. The Verkhovna Rada of Ukraine. *Law of Ukraine No.1560-XII on September 18, 1991*. About investment activity. Avail-

able at: <https://zakon.rada.gov.ua/laws/show/1560-12#Text>. Access on: 16 May 2024.

According to Vasila Usmanova, among the key criteria that are taken into account when making investment decisions are the availability of natural resources, the scale of the national market, the geographical location of the state, the level of its economic development, cultural and economic environment, as well as specific components of the government’s economic policy are of particular importance such as trade, industrial, budget, and tax policy¹¹. In other words, the researcher emphasized the determining role of the country’s general economic policy in shaping its investment attractiveness and ability to attract investment flows.

Summarizing different approaches to the definition of the concept of “investment”, A. Kukhta notes that the main purpose of investing in an enterprise is to ensure various forms of its development and capital accumulation. At the same time, the category “investment activity” should be considered from the point of view of the expectations of interested parties regarding favorable economic development and long-term growth of the enterprise’s value¹². The specified approach allows for a deeper understanding of the economic nature of investment activity and distinguishes it from other types of economic operations.

Activating investment activity in Ukraine, especially in the conditions of post-war reconstruction, is an urgent need and a strategic task of primary importance. Achieving this goal requires the formation of a favorable investment climate based on the principles of investor rights protection, predictability and transparency of regulatory policy, and reliable guarantees for investment.

Attracting foreign investment plays a critical role in the country’s post-war recovery and economic growth. Among the key investment stimulation mechanisms, the introduction of effective investment protection tools, in particular investment risk insurance, occupies an important place. An example of such a mechanism is cooperation with the Multilateral Investment Guarantee Agency

able at: <https://zakon.rada.gov.ua/laws/show/1560-12#Text>. Access on: 16 May 2024.

¹¹ USMANOVA, Vasila. Increasing investment attractiveness in the development of the national economy. *International Journal of Advance Scientific Research*, v. 05, n. 3, p. 131-138, 2023. Available at: <https://doi.org/10.37547/ijasr-03-05-21>. Access on: 16 May 2024.

¹² KUKHTA, Pavlo. Interpretation of the concept of “investment”: classic and modern approaches. *Bulletin of Taras Shevchenko Kyiv National University*, n. 121-122, p. 29-33, 2011. Available at: http://bulletin-econom.univ.kiev.ua/wp-content/uploads/2016/01/121_8.pdf. Access on: 16 May 2024.

(MIGA)¹³, which is part of the World Bank Group and offers non-commercial risk insurance for foreign direct investment in developing countries. Ukraine's interaction with MIGA began in the 1990s but gained special relevance after the start of full-scale Russian aggression in 2022. MIGA, using the Trust Fund to Support the Reconstruction and Economy of Ukraine (SURE), began providing guarantees to protect investments against war losses. In particular, the guarantee for the German bank holding ProCredit was increased from 17.1 to 40.85 million euros¹⁴.

The Law of Ukraine No. 93/96-VR "On the regime of foreign investment", dated March 19, 1996, provides several guarantees for foreign investors, including unhindered and immediate transfer abroad of profits, income, and other funds; compensation for damages caused by state bodies' actions; guarantees in the event of a change in legislation; and return of investments in case of termination of activity¹⁵.

In addition to the aforementioned guarantees, the government also applies a number of fiscal and regulatory tools to stimulate investment activity under martial law. M. Skoryk singles out the following among such tools: reduction of tax rates, in particular corporate income tax, which allows enterprises to save more funds for investments and business expansion; investment allowances and credits that provide enterprises with additional financial resources for investing in production, technology and development; tax holidays, which make it possible to temporarily suspend the payment of certain taxes in order to preserve capital in difficult economic conditions; temporary mitigation or removal of liability for violation of tax legislation to avoid additional financial difficulties; provision of social benefits to enterprises that provide social programs for employees or promote social development; concessions on land taxation to support the agricultural sector and preserve agricultural enterprises; a simplified reporting

and accounting system to reduce bureaucratic procedures; changes in capital taxation to stimulate investment attraction and business development¹⁶. The application of these tools is aimed at preserving the economic stability and competitiveness of enterprises in war conditions, contributing to the support of business and stimulating its development.

Creating a favorable institutional environment is a determining factor in stimulating investment activity in the country. The report "A New Ukraine: Fostering Investments in Freedom, Peace, and Prosperity", developed by the United States Agency for International Development (USAID), the U.S. Department of Commerce, and the American Chamber of Commerce in Ukraine, emphasizes the critical role of institutional strengthening in fostering investment. In particular, it emphasizes the importance of strengthening the role of the "UkraineInvest" Investment Promotion Agency by clearly defining its powers and objectives, improving interaction with the private sector, as well as increasing the budget, staffing, and level of professional competencies of employees for the effective promotion of Ukraine's investment opportunities. In addition, in order to attract foreign direct investment, it is necessary to create a competitive business environment, reduce the cost of doing business by reducing transaction costs, eliminate bureaucratic obstacles, and create a favorable regulatory environment¹⁷.

However, in our opinion, in order to increase Ukraine's investment attractiveness and create a favorable investment climate, it is advisable to consider the possibility of introducing additional guarantees for foreign investors, in particular, guarantees of protection against political risks, such as revolutions, uprisings, civil unrest, etc.; guarantees of compensation for damages caused as a result of terrorist acts, sabotage or military actions; guarantees of unhindered access to court and arbitration procedures for the resolution of investment disputes; guarantees regarding the provision of intellectual property rights and protection against

¹³ WORLD BANK GROUP. *Multilateral Investment Guarantee Agency*. Available at: <https://www.miga.org/>. Access on: 16 May 2024.

¹⁴ UKRAINE. *Umiga began to provide guarantees for the insurance of war risks from the Trust Fund for the Support of the Reconstruction and Economy of Ukraine*. Available at: <https://www.me.gov.ua/News/Detail?lang=uk-UA&id=538e0c4a-8c1a-4be9-97e6-ed4c0ef-b13d0&title=MigaPochalaNadavati>. Access on: 16 May 2024.

¹⁵ UKRAINE. The Verkhovna Rada of Ukraine. Law of Ukraine No.93/96-BP, on March 19, 1996. On the foreign investment regime. Available at: <https://zakon.rada.gov.ua/laws/show/93/96-bp#Text>. Access on: 16 May 2024.

¹⁶ SKORYK, Maryna; BRUKHAL, Vladyslav. Tax incentives of business under the conditions of marital state. *A young scientist*, v. 4, n. 116, p. 173-177, 2023. Available at: <https://doi.org/10.32839/2304-5809/2023-4-116-34>. Access on: 19 May 2024.

¹⁷ USAID. *New Ukraine: stimulating investment in freedom, peace and prosperity*. Ukraine: USAID, 2023. Available at: [https://www.usaid.gov/sites/default/files/2023-04/EDGE%20UIPA%20Report-%20online%20-%20Ukrainian%20\(11%20Apr%202023\)-AC.pdf](https://www.usaid.gov/sites/default/files/2023-04/EDGE%20UIPA%20Report-%20online%20-%20Ukrainian%20(11%20Apr%202023)-AC.pdf). Access on: 19 May 2024.

illegal use of technologies; guarantees of the stability of the tax regime during a certain period of time after the investment; guarantees regarding the simplification of the procedures for obtaining permits and licenses for the implementation of investment projects. The introduction of these guarantees, in combination with an effective mechanism for their implementation and international cooperation in the field of investment insurance, will contribute to the formation of a favorable investment climate in Ukraine and the attraction of foreign capital for the reconstruction of the economy.

O. Marchyshynets and S. Marchyshynets note that the creation of long-term industrial parks can also become an important tool for stimulating investments¹⁸. Such parks provide for the concentration of investors in a certain industry or sector of the economy, providing them with a special regime and benefits. For example, industrial parks may be subject to special tax regimes, including tax exemptions for a certain period or reduced tax rates. Benefits may also be provided for the lease of land plots, simplified procedures for obtaining permits and licenses, preferential tariffs for communal services, etc.

An example of a successful industrial park is Dubai Industrial City (DIC) in the United Arab Emirates. This park offers investors a favorable tax regime, full ownership of land and real estate, developed infrastructure, simplified permitting procedures, and logistical advantages. As of 2022, the park had attracted more than 800 companies from 70 countries and investments worth more than \$12 billion US¹⁹.

Several industrial parks operate in Ukraine, one of which is the Korosten Industrial Park in the Zhytomyr region. The specified park specializes in the woodworking and furniture industries, bringing together enterprises for the production of doors, parquet, MDF boards, and components for leading furniture manufacturers, in particular, the Swedish company IKEA. As of 2024, four residents have already been placed in the park, and the total amount of investments has exceeded

300 million hryvnias²⁰. Another example is the “Bila Tserkva” industrial park in the Kyiv region. Its residents are such companies as “Nova Poshta” (an innovative logistics depot was built), “Volitsya-Agro” (construction of a logistics complex for grain storage and processing), “Virastar” (production of goods and equipment for access to heights) and “Plank Electrotechnic” (manufacturer of electrical fittings and electrical installation accessories)²¹.

In general, according to the Register of Industrial Parks, as of May 2023, 63 industrial parks were registered in Ukraine²². The Law of Ukraine, “On Industrial Parks”, provides that they can receive state support in the form of benefits and incentives for initiators of creation, management companies, and participants of parks included in the Register. Financing of the arrangement of parks can be carried out from the state and local budgets, the funds of private investors, including through public-private partnerships, as well as from other non-prohibited sources. In addition, the government can compensate interest rates on loans, provide non-refundable financing for the development of parks, and compensate for the costs of connecting to utility networks²³.

Despite the existence of a legislative framework and state support mechanisms, the functioning of industrial parks in Ukraine is constrained by a number of factors. First, there are shortcomings in the legislative regulation of taxation, land acquisition, and connection to communications for park residents. Secondly, most of the operating parks have insufficiently developed infrastructure; the necessary logistics facilities are missing. Thirdly, the unstable economic and political situation negatively affects the investment attractiveness of the country. There is also a lack of financial resources from

²⁰ OVER €300 million was invested in the development of the Korosten industrial park. *Ukrinform*, 15 nov. 2023. Available at: <https://www.ukrinform.ua/rubric-economy/3787212-u-rozvitok-industrialnogo-parku-korosten-investuvali-ponad-300-miljoniv.html>. Access on: 16 May 2024.

²¹ BILA TSERKVA INDUSTRIAL PARK. [Home page]. Available at: <https://ip-bt.com/>. Access on: 16 May 2024.

²² UKRAINE. *Register of industrial parks*. 2023. Available at: <https://data.gov.ua/dataset/8206ed0c-5911-4b88-9c7f-56c6f-cd08660/resource/7c91f8d0-f153-4197-b47b-da8f65c6e800>. Access on: 19 May 2024.

²³ UKRAINE. The Verkhovna Rada of Ukraine. *Law of Ukraine No.5018-VI, on June 21, 2012*. On Industrial Parks. Available at: <https://zakon.rada.gov.ua/laws/show/5018-17/paran3#n3>. Access on: 19 May 2024.

¹⁸ MARCHYSHYNETS, Olha; MARCHYSHYNETS, Serhii. Industrial parks as a tool for attracting investments in the real sector of the region's economy. *Economic theory and history of economic thought*, No.9, p. 16-22, 2017. Available at: https://economyandsociety.in.ua/journals/9_ukr/3.pdf. Access on: 16 May 2024.

¹⁹ DUBAI INDUSTRIAL CITY. [Home page]. Available at: <https://dubaiindustrialcity.ae/>. Access on: 16 May 2024.

local budgets and private investors for the creation and arrangement of industrial parks in accordance with modern requirements. In view of the above, despite the presence of individual successful examples, industrial parks in Ukraine, in general, need further improvement of the regulatory framework, development of infrastructure, and improvement of the investment climate in order to attract more residents and investments.

Fiscal commitments are another important tool for stimulating investment. The state can allocate funds for state investment programs aimed at the development of priority sectors of the economy or regions. An example of such a program is “Big Construction” in Ukraine, which involved large-scale financing of infrastructure projects, such as the construction and repair of roads, airports, schools and hospitals²⁴. Such programs not only create favorable conditions for investment, but also directly attract private investment through public-private partnerships.

In our opinion, to further stimulate investments in Ukraine, it is important to continue reforms in investor rights protection. These reforms should include improving procedures for recognition and enforcement of foreign court decisions, strengthening the institutional capacity of bodies that ensure investor protection, and intensifying negotiations on the conclusion of new investment agreements.

Separately, it is worth paying attention to the need to create favorable conditions for attracting “green” investments aimed at the development of renewable energy, energy-efficient technologies, and environmental protection projects. As K. Tokareva notes, full and timely access to environmental information is the key to implementing the principles of sustainable development, rational use of natural resources, and nature conservation for future generations, as well as effective provision of human rights and freedoms²⁵. Sunil Kumar and other researchers note that the primary benefit of developing green brand equity is increased environmen-

tal awareness, which companies can use to gain competitive advantage and enter new markets with their green goods and services²⁶. Therefore, the creation of favorable conditions for “green” investments is important both at the global level and for the reconstruction of Ukraine in the conditions of global climate change and the transition to sustainable development. We believe that in order to stimulate such investments, additional special benefits and preferences, tax exemptions, or rate reductions for projects in the field of renewable energy or energy efficiency should be introduced, as well as specialized funds or other financial instruments should be created to support them.

Despite the difficult security situation and military actions on the country’s territory, Ukraine maintains trade and economic ties with several regions of the world. T. Batrakova notes that in 2022, Ukraine’s largest trade partners were Europe (export - 62.31%, import - 48.78%), Asia (export - 23.44%, import - 29.03%), EU countries (export - 60.59%, import - 44.79%), and America (export - 2.89%, import - 5.37%)²⁷.

According to the statistical data of the National Bank of Ukraine, in 2023, there was an increase in the inflow of foreign direct investments into the country’s economy. The volume of attracted foreign direct investments amounted to \$4.25 billion, which is 7.6 times higher than in 2022 but 42% less than in 2021²⁸.

The main foreign investors in the corporate segment in 2022-2023 were companies (brands) that already had production facilities in Ukraine before the full-scale invasion of the Russian Federation. Among them are Carlsberg, Cersanit, Kronospan, Laude, Nestle, Phillip Morris, Velux. Most of the mentioned international corporations directed investments to relocation of production, repair of damaged facilities and social projects, using the services of the UkraineInvest investment attraction and support office. In addition, a number of

²⁴ UKRAINE. *Big construction*. Available at: <https://arhioda.gov.ua/gromadskosti/velike-budivnictvo/>. Access on: 16 May 2024.

²⁵ KOPYLENKO, Oleksandr; SOPILKO, Iryna; TOKARIEVA, Kseniia. Experience of foreign countries in the implementation of the right to access to environmental information. In: BIANCA, Ene Andreea et al. *Current issues of the management of socio-economic systems in terms of globalization challenges*. Košice: Vysoká škola bezpečnostného manažérstva v Košiciach, 2023. c. 499-515. Available at: <https://philarchive.org/archive/BEZCIO-2>. Access on: 16 May 2024.

²⁶ KUMAR, Sunil; CHAKRABORTY, Abhishek; SHARMA, Dr Sheetal. Green Investments: Implications on Sustainability. *Indian Journal of Natural Products*, n. 81, p. 65940-65951, 2023. Available at: https://www.researchgate.net/publication/377700589_Green_Investments_Implications_on_Sustainability. Access on: 16 May 2024.

²⁷ BATRAKOVA, Tetiana Ivanivna. The current state of Ukraine’s foreign trade under the conditions of economic instability. *Digital economy and economic security*, v. 4, n. 04, p. 56-62, 2023. Available at: <https://doi.org/10.32782/dees.4-10>. Access on: 16 May 2024.

²⁸ FOREIGN direct investment (2002-2023). *Minfin*, 1 jan. 2025. Available at: <https://index.minfin.com.ua/ua/economy/fdi/>. Access on: 16 May 2024.

corporations (ArcelorMittal, Bayer, CRH, Fixit, Kingspan, Onur Group, Unilever) announced their intention to reinvest funds to support their assets in Ukraine²⁹.

According to the data of the European Business Association, more than a third of its members had or have investment projects in Ukraine in 2022-2024 with an average investment amount from 3 to \$8 million³⁰.

Therefore, despite the military actions, Ukraine maintains stable foreign economic ties and remains attractive to foreign investors, mainly those who have already entered the Ukrainian market. Investments are directed to the restoration of production capacities, the creation of reserve energy sources, and the implementation of new projects. At the same time, the stimulation of foreign investments and domestic business entities must be balanced to ensure the sustainable development of the national economy.

On the one hand, Ukraine needs significant financial resources for the reconstruction of war-damaged territories, so actively attracting foreign investments is critically important. However, excessive stimulation of foreign investors can pose risks for national enterprises, reducing their competitiveness and limiting access to the domestic market.

The key challenge is to create a balanced and stimulating legal regime that would take into account the interests of all business entities. The legislation of Ukraine on investments and foreign economic activity needs to be updated and harmonized with the best international practices. In particular, it is necessary to review the regulations regarding tax and customs benefits, investment protection guarantees, and simplification of permit procedures. It is important to ensure transparent and non-discriminatory conditions for conducting economic activities for both domestic and foreign entities. In order to ensure proportional stimulation of foreign investments and the creation of a favorable legal regime

of business within the country, it is necessary to take into account several aspects. As O. Kurepina notes, legal means of a stimulating nature, which can affect the income or expenses of the state and local budgets, are subject to assessment for compliance with the criteria of state aid to business entities. This applies to both domestic and foreign investors, which ensures equality and a non-discriminatory approach³¹.

Secondly, Ukraine's current legislation does not establish a universal mechanism for the application of stimulating legal means since they have different features and can be classified into vertical (organizational and legal) and horizontal (contractual) types. For each type of stimulating legal means, it is necessary to develop an appropriate implementation mechanism that will ensure transparency and predictability for all business entities.

Thirdly, within the framework of the post-war reconstruction of Ukraine, special attention needs to be paid to the use of legal means to stimulate the development of regions. It is necessary to bring Ukrainian legislation into compliance with the norms of EU law regarding the provision of regional state aid, in particular, Guidelines for Regional State Aid No. 2021/C 153/01³². The specified step will avoid collisions and create equal conditions for national and foreign investors implementing investment projects in certain regions.

Thus, to ensure proportional stimulation, it is necessary to implement the norms of EU law on state aid, develop clear mechanisms for the application of various types of stimulating legal means, and ensure equality and a non-discriminatory approach to all business entities, regardless of their origin.

At the same time, foreign investors face certain risks in the reconstruction of Ukraine, such as an unstable security situation, potential delays and interruptions in project implementation, fluctuations in exchange rates, and inflationary processes. Domestic entities may face increased competition from foreign companies, which may adversely affect their market share and profitability. Excessive stimulation of certain industries or entities

²⁹ SHCHERBYNA, Artem. They invest despite the war. Who and how much invests in Ukraine among international and Ukrainian businesses? Review from an investment analyst. *Forbes*, 8 dec. 2023. Available at: <https://forbes.ua/money/investuyut-popri-viynu-kh-to-ta-skilki-vkladat-v-ukrainu-sered-mizhnarodnogo-ta-ukrainskogo-biznesu-oglyad-vid-investanalitika-artema-shcherbini-08122023-17779>. Access on: 16 May 2024.

³⁰ VINOKUROV, Yaroslav. War is not an obstacle. Investments in Ukraine are growing, but not enough for recovery. What should the authorities do? *Economic Truth*, 25 apr. 2024. Available at: <https://www.epravda.com.ua/publications/2024/04/25/712862/>. Access on: 16 May 2024.

³¹ KUREPINA, Olena. Features of the application of the incentive legal regime of management. *Kyiv Journal of Law*, n. 1, p. 63-71, 2024. Available at: <https://doi.org/10.32782/kjl/2024.1.8>. Access on: 16 May 2024.

³² KUREPINA, Olena. Features of the application of the incentive legal regime of management. *Kyiv Journal of Law*, n. 1, p. 63-71, 2024. Available at: <https://doi.org/10.32782/kjl/2024.1.8>. Access on: 16 May 2024.

can distort the conditions of competition and lead to an inefficient allocation of resources.

Considering the above, forming an effective legal regime in the conditions of post-war reconstruction requires careful analysis of various factors and achieving a balance between the attraction of foreign investments and the support of national enterprises. Only with such an approach can sustainable economic development, competitiveness of domestic products, and full integration of Ukraine into global markets be ensured.

In our opinion, with the aim of creating a favorable investment climate in Ukraine and increasing its investment attractiveness, it is expedient to propose a set of economic and legal mechanisms to stimulate business. V. Poiedynok notes that the need for huge financial resources for the post-war reconstruction of the country actualizes the need to use special regimes of economic activity aimed at reviving the economy and attracting large-scale investments³³. One such mechanism may be the application of special regimes of investment activity, which provide special conditions for investors implementing projects in priority industries or depressed regions. Such regimes may include preferential conditions for taxation, customs regulation, land acquisition, etc.

For example, it is possible to introduce a regime of priority development territories in war-affected regions, which will provide for the provision of tax and other benefits for investors in order to promote the reconstruction and economic recovery of these territories. In addition, additional special regimes may be considered, such as the regime of investment projects with significant investments, which will provide for the creation of special conditions for investors making large-scale capital investments in the country's economy, including tax and land benefits, a simplified procedure for obtaining permits. A regime of special support for the development of innovative entrepreneurship, particularly in cities, may also be introduced, which will provide tax benefits, a simplified procedure for registering enterprises, and other measures to stimulate activity in the field of innovation and technology.

³³ POIEDYNOK, Valeriia. Special management regimes as a tool for post-war reconstruction. *Law of Ukraine*, n. 8, p. 44-55, 2023. Available at: <https://openurl.ebsco.com/EPDB:gcd:3:25450963/department2?sid=ebsco;plink=scholar&id=ebsco:gcd:172836009&url=c>. Access on: 16 May 2024.

Effective legal regulation and implementation of the specified special regimes of investment activity can become effective tools for stimulating investments, contributing to increasing Ukraine's investment attractiveness and attracting capital for the development of the economy.

Another promising mechanism is the stimulation of investment activities at the local level³⁴. Local self-government bodies can create local investment support funds, initiate the construction of investment infrastructure facilities, and provide preferences to investors in the field of communal property. Decentralization of powers in the field of investment policy will contribute to increased efficiency and better consideration of the specifics of specific territories.

Access to financing is a key factor that stimulates investment activity and facilitates the implementation of investment projects. In Ukraine, there are a number of mechanisms for lending and guaranteeing investments with the participation of the state, international financial organizations, and commercial banks. One example is state support for investment projects with significant investments³⁵. The specified program offers investors tax and customs benefits, making large-scale capital investments in the country's economy more attractive.

The issue of protecting intellectual property rights and stimulating investments in high-tech industries deserves special attention. For this direction, it is necessary to improve the legislation in the field of intellectual property, strengthen responsibility for violations of intellectual property rights, and introduce preferential tax regimes for enterprises investing in scientific research and innovation. It is worth noting that in 2016, a strategy for the development of high-tech industries until 2025 was developed in Ukraine, and a plan of measures for its implementation was approved³⁶, but so far, it has not been adopted.

³⁴ BILYK, Victoria. Investment tools for domestic innovative business support at regional and local levels. *Herald of Khmelnytskyi National University: Economic sciences*, n. 6, p. 424-429, 2023. Available at: <https://doi.org/10.31891/2307-5740-2023-324-6-66>. Access on: 16 May 2024.

³⁵ UKRAINE. The Verkhovna Rada of Ukraine. *Law of Ukraine No.1116-IX, on December 17, 2020*. On state support of investment projects with significant investments in Ukraine. Available at: <https://zakon.rada.gov.ua/laws/show/1116-20#Text>. Access on: 16 May 2024.

³⁶ UKRAINE. Cabinet of Ministers of Ukraine. *Draft order*. On the approval of the Strategy for the development of high-tech in-

We believe that the lack of a strategy for the development of high-tech industries approved at the state level negatively affects the investment attractiveness of the relevant sectors of the economy. The presence of such a strategic document is an important signal for investors regarding the priority of the development of innovative and high-tech industries in the country. In addition, the strategy should define specific measures, tools, and mechanisms for stimulating investments in specified industries, such as preferential taxation, financial support for scientific research, protection of intellectual property rights, etc. The absence of such a strategy prevents investment in the high-tech sector of Ukraine's economy.

In general, the effectiveness of the implementation of any legal mechanisms to stimulate investment largely depends on the stability and predictability of the legal field. Therefore, it is necessary to ensure the consistency of legislative policy in this area, to avoid frequent and radical changes in the rules for investors, as well as to promote the development of the institutional capacity of bodies responsible for the implementation of investment policy. The improvement of the judicial system, the development of arbitration and mediation procedures, as well as the implementation of international standards of corporate governance will strengthen the confidence of investors in the proper protection of their interests.

Comprehensive implementation of the specified economic and legal mechanisms for economic stimulation will contribute to the improvement of the investment climate in Ukraine, the attraction of both domestic and foreign investments, which, in turn, will ensure economic growth, technological development and increase the welfare of the population.

Continuing consideration of the conceptual foundations of stimulating the attraction of investments in reconstruction projects of Ukraine, it is necessary to pay special attention to the issue of forming an attractive investment image of the country in the international arena. Agaptus Nwozor and Oladiran Afolabi rightly point out that a positive image is an important factor

influencing the decision of foreign investors about the advisability of investing in a particular country³⁷.

Considering the above, it is advisable to develop a comprehensive strategy for promoting the investment potential of Ukraine, which would cover a wide range of information and communication measures. In particular, in our opinion, it is necessary to actively popularize successful investment projects implemented by foreign investors on the territory of Ukraine to highlight the competitive advantages of the Ukrainian market, as well as to organize thematic events (conferences, exhibitions, etc.) abroad.

We believe that foreign diplomatic missions can play an important role in forming and promoting a positive investment image of Ukraine through active interaction with local business circles, conducting informational and promotional campaigns, and organizing meetings and presentations for potential investors. In particular, they can provide up-to-date information about the investment climate and opportunities in Ukraine, highlight successful examples of implemented projects, and promote the establishment of business contacts between Ukrainian and foreign companies.

In addition to traditional measures, it is advisable to actively use modern digital tools, such as the creation of specialized web resources, presence in social networks, and media campaigns in the digital environment. This step will allow us to effectively convey information about Ukraine's investment opportunities to a wide international audience and potential investors.

The formation of a favorable investment climate and a positive image of Ukraine as an attractive country for foreign investments requires a comprehensive approach. Firstly, the implementation of the OECD Principles of Corporate Governance in legislation and practice is ensured, which increases the confidence of investors³⁸. Secondly, investment infrastructure is being developed, in particular, industrial parks, business incubators, and logistics centers at the national, regional, and local levels. Thirdly, the legislation is harmonized

dustries until 2025 and the approval of the plan of measures for its implementation. Available at: <https://ips.ligazakon.net/document/NT2490>. Access on: 16 May 2024.

³⁷ NWOZOR, Agaptus; AFOLABI, Oladiran. Keeping up appearance? Nigeria's anti-corruption crusade and image dilemma in the global arena. *Journal of Financial Crime*, n. 3, p. 813-827, 2023. Available at: <https://doi.org/10.1108/JFC-02-2022-0039>. Access on: 16 May 2024.

³⁸ OECD. *OECD guidelines for corporate governance in state-owned enterprises*. Paris: OECD, 2015. Available at: <https://doi.org/10.1787/9789264312906-uk>. Access on: 16 May 2024.

with the EU law, in particular, in the field of commercial mediation and representation, which contributes to the attraction of investments and access to European markets. In our opinion, the comprehensive implementation of the mentioned measures will strengthen the investment image of Ukraine and attract the necessary financial resources for economic development.

Improving the legal regulation of commercial mediation plays an important role in forming a favorable investment climate and a positive image of Ukraine as an attractive country for foreign investments. Harmonizing legislation in this area with EU law will contribute to attracting investments and allowing Ukrainian companies to enter European markets.

Researchers single out the following key services in this field: search for potential foreign partners, preparation of draft contracts and their conclusion, organization of transport and forwarding services, and advertising and marketing activities for the promotion of goods and services in foreign markets³⁹. Complementing the list, we can highlight other important functions: crediting parties and providing guarantees of payment for goods, which consists of financial support of the participants of the agreement and minimizing the risks of non-fulfillment of obligations; various related services, in particular, providing advice on international law, technical maintenance, translation of documentation and other services that contribute to the improvement of the trade process.

The current regulatory legal framework of Ukraine, which regulates the field of commercial mediation, in particular the Commercial Code of Ukraine⁴⁰, is characterized by the presence of a number of shortcomings and gaps, which cause legal uncertainty and create obstacles to the implementation of such activities. In particular, there is a lack of clear definitions of various types of commercial intermediaries, their rights and obligations, and mechanisms for protecting their interests. There are also problems with the regulation of certain

aspects of mediation contracts, in particular territorial restrictions, non-exclusivity conditions, compensation in case of contract termination, etc. Additional obstacles are administrative barriers related to taxation and currency regulation of commercial mediation operations.

In our opinion, the improvement of the legislation on commercial mediation should take place in the following directions: harmonization of definitions of various types of commercial intermediaries (agents, distributors, commission agents, etc.) in accordance with European practice and elimination of uncertainties and gaps; a clear definition of the rights and obligations of parties to mediation agreements, mechanisms for protecting their interests; implementation of European standards regarding requirements for mediation contracts, in particular terms on territorial restrictions, non-exclusivity, compensation in case of termination of the contract, etc.; improvement of approaches to taxation and currency regulation of commercial mediation operations in order to eliminate administrative barriers; development of the institutional capacity of state authorities in the sphere of regulation and support of commercial mediation.

Proper legislative regulation of the commercial mediation industry in accordance with European standards will create favorable conditions for the development of international trade, attraction of foreign investments, and promotion of Ukrainian goods and services to foreign markets. This, in turn, will have a positive effect on Ukraine's investment image and economic growth as a whole.

3 Conclusion

In the process of rebuilding Ukraine after the end of the war, it is critically important to attract large-scale investment resources that will ensure the restoration of the destroyed infrastructure, stimulate economic growth, and increase the welfare of the population. In order to effectively stimulate investment in reconstruction projects, a number of key principles must be followed. First, a comprehensive approach should be applied, which involves the use of various legal, economic, organizational, informational, and communication mechanisms for investment stimulation. Only their ba-

³⁹ MANZYUK, Vasyly; ZABOROVSKYY, Victor; VASHKOVICH, Victoria. On the development of legislation on commercial brokering in business. *Uzhhorod National University Herald. Series: law*, n. 71, p. 167-176, 25 aug. 2022. Available at: <https://doi.org/10.24144/2307-3322.2022.71.28>. Access on: 16 May 2024.

⁴⁰ UKRAINE. The Verkhovna Rada of Ukraine. *Code of Ukraine No.436-IV, on January 16, 2003*. Commercial Code of Ukraine. Available at: <https://zakon.rada.gov.ua/laws/show/436-15#Text>. Access on: 21 May 2024.

lanced combination will ensure the maximum effectiveness of the state's investment policy.

Secondly, it is extremely important to create a favorable investment climate by forming a predictable and transparent regulatory environment that will guarantee proper protection of investors' rights, risk minimization, and equal conditions for all market participants. The specified direction provides for the improvement of legislation, the development of authorities' institutional capacity, and the introduction of effective mechanisms for the resolution of investment disputes.

Thirdly, the use of stimulating mechanisms should be targeted and take into account the priority of certain sectors of the economy and war-affected regions. Concentrating investment resources in such areas will speed up their reconstruction and ensure sustainable economic growth. At the same time, it is necessary to achieve a fair balance between attracting foreign investments and supporting national economic entities, avoiding excessive stimulation of some at the expense of others.

Another fundamental aspect should be the prioritization of "green" investments in renewable energy projects, energy-efficient technologies, and environmental protection measures. In addition to the ecological effect, such a step will contribute to Ukraine's transition to a model of sustainable development. It is also important to stimulate investments in high-tech industries and innovations, which will ensure technological progress and increase the competitiveness of the national economy.

Effective implementation of investment policy requires decentralization of powers and resources in the specified area, which will allow local self-government bodies to stimulate investments, taking into account the specifics of the respective territories. In addition, it is critically important to intensify international cooperation, promote a positive investment image for Ukraine, and popularize its investment potential on the world stage. The specified vector will contribute to the attraction of foreign capital and the access of Ukrainian enterprises to international markets.

Adherence consistent with these principles will allow Ukraine to mobilize the necessary investment resources as effectively as possible to rebuild the infrastructure destroyed by the war, revive the economy, and ensure the sustainable development of the state in the post-war period.

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Chemicals and hazardous waste management: international norms and their implementation in India

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Dulung Sengupta

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Abstract

The objective of this paper is to analyse the status of Chemicals and Hazardous waste management in India. Chemicals and hazardous wastes generated in the current industrialised world cause serious damage to human health and the environment. India is a party to five international instruments, namely the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Stockholm Convention on Persistent Organic Pollutants, the Minamata Convention on Mercury, and the Strategic Approach to International Chemicals Management (SAICM), to protect the environment from the evil effects of chemicals and hazardous wastes. Financial and technological constraints, lack of awareness, the attitude of indifference of industrial units, the developmental needs of the country, and inadequate enforcement mechanisms have severely affected Indian compliance status vis-a-vis international norms. Evaluating the present scenario, especially to unearth the problems faced in grassroots-level implementation and to address them adequately, is indispensable to prevent the looming catastrophe. We have discussed the five international instruments and India's obligations as a member state in the first part of the paper followed by the status of chemicals and hazardous management in the country by analysing the national inventory of hazardous wastes from 2016-2022. In the final segment, we have summarised our findings and provided our independent opinion on measures that may be taken for the sound management of chemical and hazardous wastes in the country.

Keywords: hazardous wastes; hazardous waste management; chemicals; environment; human health.

Resumo

O objetivo deste artigo é analisar a situação da gestão de produtos químicos e resíduos perigosos na Índia. Os produtos químicos e resíduos perigosos

gerados no mundo industrializado contemporâneo causam sérios danos à saúde humana e ao meio ambiente. Para mitigar esses impactos, a Índia é signatária de cinco instrumentos internacionais, a saber: a Convenção de Basileia sobre o Controle de Movimentos Transfronteiriços de Resíduos Perigosos e seu Depósito; a Convenção de Roterdã sobre o Procedimento de Consentimento Prévio Informado para Certos Produtos Químicos e Pesticidas Perigosos no Comércio Internacional; a Convenção de Estocolmo sobre Poluentes Orgânicos Persistentes; a Convenção de Minamata sobre Mercúrio; e a Abordagem Estratégica para a Gestão Internacional de Produtos Químicos (SAICM). Esses instrumentos visam proteger o meio ambiente dos efeitos nocivos decorrentes do uso e descarte de substâncias químicas e resíduos perigosos. Contudo, a implementação eficaz dessas normativas na Índia enfrenta desafios significativos. Restrições financeiras e tecnológicas, a falta de conscientização, a atitude de indiferença de algumas unidades industriais, as demandas do desenvolvimento nacional e a insuficiência dos mecanismos de fiscalização afetam gravemente o cumprimento das normas internacionais pelo país. A avaliação do cenário atual, sobretudo para identificar as dificuldades enfrentadas na implementação em nível local e propor soluções eficazes, é essencial para prevenir uma possível catástrofe ambiental e sanitária. No primeiro segmento deste estudo, discutimos os cinco instrumentos internacionais e as obrigações da Índia como Estado-membro. Em seguida, analisamos a situação da gestão de produtos químicos e resíduos perigosos no país, com base no inventário nacional de resíduos perigosos de 2016 a 2022. Na parte final, sintetizamos nossas conclusões e apresentamos uma análise independente com recomendações para a gestão adequada dessas substâncias na Índia.

Palavras-chave: resíduos perigosos; gestão de resíduos perigosos; produtos químicos; meio ambiente; saúde humana

1 Introduction

The earth is susceptible to ruinous and irreversible environmental changes that pose serious threats to the ecosystem and human life it supports. These changes are outcomes of human activities that have thoughtlessly exploited the planet and its resources until it beca-

me evident that these environmental changes are detrimental to human life and that further deterioration would threaten their very existence. According to studies conducted over the years, scientists have identified certain planetary boundaries that are indispensable for maintaining the environmental balance. Fearfully, six of the nine identified boundaries have already been transgressed by 2023.¹ Despite the global efforts to restore the lost balance, the outcome is dismal, raising doubts about the sufficiency of policies, their implementation, and the sustainability of human activities at the international as well as national levels.

The thresholds of production of novel entities² have been quantified in the 2023 report by the Stockholm Resilience Centre³ and it is way beyond the safe boundaries. The pace at which new chemicals and other novel entities are being produced and released into the ecosystem is alarming. Presently, we can find at least 3,50,000 varieties of manufactured chemicals in the world markets which include plastics, industrial and other chemicals, and pharmaceuticals including antibiotics.⁴ These novel entities developed by mankind over the years in humungous volumes have transgressed the planetary boundaries making it very difficult for governments across the world to manage them, assess the potential risks, and control the environmental damage.⁵ The production and use of these novel entities lead to the generation of chemical wastes which has been a matter of concern for years. Scaling down the quantity of waste generated, employing effective reuse and recycling methods, and proper management and disposal of waste are necessary to protect the environment. Multilateral action and efficient implementation of environmental

¹ PLANETARY Boundaries. [2024?]. Available at: <https://www.stockholmresilience.org/research/planetary-boundaries.html>. Accessed on: 11 May 2024.

² 'Novel entities' means "new substances, new forms of existing substances and modified life forms", including "chemicals and other new types of engineered materials or organisms not previously known to the Earth system as well as naturally occurring elements (for example, heavy metals) mobilized by anthropogenic activities". See PERSSON, Linn *et al.* Outside the safe operating space of the planetary boundary for novel entities. *Environmental Science & Technology*, [s. l.], v. 56, p. 1510 – 21, 2022.

³ RICHARDSON, J. *et al.* *Azote for Stockholm Resilience Centre*. Estocolmo: Stockholm Resilience Centre, 2023.

⁴ PLANETARY Boundaries. [2024?]. Available at: <https://www.stockholmresilience.org/research/planetary-boundaries.html>. Accessed on: 11 May 2024.

⁵ PLANETARY Boundaries. [2024?]. Available at: <https://www.stockholmresilience.org/research/planetary-boundaries.html>. Accessed on: 11 May 2024.

programs are essential for managing the novel entities, analyzing the potential risks, taking remediation actions for the environmental damage caused, and for effectively managing and disposing of the hazardous wastes generated from their production and use.

The Indian chemical industry is magnanimous and around 80,000 varieties of chemicals are available in the markets.⁶ India ranks sixth among the world's largest chemical-producing countries and is the fourth-largest producer of chemicals in Asia.⁷ India contributes around 2.5 percent of the total sale of chemicals worldwide and the market is projected to reach US\$ 304 billion by 2025.⁸ It is the second-largest producer as well as the third-largest consumer of chemical fertilizers.⁹ Around 16% of the world's dyestuff and dye intermediaries are produced in India.¹⁰ India is world's eleventh-largest exporter of chemicals and the exports have increased about 106 times from 2013-14 to 2021-22.¹¹ India exports chemicals to more than 175 coun-

tries across the world,¹² which makes it a hub for the manufacture of chemicals. In the process, it also generates large quantities of hazardous wastes. The number of hazardous waste generating units has increased over the years and although India has a comprehensive legal framework for the storage, management, and disposal of hazardous wastes, there are noticeable gaps in the implementation.

In the first part of the paper, we have discussed the five international instruments to which India has been a signatory and India's obligations as a member nation towards safe and scientific management of chemicals and hazardous wastes. These instruments have played a vital role in designing the domestic legal framework and policies across countries, including India and act as guiding factors for paving the way forward in an environmentally sustainable manner. In the latter part of the paper, we have presented the current status of the management of chemicals and hazardous wastes in India and analyzed the gaps in implementation and the scope for ameliorating the deficiencies.

2 International Instruments

2.1 The Basel Convention

The Basel Convention is one of the first significant global instruments that gathered the focus of nations toward the sound management and disposal of hazardous wastes. The lack of a global document governing the cross-national exchange of hazardous wastes and the increasing concern over the effective means of managing and disposing of such wastes, especially by developing countries paved the way for the adoption of the Convention.¹³ The Cairo Guidelines, the precursor to the Basel Convention, was a set of guidelines and principles for assisting the Governments in developing policies for management of hazardous wastes in an en-

⁶ KAPOOR, Amit; NEGI, Subhanshi. *India's booming chemical and petrochemical industry: understanding industry landscape*. Gurugram: Institute of Competitiveness; Ministry of Chemicals And Fertilizers, 2022. Available at: https://chemicals.gov.in/sites/default/files/inline-files/Report_Understanding_Industry_Landscape.pdf. Accessed on: 13 June 2024.

⁷ KAPOOR, Amit; NEGI, Subhanshi. *India's booming chemical and petrochemical industry: understanding industry landscape*. Gurugram: Institute of Competitiveness; Ministry of Chemicals And Fertilizers, 2022. Available at: https://chemicals.gov.in/sites/default/files/inline-files/Report_Understanding_Industry_Landscape.pdf. Accessed on: 13 June 2024.

⁸ KAPOOR, Amit; NEGI, Subhanshi. *India's booming chemical and petrochemical industry: understanding industry landscape*. Gurugram: Institute of Competitiveness; Ministry of Chemicals And Fertilizers, 2022. Available at: https://chemicals.gov.in/sites/default/files/inline-files/Report_Understanding_Industry_Landscape.pdf. Accessed on: 13 June 2024.

⁹ INDIA. Ministry of Chemicals And Fertilizers. Department of Fertilizers. *Fortieth report demand for grants 23-24, Standing Committee on Chemicals and Fertilizers 2022-23*. 2023. Available at: https://loksabhadocs.nic.in/lssccommittee/Chemicals%20&%20Fertilizers/17_Chemicals_And_Fertilizers_40.pdf. Accessed on: 13 June 2024.

¹⁰ KAPOOR, Amit; NEGI, Subhanshi. *India's booming chemical and petrochemical industry: understanding industry landscape*. Gurugram: Institute of Competitiveness; Ministry of Chemicals And Fertilizers, 2022. Available at: https://chemicals.gov.in/sites/default/files/inline-files/Report_Understanding_Industry_Landscape.pdf. Accessed on: 13 June 2024.

¹¹ KAPOOR, Amit; NEGI, Subhanshi. *India's booming chemical and petrochemical industry: understanding industry landscape*. Gurugram: Institute of Competitiveness; Ministry of Chemicals And Fertilizers, 2022. Available at: https://chemicals.gov.in/sites/default/files/inline-files/Report_Understanding_Industry_Landscape.pdf. Accessed on: 13 June 2024.

¹² INDIA. Ministry of Commerce and Industry. *Chemical industry and export in India*. 2014. Available at: <https://www.indiantradeportal.in/vs.jsp?lang=0&id=0,31,24100,24105>. Accessed on: 13 June 2024.

¹³ VALIN, D. The Basel Convention on the control of transboundary waste and their disposal: should the United States ratify the accord. *Indiana International & Comparative Law Review*, [s. l.], 6, n.1, p. 267-288, 1995.

vironmentally safe manner.¹⁴ These guidelines covered the management of hazardous wastes from the source of their generation to their ultimate disposal with special emphasis on the transboundary exchange of the wastes.¹⁵ The United Nations Environment Programme (UNEP) Governing Council created a working group to facilitate the incorporation of the Cairo Guidelines into a Convention to make it binding on the parties to it under international law. The Khian Sea and the Koko incidents added much-needed impetus to the negotiations, and thereafter, in March 1989, the Basel Convention was formulated by representatives from 116 countries¹⁶ and it finally came into force on 5 May 1992. “Wastes” are defined as substances or objects that are disposed of, are intended to be disposed of or required to be disposed of.¹⁷ It was brought into effect to address the risk of environmental degradation and damage caused to mankind by the transportation of hazardous and other wastes, especially to the developing countries, which faced capability constraints in managing such wastes.¹⁸ Annexure III of the Convention enlists characteristics that are used to classify a substance as hazardous under the Convention. A waste is considered hazardous if it is explosive, corrosive, oxidizing, flammable, poisonous, infectious, or toxic¹⁹ and due to such characteristics, it

might have severe and irreparable impacts on human health and the environment, if not disposed of systematically and scientifically.²⁰

The Convention does not put an overall ban on the movement of hazardous wastes across nations per se, but it emphasizes that it is necessary to acknowledge and protect the sovereign rights of every country to restrict the disposal of foreign hazardous wastes in their territory where such wastes pose serious risks to public health and the environment.²¹ It focuses on the efficient management and sound disposal of hazardous wastes by the countries by putting the ultimate responsibility on the exporter of the waste.²² The significance of the proper exchange of information is recognized as one of the most important factors in the process of transboundary exchange of wastes. The prior information exchange during the transboundary exchange of chemical wastes shall be the guiding factor for countries to accept or restrict the import of hazardous wastes into their territories.²³ For the realization of its objectives, the Convention stresses on the creation and application of low-waste technologies, recycling of wastes to minimize the quantum of hazardous wastes generated, and establishment of sound waste management and disposal systems by the parties to the Convention.²⁴

Following the general obligations as mentioned under Article 4 of the Convention, the parties are required to make efforts for reducing the generation of hazardous and other wastes in its territory and set up adequate facilities for the disposal of such wastes in a sound manner. The member states also have the duty to control and minimize the cross-border movement of

¹⁴ INFORMEA. *Decision 14/30 of the Governing Council of UNEP, Cairo guidelines and principles for the environmentally sound management of hazardous wastes*. 1987. Available at: <https://www.informea.org/sites/default/files/imported-documents/UNEP-CHW-COMP-GUID-CairoESMofHazardousWaste1987.English.pdf>. Accessed on: 11 May 2024.

¹⁵ INFORMEA. *Decision 14/30 of the Governing Council of UNEP, Cairo guidelines and principles for the environmentally sound management of hazardous wastes*. 1987. Available at: <https://www.informea.org/sites/default/files/imported-documents/UNEP-CHW-COMP-GUID-CairoESMofHazardousWaste1987.English.pdf>. Accessed on: 11 May 2024.

¹⁶ VU, Hao-Nhien Q. The Law of Treaties and the Export of Hazardous Wastes. *UCLA Journal of Environmental Law And Policy*, [s. l.], v. 12, n. 2, p. 389 – 434, 1994.

¹⁷ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

¹⁸ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

¹⁹ Annex III, BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

²⁰ WOLTERS, Claire. Toxic waste, explained. *National Geographic*, 2019. Available at: <https://www.nationalgeographic.com/environment/global-warming/toxic-waste/>. Accessed on: 11 May 2024.

²¹ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

²² BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

²³ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

²⁴ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

hazardous wastes such that that will safeguard human beings and the environment. It shall be the exporter's responsibility not to export hazardous waste to any country which has restricted the import of such waste or to any developing country, which it has reason to believe is not competent to handle the waste in an environmentally friendly manner.

Under the Convention, the transnational movement of hazardous wastes is permitted only under three circumstances: firstly, where the exporting country lacks the capacity to dispose of the waste in an environmentally sound manner; secondly, where the wastes serve as raw materials for recycling and recovery industries and lastly, where the parties to the transboundary movement of the hazardous wastes have agreed upon some criteria which do not defeat the broader objectives of the Convention.²⁵ The Convention is in its complete spirit against any illegal traffic of hazardous wastes and points out any such illegal movement as criminal.²⁶ It emphasizes on the effective dissemination of information to control illegal dumping of hazardous wastes.²⁷ Along with the information procedure, it also states the requirement of a movement document which is to be accompanied by the waste from the place of commencement of the transboundary exchange to the place of its disposal.²⁸ The exporting state shall prohibit the generator or exporter from initiating the transboundary movement until it obtains a written consent from the importing state.²⁹ The packaging, labelling, and trans-

portation of hazardous wastes are to be done strictly adhering to the generally accepted and recognized international rules and international practices.³⁰ The member states are under the obligation to take all such measures under their national jurisdiction to restrict every person from transporting or disposing of hazardous wastes in the absence of valid authorization to do so.³¹

The Ban Amendment is considered to be a significant milestone in the life years of the Basel Convention. It was adopted in 1995 during the third meeting of the Conference of Parties (COP). The amendment prohibits the transboundary movement of hazardous chemical wastes from OECD to non-OECD nations.³² However, it is highly debated as even though the ban might be effective in combating the menace of dumping wastes in developing countries, it is also argued that it might disincentivize fair trade and the development of sound waste recycling methods.³³

At present, 187 countries are parties to the Basel Convention. It acts as an umbrella for all other conventions adopted for the sound management of hazardous wastes and has contributed significantly towards the development of technical guidelines for facilitating the sound management of wastes by various Governments and all stakeholders. With synergies created through the adoption and enforcement of the Rotterdam and Stockholm conventions, the Basel Convention is in a position to consider the wastes in a manner that promotes the management of wastes throughout their complete life cycle.³⁴

²⁵ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024. Art. 4.

²⁶ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024. Art. 9.

²⁷ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024. Art. 4.

²⁸ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024. Art. 4.

²⁹ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024.

Art. 4.

³⁰ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024. Art. 4.

³¹ BASEL Convention on the control of transboundary movements of hazardous wastes and their disposal. Basel, 1992. Available at: <https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>. Accessed on: 13 June 2024. Art. 4.

³² MILESTONES. 2024. Available at: <http://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx>. Accessed on: 13 June 2024.

³³ POPE, Elizabeth S. The shadowy world of hazardous waste disposal: why the Basel Convention's structure undermines its substance. *S. C. Journal of International Law and Business*, [s. l.], v. 13, n. 2, p. 305 – 338, 2017.

³⁴ MILESTONES. 2024. Available at: <http://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx>. Accessed on: 13 June 2024.

2.2 The Rotterdam Convention

Considering the growing concern over the potential risks posed by the increasing production and transboundary exchange of hazardous pesticides and chemicals, the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO), jointly took initiatives leading to the development and promotion of voluntary information exchange programmes during the middle of 1980s.³⁵ The most vulnerable and exposed to the perils of the production and trade of such hazardous chemicals were the developing countries which did not have proper infrastructure or ability to monitor the import and use of chemicals. To mitigate these concerns, the FAO launched the International Code of Conduct on Distribution and Use of Pesticides in 1985 and the London Guidelines for the Exchange of Information on Chemicals in International Trade was set up by the UNEP in 1987.³⁶ In 1989, both the organizations jointly implemented the Prior Informed Consent Procedure for proper dissemination of information so that the governments could make an informed decision on chemical imports after carefully assessing the hazards attached to it. However, the organizations soon felt that the prior informed consent procedure lacked mandatory control mechanisms which led to the formulation of the Prior Informed Consent Procedure for Certain Hazardous Chemicals in International Trade in March 1988 after the 1992 Rio Summit. The Convention was adopted on 10 September 1998 in Rotterdam and entered into force on 24 February 2004.³⁷

The Rotterdam Convention is one of the most important instruments that aims to curb and mitigate the baleful effects caused by the process of exchange of hazardous chemicals and pesticides through international trade between the nations. Presently, there are 161

parties to the Rotterdam Convention.³⁸ The prior informed consent (PIC) and Information Exchange form the cornerstone of this Convention. The list of chemicals subject to the PIC procedure has been provided under Annex III of the Convention. The PIC procedure formalizes a mechanism for obtaining and circulating the decisions of the importing states signifying their assent to receive future shipments of chemicals that are listed in Annex III or otherwise. To ensure informed decision-making by the states, a decision guidance document is prepared for every chemical that is listed in Annex III, and circulated to all member states for assessing the risks associated with the handling and disposal of the chemical. The Convention also promotes information exchange among the member states for a wide range of chemicals that are potentially hazardous under Article 14. Under Article 12, each member state is duty-bound to notify every regulatory action taken by them for banning or placing severe restrictions on chemicals. Any country intending to export a banned or severely restricted chemical from its territory should issue a notification to every importing party prior to the first shipment and yearly thereafter. Article 13 states that any transboundary exchange of banned or severely restricted chemicals should be accompanied by essential health and safety information and a safety data sheet.

Articles 5, 6, and 7 of the Convention contain provisions for listing banned or severely restricted chemicals and severely hazardous pesticide formulations under Annex II and for bringing them under the ambit of the PIC procedure. One of the central aims of the Convention is to promote the sound management of chemicals in all countries. It gives special recognition to the requirements of countries in the developing stage in this regard and emphasizes technology transfer along with transfer of finances and technical assistance to them to strengthen their capabilities and capacities for achieving the goals of the Convention.³⁹ The Convention has been implemented to achieve sustainable development which cannot be a reality if trade and environ-

³⁵ HISTORY of negotiations of the Rotterdam Convention. 2024. Available at: <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

³⁶ HISTORY of negotiations of the Rotterdam Convention. 2024. Available at: <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

³⁷ HISTORY of negotiations of the Rotterdam Convention. 2024. Available at: <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

³⁸ See STATUS of ratifications. 2024. Available at: <http://www.pic.int/Countries/Statusofratifications/tabid/1072/language/en-US/Default.aspx>. Accessed on: 13 June 2024.

³⁹ ROTTERDAM Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. Rotterdam, 2004. Available at: <https://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx>. Accessed on: 13 June 2024.

ment are not mutually supportive and in consonance with each other.

The Convention gives due regard to the health of consumers and workers along with general public health and the environment and is a principal instrument for protecting the same from the harmful impacts of internationally traded hazardous chemicals and pesticides. It encourages shared responsibility and mutual cooperation among member states for holistically achieving the desired objectives.⁴⁰ The Convention applies explicitly to chemicals that are banned, severely restricted or are severely hazardous.⁴¹

For ensuring adherence to the objectives of the convention and their successful implementation, the parties are required to take all necessary measures. Strengthening of national institutions and infrastructure plays a pivotal role in sound industrial practices, and thus, the parties should amend or adopt their legislative and administrative measures in a manner that leads to the realization of the objectives of the Convention in the most effective manner.⁴² It is to be ensured by the parties that the public has adequate avenues to procure information on handling of chemicals, accident management, and safer alternatives for the production of their products.⁴³

Bridging information gaps and guiding all stakeholders to make an informed decision is undoubtedly beneficial for preventing/regulating illegal dumping and exchange of hazardous wastes. By getting prior information, especially the developing countries will be in a better position to make decisions regarding future shipments of hazardous chemicals by analyzing the risks at-

tached with the handling and disposal of the chemicals and weighing them with the infrastructure, technology, and finances available for their sound management at their disposal.

2.3 Stockholm Convention on Persistent Organic Pollutants

The Stockholm Convention is based on the precautionary principle and was adopted to protect human health and the environment from the dangers of persistent organic pollutants (POPs).⁴⁴ POPs are organic chemical substances, which, owing to their physical and chemical properties, remain intact in the environment once released into it and are toxic to both human beings and wildlife.⁴⁵ They have the inherent ability to spread widely throughout the environment as an outcome of various natural processes that involve soil, water, and air and accumulate in fatty tissues of living organisms, including human beings.⁴⁶ This process is called bioaccumulation.⁴⁷ Some of the most serious effects of POPs include cancer, hypersensitivity, allergies, and damage to the nervous system, the reproductive system, and the immune system.⁴⁸ One of the most serious concerns over the contamination of the environment caused by POPs is that they can travel all across the globe thousands of kilometers away from the POP source and that they can be easily transmitted to the offspring of the living organisms that are affected by POPs.

Considering the ruinous impacts of POPs, the Governing Council of UNEP made a request for developing an international process for assessing a list of 12 POPs which are known as the Dirty Dozen,⁴⁹ and

⁴⁰ ROTTERDAM Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. Rotterdam, 2004. Available at: <https://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.asp>. Accessed on: 13 June 2024. Art. 1.

⁴¹ ROTTERDAM Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. Rotterdam, 2004. Available at: <https://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.asp>. Accessed on: 13 June 2024. Art. 3.

⁴² ROTTERDAM Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. Rotterdam, 2004. Available at: <https://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.asp>. Accessed on: 13 June 2024. Art. 4.

⁴³ ROTTERDAM Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. Rotterdam, 2004. Available at: <https://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.asp>. Accessed on: 13 June 2024. Art. 15.

⁴⁴ STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024.

⁴⁵ WHAT are POPs?. Switzerland, 2024. Available at: <http://chm.pops.int/TheConvention/ThePOPs/tabid/673/Default.aspx>. Accessed on: 11 May 2024.

⁴⁶ MORTIMER, M.; REICHEL-T-BRUSHETT, A. *Marine pollution- monitoring, management and mitigation: persistent organic pollutants* (POPs). Berlin: Springer, 2023. p.187.

⁴⁷ MORTIMER, M.; REICHEL-T-BRUSHETT, A. *Marine pollution- monitoring, management and mitigation: persistent organic pollutants* (POPs). Berlin: Springer, 2023. p.187.

⁴⁸ WHAT are POPs?. Switzerland, 2024. Available at: <http://chm.pops.int/TheConvention/ThePOPs/tabid/673/Default.aspx>. Accessed on: 11 May 2024.

⁴⁹ POPS and pesticides. 2022. Available at: <http://www.toxiclink.org/?q=content/pops-and-pesticides>. Accessed on: 13 June 2024.

sought recommendations from the International Forum on Chemical Safety (IFCS) on international action in this matter in May 1995.⁵⁰ In June 1996, the IFCS recommended a legally binding instrument of a global character for minimizing the risks from the 12 POPs for reducing or eliminating their emissions and discharges into the environment.⁵¹ Pursuant to this and through constant efforts made in this regard, the Stockholm Convention was adopted in 2001 at Stockholm, which came into force on 17 May 2004. Currently, 184 countries are parties to it.

The Stockholm Convention places the responsibility on the manufacturers of Persistent Organic Pollutants to take steps to reduce the harmful impacts of POPs and to provide adequate information to users, governments, and the public to make them aware of the hazardous nature and properties of chemicals. It emphasizes that the contribution made by the private or non-governmental sector is indispensable in reducing and eliminating emissions and discharges of POPs. The Convention requires all parties to prohibit and stop the production, use imports, and exports of POPs mentioned in Annex A.⁵² The Convention allows for the registration of specific exemptions by the member nations which enables them to produce and use certain POPs for which alternatives are not readily available, however, the transboundary exchange of these chemicals can take place only under specific restrictive conditions as provided under the Convention. Annex B to the Convention permits the parties to register for the production and use of the listed POPs for acceptable purposes. The member nations are required to take all measures to promote the use of the best environmental practices and techniques to control the emissions and discharge of POPs into the environment.⁵³ Each party

should ensure that chemicals listed in Annexes A and B are imported only to be disposed of in an environmentally safe manner or for the purpose for which the party has acquired permission in adherence with the PIC Procedure.⁵⁴

The Parties to the Convention should make maximum efforts to minimize or stop the emissions and discharges from the unintentionally produced POPs and ensure that any stockpiles or waste that contains POPs or is believed to be contaminated with them are managed and disposed of safely in an environmentally sound manner.⁵⁵ Stockpiles of chemicals listed in Annex A or B, which are not usable as per the specific exceptions or acceptable purposes provided and are prohibited from being exported according to the provisions of this Convention, shall be treated as wastes.⁵⁶ These wastes should be handled, collected, transported, stored, and disposed of most effectively.⁵⁷

The cross-border movement of wastes containing POPs should be carried on in conformity with the relevant rules, standards, and guidelines applicable to such movement. The Convention creates provisions for a Persistent Organic Pollutants Review Committee comprising experts in the assessment and management of chemicals. It has been established for the examination of proposals for the listing of chemicals by the parties under the Convention in an integrative and balanced manner following the provisions of Article 8 of the Convention.

The ninth meeting of the Conference of the Parties (COP) to the Stockholm Convention was conducted from 29 April to 10 May 2019 at the Geneva International Conference Centre (CICG), Geneva, Switzerland. The central theme of the meeting was “Clean Planet,

⁵⁰ HISTORY of negotiations of the Rotterdam Convention. 2024. Available at: <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁵¹ HISTORY of negotiations of the Rotterdam Convention. 2024. Available at: <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁵² STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024. Art. 3.

⁵³ STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024. Art. 5.

⁵⁴ STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024. Art. 3.

⁵⁵ STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024. Art. 8.

⁵⁶ STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024. Art. 8.

⁵⁷ STOCKHOLM Convention on Persistent Organic Pollutants. Stockholm, 2004. Available at: <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>. Accessed on: 11 May 2024. Art. 8.

Healthy People: Sound Management of Chemicals and Waste”.⁵⁸ The meeting concluded with the listing of two chemicals, namely dicofol and perfluorooctanoic acid (PFOA), its salts, and related compounds in Annex A.⁵⁹ Amendments were made in Annex B which details out the acceptable purposes and specific exemptions for perfluorooctanesulfonic acid (PFOS), its salts, and perfluorooctanesulfonyl fluoride.⁶⁰ The most significant outcomes included reviewing the progress made in getting rid of polychlorinated biphenyls (PCBs), adopting terms of reference for determining the amount of funding required for the Convention’s effective implementation between 2022 and 2026, adopting the updated framework for evaluating its efficacy, and endorsing the Novosibirsk Institute of Organic Chemistry in Novosibirsk, Russian Federation, as a regional centre for the Stockholm Convention.⁶¹

2.4 The Minamata Convention on Mercury

Mercury, owing to its ability to persist in the environment, once it is anthropogenically introduced through accumulation and to cause significant harmful impacts on human health and the environment, has made itself a chemical of global concern. Mercury contamination can negatively impact the neurological development of the foetus, cause lower fertility, and affect the brain, neurological system, cardiovascular system, kidneys, and skin.⁶² The UNEP started a global assessment of

mercury and its compounds in 2001, which evidenced the need to take further actions to address the lethal impacts of mercury and its compounds on human health and the global environment.⁶³ The UNEP Governing Council finally agreed in 2009 that there was a requirement for an international treaty to take effective steps for the minimizing of the amount of harmful mercury in the environment. The Minamata Convention was adopted by delegates representing over 140 countries on 19 January 2013. It came into force in 2017, and till April 2018, 91 countries have joined the Convention.⁶⁴ The Minamata Convention is named after the city of Minamata situated in Japan, which experienced the ugliest case of mercury contamination after industrial wastewater containing methyl-mercury was discharged into the Minamata Bay from a chemical factory. The poisoning and adverse effects continued for decades killing wildlife, destroying food chains, taking the lives of innumerable inhabitants, and leaving others severely disabled. The lesson that we learned from the experiences of Minamata Bay is that Mercury does not just damage individual victims; it has the potential to damage entire communities.⁶⁵

The Minamata Convention provides an innovative and comprehensive approach relating to mercury and its compounds throughout their lifecycle that commences from its mining and continues till the disposal of mercury and mercury-bearing wastes. It is founded on the principles laid down under the Basel, Rotterdam, and Stockholm conventions, and all these conventions taken together, form a cyclopedic international framework for the most effective and sound management of chemicals and wastes that are hazardous. The global transport of mercury demands global action, which is impossible to achieve in the absence of a multilateral global document. The primary vision of the Convention is to safeguard the environment and public health against anthropogenic emissions of mercury and

⁵⁸ REPORT of the Conference of the Parties to the Stockholm Convention on persistent organic pollutants on the work of its night meeting. 2019. Available at: <http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP9/tabid/7521/Default.aspx>. Accessed on: 11 May 2024.

⁵⁹ REPORT of the Conference of the Parties to the Stockholm Convention on persistent organic pollutants on the work of its night meeting. 2019. Available at: <http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP9/tabid/7521/Default.aspx>. Accessed on: 11 May 2024.

⁶⁰ REPORT of the Conference of the Parties to the Stockholm Convention on persistent organic pollutants on the work of its night meeting. 2019. Available at: <http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP9/tabid/7521/Default.aspx>. Accessed on: 11 May 2024.

⁶¹ REPORT of the Conference of the Parties to the Stockholm Convention on persistent organic pollutants on the work of its night meeting. 2019. Available at: <http://chm.pops.int/TheConvention/ConferenceoftheParties/Meetings/COP9/tabid/7521/Default.aspx>. Accessed on: 11 May 2024.

⁶² MERCURY: environmental implications and toxicity. *Parivesh Bhawan*, [s. l.], p. 37-42, 2009. Available at: https://cpcb.nic.in/uploads/News_Letter_Mercury_2017.pdf. Accessed on: 13 June 2024.

⁶³ MERCURY: environmental implications and toxicity. *Parivesh Bhawan*, [s. l.], p. 37-42, 2009. Available at: https://cpcb.nic.in/uploads/News_Letter_Mercury_2017.pdf. Accessed on: 13 June 2024

⁶⁴ HISTORY of negotiations of the Rotterdam Convention. 2024. Available at: <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁶⁵ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024.

its compounds.⁶⁶ It mandates that the parties regulate mercury emissions by reducing and eliminating the use of mercury and its discharge from small-scale gold mining,⁶⁷ control mercury emissions,⁶⁸ and gradually eliminate or reduce the use and release of mercury in certain products⁶⁹ and manufacturing processes⁷⁰ as provided under the Convention. It bans new mercury mines.⁷¹ The member nations are required to take suitable steps to manage and dispose of mercury wastes in consonance with the Basel Convention.⁷² Another vital aspect dealt with under this Convention is the identification, assessment, prioritization, management, and remediation of sites contaminated by mercury and mercury compounds in an environmentally sound manner by the Parties.⁷³ The Convention contains comprehensive provisions for technical⁷⁴ and financial assistance,⁷⁵

information exchange,⁷⁶ public awareness,⁷⁷ research, and monitoring⁷⁸ providing a complete framework for meeting its objectives of protecting humankind and the environment from the claws of mercury pollution.

2.5 The SAICM

The Strategic Approach to International Conference on Chemicals Management (SAICM) is a global policy framework envisioned to enhance chemical safety at the global level.⁷⁹ It was adopted on 6 February 2006 with the primary goal of attaining responsible chemical management throughout their lifecycle so that, by 2020, chemicals are produced and used in a way that minimizes their significant negative effects on the environment and human health.⁸⁰ The SAICM comprises of the Dubai Declaration on International Chemicals Management and an Overreaching Policy Strategy, and the broad objectives of the document are organized under five themes, namely, risk reduction; knowledge and information; governance; capacity-building and technical cooperation; and illegal international traffic.⁸¹ Managing chemicals responsibly has been considered indispensable for sustainable development, poverty eradication and reduction and elimination of diseases, improvement of human health, protection of the environment, and overall development in the standard of living of people.⁸² The SAICM works towards bridging

⁶⁶ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 1.

⁶⁷ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 7.

⁶⁸ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 8.

⁶⁹ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 3.

⁷⁰ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 5.

⁷¹ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 3.

⁷² UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 11.

⁷³ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 12.

⁷⁴ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 14.

⁷⁵ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 13.

⁷⁶ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 17.

⁷⁷ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 18.

⁷⁸ UNITED NATIONS. *Minamata Convention on Mercury*. Minamata, 2017. Available at: <http://www.mercuryconvention.org/Portals/11/documents/Booklets/COP3-version/Minamata-Convention-booklet-Sep2019-EN.pdf>. Accessed on: 11 May 2024. Art. 19.

⁷⁹ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸⁰ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸¹ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸² UNITED NATIONS. *Overview, strategic approach to international*

the existing gaps in the capacities to achieve sustainable chemical management systems suitable for both developed and developing countries.⁸³ The SAICM covers not only the environmental aspects of chemical safety within its ambit but also stresses the economic, social, health, and labour aspects.⁸⁴ It extends to agricultural and industrial chemicals and intends to cover them throughout their lifecycle, including in products.⁸⁵ The Dubai Declaration and the Overreaching Policy Strategy are accompanied by a Global Plan of Action⁸⁶, which acts as a guiding document for the stakeholders to realize the objectives of the SAICM.⁸⁷

3 The Indian Position

India became a signatory to the Basel Convention and ratified it on 5 May 1992, and subsequently, signed the Rotterdam Convention in 2005, the Stockholm Convention in 2006, the Minamata Convention in 2014, and the SAICM in 2006. However, studies have shown that the chemical and hazardous waste management system in the country is still far away from being satisfactory.⁸⁸ Developing countries like India are still struggling and lagging as compared to developed countries in protecting the environment and lives of people from the devastating and chronic effects of hazardous chemicals

and wastes.⁸⁹ Even after three decades after the adoption of the Basel Convention, it is approximated that over 90% of waste is still produced and traded from the industrial nations.⁹⁰ Growth of international trade has also been a major factor behind the developing countries being easy targets for dumping hazardous wastes from developed countries as the zeal for having access to foreign markets has made the developing countries compromise their environmental standards during trade negotiations.⁹¹ Added to this, the PIC procedure under the Basel Convention presupposes the ability of the nations to assess the probable risks for making an informed decision regarding the import of hazardous wastes, which is lacking in a developing country like India.⁹² Hence, the PIC procedure does not work effectively to regulate the movement of chemicals and hazardous wastes from developed to developing countries.

The Rotterdam Convention, if effectively implemented, will be a boon for developing countries to overcome the problem of trade in hazardous chemicals and substances but like all other conventions, it requires domestic regulations and enforcement mechanisms for the realisation of its goals. Unfortunately, India lacks such an effective regulatory mechanism, and thereby, many chemicals, though banned in the host countries, find a way to India in the process of exportation.⁹³ Economic benefits are also often prioritised over health and environmental damage in the zeal to increase market access to Indian products.⁹⁴ Added to these concerns,

chemicals management. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸³ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸⁴ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸⁵ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸⁶ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁸⁷ PERREZ, Franz Xaver. The strategic approach to international chemicals management: lost opportunity or foundation for a brave new world. *Review of European Comparative and International Environmental Law*, [s. l.], v. 15, n. 3, p. 245 – 257, 2006.

⁸⁸ KARTHIKEYAN, Leelavathy *et al.*, The management of hazardous solid waste in India: an overview. *MDPI, Environments*, [s. l.], v. 5, n. 9, 2018.

⁸⁹ UNITED NATIONS. *Overview, strategic approach to international chemicals management*. [202-?]. Available at: <http://www.saicm.org/About/SAICMOverview/tabid/5522/language/en-US/Default.aspx>. Accessed on: 11 May 2024.

⁹⁰ AJIBO, Kenneth I. Transboundary hazardous wastes and environmental justice: implications for economically developing countries. *Environmental Law Review*, [s. l.], v. 18, n. 4, p. 267 – 283, 2016.

⁹¹ AJIBO, Kenneth I. Transboundary hazardous wastes and environmental justice: implications for economically developing countries. *Environmental Law Review*, [s. l.], v. 18, n. 4, p. 267 – 283, 2016.

⁹² AJIBO, Kenneth I. Transboundary hazardous wastes and environmental justice: implications for economically developing countries. *Environmental Law Review*, [s. l.], v. 18, n. 4, p. 267 – 283, 2016.

⁹³ ZAHEDI, Nancy S. Implementing the Rotterdam Convention: the challenges of transforming aspirational goals into effective controls on hazardous pesticide exports to developing countries. *Geo. International Environmental Law Review*, [s. l.], v. 11, n. 3, p. 707 – 740, 1999.

⁹⁴ ZAHEDI, Nancy S. Implementing the Rotterdam Convention: the challenges of transforming aspirational goals into effective controls on hazardous pesticide exports to developing countries. *Geo. International Environmental Law Review*, [s. l.], v. 11, n. 3, p. 707 – 740, 1999. p. 710.

industrial lobbying is yet another serious concern regarding the listing of chemicals under Annex III of the Rotterdam Convention to ban or severely restrict them.⁹⁵ This was one of the major reasons for the opposition to the listing of Chrysotile asbestos by India despite the known adverse impacts of the substance on human health and the environment.⁹⁶

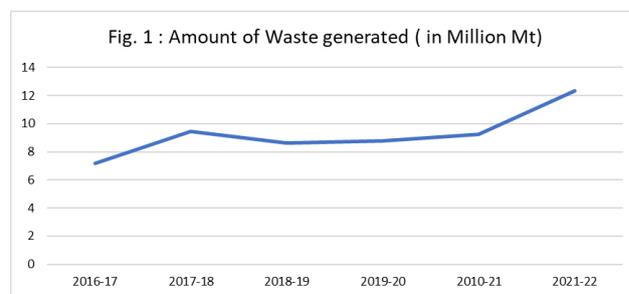
Indian track record in terms of handling POPs and mercury is also not good, despite being party to the above-mentioned international instruments. Although India is the second largest contributor to global mercury pollution, there is no single consolidated regulation for managing a specific pollutant like mercury.⁹⁷ Its regulatory setups and implementation of action plans for managing mercury and POPs are grossly inadequate with no dedicated management strategy and inadequate monitoring by the authorities.⁹⁸ Lack of awareness, information exchange, financial and technological constraints, under-enforcement of existing laws, and flaws in governance hinder the implementation of the above-mentioned international instruments in India.⁹⁹ Hence, it is the need of the hour to probe into the current situation in India to unearth the practical difficulties faced in different parts of India while implementing international obligations in handling chemicals and hazardous wastes to find a durable solution.

3.1 Generation of Hazardous Wastes in India

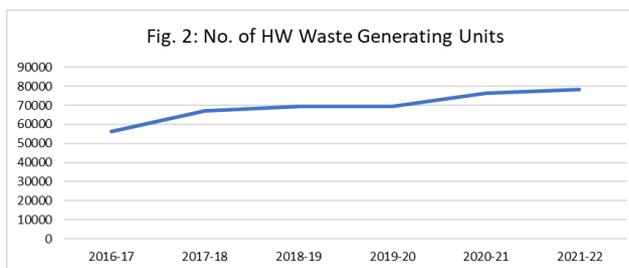
India generated 12.35 million Metric Tonnes of hazardous wastes in 2021-22, which is approximately 25% more than the year before it. The graph below in Fig.1 shows the steady increase in the quantum of waste ge-

nerated in the country from 2016 to 2022. The increase can be attributed to either the increase in the number of hazardous waste-generating industries or due to higher reporting of the same. In certain districts of almost half of the states in the country, the quantity of waste generated transgresses the authorized limit.¹⁰⁰ As evident from the graph in Fig. 2, the number of hazardous waste-generating industrial units has also increased over the past years. There is almost a 30% increase in the number of industrial units generating hazardous wastes from 2016-22. Several states have reported to manage more quantity of hazardous wastes than their quantity available for them for management.¹⁰¹ Gujarat generates 28.30% of hazardous wastes which is the highest in the country. Gujarat, Maharashtra, Tamil Nadu, Odisha, Andhra Pradesh, Rajasthan, Jharkhand, Uttar Pradesh, Telangana and Kerala cumulatively generate about 88% of the total hazardous waste generated in India.

Graphic 1



Graphic 2



⁹⁵ BASU, Soma. India reverses stand on asbestos at Rotterdam Convention Meet. *DownToEarth*, [s. l.], May 2013. Available at: <https://www.downtoearth.org.in/news/india-reverses-stand-on-asbestos-at-rotterdam-convention-meet-40990>. Accessed on: 11 May 2024.

⁹⁶ BASU, Soma. India reverses stand on asbestos at Rotterdam Convention Meet. *DownToEarth*, [s. l.], May 2013. Available at: <https://www.downtoearth.org.in/news/india-reverses-stand-on-asbestos-at-rotterdam-convention-meet-40990>. Accessed on: 11 May 2024.

⁹⁷ SHARMA, B. M. *et al.* Implementation of the Minamata convention to manage mercury pollution in India: challenges and opportunities. *Environ. Sci. Eur.*, [s. l.], v. 31, n. 4, p. 10, 2019.

⁹⁸ SHARMA, B. M. *et al.* Implementation of the Minamata convention to manage mercury pollution in India: challenges and opportunities. *Environ. Sci. Eur.*, [s. l.], v. 31, n. 4, p. 10, 2019.

⁹⁹ SHARMA, B. M. *et al.* Implementation of the Minamata convention to manage mercury pollution in India: challenges and opportunities. *Environ. Sci. Eur.*, [s. l.], v. 31, n. 4, p. 10, 2019.

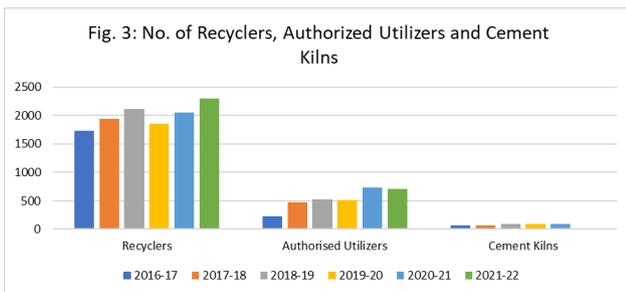
¹⁰⁰ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2019-20*. 2021. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2019-20.pdf. Accessed on: 13 June 2024.

¹⁰¹ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2021-22*. 2023. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2021-22.pdf. Accessed on: 13 June 2024.

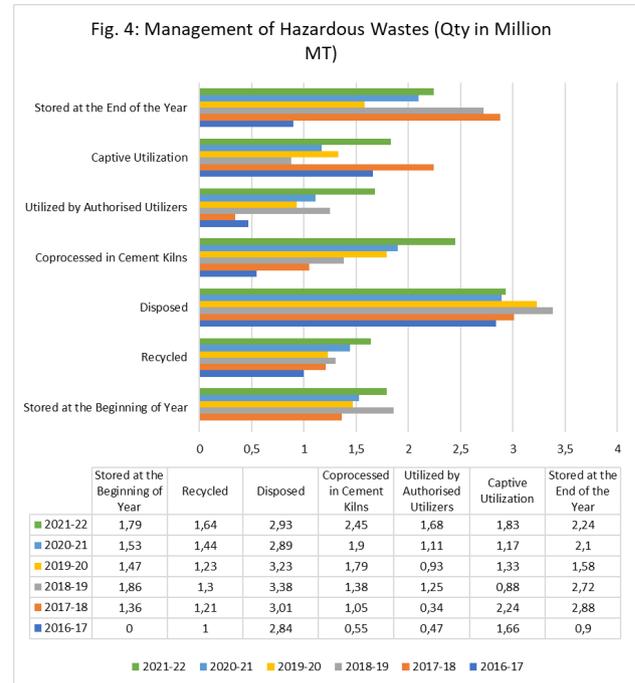
3.2 Management of Hazardous Waste in India

The hazardous wastes generated from the industries are stored on the premises before they are recycled, disposed of, utilized by authorized dealers, or co-processed in cement kilns. In almost all the years ranging from 2016-22, interstate movement of hazardous waste has been recorded but there are inconsistencies in the data about the quantity involved. On the positive side, India has recorded an increase in the number of recyclers and the quantum of waste that is recycled. Most of the recyclers are located in Maharashtra, Haryana, Gujarat, and Uttar Pradesh. There has also been a rise in the number of authorized users and cement kilns where hazardous wastes can be utilized. They are majorly located in the states of Gujarat, Maharashtra and Uttar Pradesh. Resultantly, despite the increase in the quantity of hazardous waste generated, the quantity that is residual for disposal has not increased. However, it is observed that a significant quantity of hazardous wastes continues to be stored in the industrial units at the end of the year.

Graphic 3



Graphic 4



3.3 Availability of TSDFs

Presently, 50 Treatment, Storage and Disposal Facilities (TSDFs) are available across India. Some of these facilities are integrated but others are either commonly secured landfills or incinerators alone. The number of TSDFs has risen from 42 to 50 and the number of integrated facilities has risen from 18 to 20 from 2016 to 2022. Apart from these, there are 141 captive facilities.

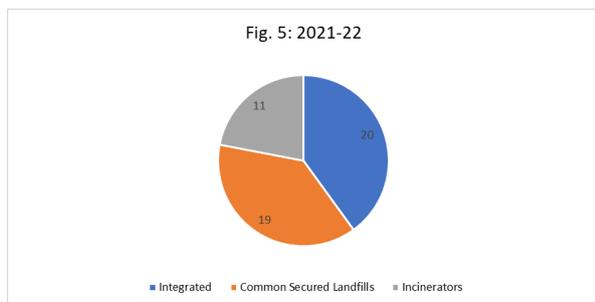
10 states namely, Assam, Bihar Chandigarh, Delhi, Manipur, Meghalaya, Mizoram, Nagaland, Puducherry and Sikkim have neither common nor captive facilities for disposal of hazardous waste. Bihar, Chandigarh, Delhi, Puducherry and Sikkim transport their hazardous wastes to other states for disposal in common secured landfill facility and incinerators.¹⁰² Despite having TSDF, some of the states such as Madhya Pradesh, Rajasthan, and Tamil Nadu transport their wastes to other states for disposal although their capacity is underutilized.¹⁰³

¹⁰² INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2021-22*. 2023. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2021-22.pdf. Accessed on: 13 June 2024.

¹⁰³ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2020-21*. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_inventory2020-21.pdf. Ac-

Strikingly, the infrastructure for handling, management, and disposal of hazardous domestic waste is almost non-existent. As per the Solid Waste Management Rules 2016, domestic hazardous wastes such as paint drums, pesticide cans, CFL bulbs, tubelights, expired medicines, broken mercury thermometers, used batteries, needles and syringes, contaminated gauges, etc, are required to be safely collected by deposition centres and transported for safe disposal. However, only Tamil Nadu has one centre for collecting such waste and has received around 131 MT of waste in 2018-19 which was sent for disposal to the common TSDF.¹⁰⁴ Fluorescent and mercury-containing lamps are regulated under E-Waste Management Rules 2016, and are required to be channelized through common TSDF if no specialized recycling facility is available. At present, only six states namely, Kerala, Madhya Pradesh, Maharashtra, Punjab, Uttar Pradesh and West Bengal have collection centres for domestic wastes such as fluorescent and mercury-containing lamps, which raises concerns regarding the handling, management, and disposal of such wastes in other states.¹⁰⁵ Out of the 17 collection centres in the country, 12 are located in Maharashtra.¹⁰⁶

Graphic 5



cessed on: 13 June 2024.

¹⁰⁴ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2019-20*. 2021. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2019-20.pdf. Accessed on: 13 June 2024.

¹⁰⁵ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2020-21*. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_inventory2020-21.pdf. Accessed on: 13 June 2024.

¹⁰⁶ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2019-20*. 2021. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2019-20.pdf. Accessed on: 13 June 2024.

Table

1

Treatment and Disposal (collected from annual inventory of hazardous wastes)						
	2021-22	2020-21	2019-20	2018-19	2017-18	2016-17
No. of TSDF	50	45	45	45	42	42
Integrated	20	18	17	17	18	18
Common Secured Landfills	19	16	16	16	14	14
Incinerators	11	11	12	12	10	10
No. of States with no TSDF	10	11	11	11	11	11
No. of Captive Facilities	141	136	136	131	112	NA

3.4 Gaps in Reporting

In spite of an operative legal framework and efforts by the implementors, more than 30% of hazardous waste generating and handling units do not submit annual returns to the State Pollution Control Boards. The number of industries filing returns has steadily risen over the last few years but the situation still remains dismal.

Graphic 6

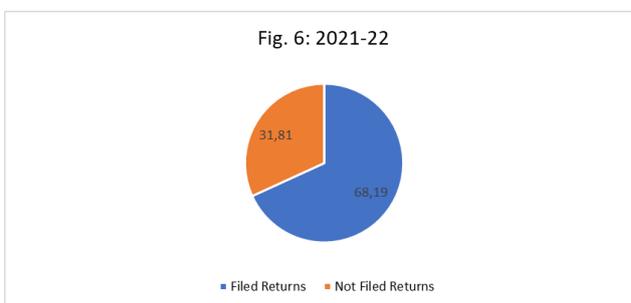


Table 2

Year	2021-22	2020-21	2019-20	2018-19	2017-18	2016-17
No. of HW Generating Industries	78437	76235	69308	69416	66914	56350

Year	2021-22	2020-21	2019-20	2018-19	2017-18	2016-17
Percentage of Industries Filing Returns	68.19	63.96	67	54.18	Data NA	Data NA

In the annual reports submitted by the hazardous waste generating and handling units, recyclers, and utilizers, there are disparities in the information provided by them.¹⁰⁷ There are inconsistencies, especially in the quantum of hazardous wastes that are recycled, utilized, transported to another state, disposed of, and stored at the beginning or end of the year.¹⁰⁸

The State Pollution Control Boards are required to file annual inventories with the Central Pollution Control Board. Around 16% of the states have not filed their inventories in 2021-22. There are mismatches and shortcomings in the inventories filed by the State Boards but very few of them provide the required clarifications or file revised inventories to the Central Board where they are directed to do so.¹⁰⁹

3.5 Transboundary Movement

The reported quantity of hazardous wastes imported and exported in India is less and forms a negligible fraction of the total hazardous waste that is handled and disposed of. In 2020-21, about 8,34,955 MT of imported HW had been recycled and utilized.¹¹⁰ However, 1,49,337 MT of hazardous waste had been reportedly

¹⁰⁷ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2021-22*. 2023. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2021-22.pdf. Accessed on: 13 June 2024.

¹⁰⁸ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2021-22*. 2023. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2021-22.pdf. Accessed on: 13 June 2024.

¹⁰⁹ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2021-22*. 2023. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2021-22.pdf. Accessed on: 13 June 2024.

¹¹⁰ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2020-21*. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_inventory2020-21.pdf. Accessed on: 13 June 2024.

imported in the same period.¹¹¹ This showcases the disparities in the actual and reported quantities. Further, about 2,635 MT of hazardous wastes had been exported.¹¹² In 2021-22 the quantity of imports rose to 0.33 million MT¹¹³ but the quantity of export was only 982 MT.¹¹⁴

Table 3

Year	2021-22	2020-21	2019-20
Quantity of Waste Imported (in Million MT)	0.33	0.15	0.42
Quantity of Waste Exported (in Million MT)	0.001	0.003	0.01

3.6 Remediation of Contaminated Sites

Due to widespread pollution, several sites in the country have been tagged as contaminated.¹¹⁵ Landfill production areas, dumps, waste storage and treatment sites, mine tailings sites, spill sites, and chemical waste handling and storage sites are commonly contaminated areas that are highly polluted by toxic and hazardous substances. As per reports, in the contaminated sites H-Acid was found in Madhya Pradesh, pesticides in Kerala, mercury in Odisha and Tamil Nadu, hexa-

¹¹¹ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2020-21*. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_inventory2020-21.pdf. Accessed on: 13 June 2024.

¹¹² INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2020-21*. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_inventory2020-21.pdf. Accessed on: 13 June 2024.

¹¹³ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2021-22*. 2023. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_Inventory2021-22.pdf. Accessed on: 13 June 2024.

¹¹⁴ INDIA. Ministry of Environment, Forest and Climate Change. Central Pollution Control Board. *National inventory on generation and management of hazardous and other wastes 2020-21*. Available at: https://cpcb.nic.in/uploads/hwmd/Annual_inventory2020-21.pdf. Accessed on: 13 June 2024.

¹¹⁵ CENTRAL POLLUTION CONTROL BOARD. *Annual report 2020-21*. 2021. Available at: <https://cpcb.nic.in/openpdffile.php?id=UmVwb3J0RmlsZXZlMTQwMT8xNjU1MzU0NzIxX2lZGllh-cGhvdG8xNjQ3MS5wZGY=>. Accessed on: 13 June 2024.

valent chromium in Uttar Pradesh, and Asbestos and Chromite in Jharkhand, etc.¹¹⁶ The presence of these sites is not just restricted to commercial and industrial areas but has been also identified in residential, agricultural, recreational, and wilderness areas in rural as well as urban regions.¹¹⁷ Further dumping or spillage of hazardous wastes and chemicals will further contaminate the areas causing adverse impacts on the environment. Contamination of soil, surface, and groundwater in the impact zones exposes people to known and unknown health hazards.

Table 4

No. of Contaminated Sites	No. of Probable Contaminated Sites	Sites that have been investigated and identified for remediation	No. of States with Contaminated Sites	No. of states where remediation work is in process	Total no. of remediations
112	168	28	21	6	11

Source: Annual Report 2020-21, Central Pollution Control Board, Ministry of Environment, Forest and Climate Change, Govt. of India.

Odisha, Uttar Pradesh, and Delhi have the highest number of contaminated sites in the country and the maximum number of probable contaminated sites are present in Delhi, Gujarat, Haryana, Karnataka, Madhya Pradesh, and Uttar Pradesh.¹¹⁸ The process of remediation of contaminated sites has begun in India under the National Clean Energy Fund.¹¹⁹ It is being carried out based on scientific assessment of the Source-Path-

way-Receptor scenario taking carefully into account the risks posed to human health.¹²⁰ However, as presented in the above table, the number of sites that have identified for remediation is significantly low in comparison to the number of contaminated and probable contaminated sites. Only 28 % of the states where contaminated sites are present have commenced remediation and as a result, only 11 out of the 112 contaminated sites are under the remediation process.

4 Conclusion

India has taken considerable steps in the transportation, management, and disposal of hazardous wastes but considering the pace of generation of hazardous wastes, the efforts seem inadequate. There has been an exponential rise in the number of hazardous waste generating units over the years which in turn has directly impacted the quantum of waste generated in the country. The number of TSDFs in the country has increased but still, 11 states in the country do not have proper facilities for disposing of hazardous wastes. Although on the brighter side, the number of industries filing annual returns has increased, the gaps in reporting continue to cripple access to complete information about the quantity of waste generated, its management, and sound disposal. Inconsistencies in data are a major roadblock to enhancing the existing infrastructure and regulations by the state and central governments, which needs immediate attention. Improper reporting should be checked by the State Pollution Control Boards and they should be more pro-active in collection of accurate data and submitting the same to the Central Pollution Control Board. Interstate movement of hazardous wastes for disposal especially between states that have adequate facilities require strict monitoring.

Despite an operating legal framework in place, many states continue to lack proper facilities for the disposal of hazardous wastes. The state governments and Central Government in a cooperated manner may address the infrastructural deficiencies and take adequate measures for mitigating the same. It is highly important that

¹¹⁶ CENTRAL POLLUTION CONTROL BOARD. *Annual report 2020-21*. 2021. Available at: <https://cpcb.nic.in/openpdffile.php?id=UmVwb3J0RmlsZXMTQwM18xNjU1MzU0NzZkX21lZGhhcGhvdG8xNjQ3MS5wZGY=>. Accessed on: 13 June 2024.

¹¹⁷ CENTRAL POLLUTION CONTROL BOARD. *Annual report 2020-21*. 2021. Available at: <https://cpcb.nic.in/openpdffile.php?id=UmVwb3J0RmlsZXMTQwM18xNjU1MzU0NzZkX21lZGhhcGhvdG8xNjQ3MS5wZGY=>. Accessed on: 13 June 2024.

¹¹⁸ CENTRAL POLLUTION CONTROL BOARD. *Annual report 2020-21*. 2021. Available at: <https://cpcb.nic.in/openpdffile.php?id=UmVwb3J0RmlsZXMTQwM18xNjU1MzU0NzZkX21lZGhhcGhvdG8xNjQ3MS5wZGY=>. Accessed on: 13 June 2024.

¹¹⁹ CENTRAL POLLUTION CONTROL BOARD. *Annual report 2020-21*. 2021. Available at: <https://cpcb.nic.in/openpdffile.php?id=UmVwb3J0RmlsZXMTQwM18xNjU1MzU0NzZkX21lZGhhcGhvdG8xNjQ3MS5wZGY=>. Accessed on: 13 June 2024.

¹²⁰ CENTRAL POLLUTION CONTROL BOARD. *Annual report 2020-21*. 2021. Available at: <https://cpcb.nic.in/openpdffile.php?id=UmVwb3J0RmlsZXMTQwM18xNjU1MzU0NzZkX21lZGhhcGhvdG8xNjQ3MS5wZGY=>. Accessed on: 13 June 2024.

the threats posed by domestic hazardous wastes and E-waste on human health and environment are identified and proper information is disseminated for their sound management and disposal. Establishment of collection centres, recycling facilities, and disposal units for domestic hazardous wastes and E-waste is necessary for preventing hazards to human health and the environment.

There has been an increase in the quantity of recyclable waste in India and the number of recyclers, utilizers, and cement kilns utilizing hazardous wastes has also increased significantly. As an outcome, the quantity of undisposed wastes has not increased much in comparison to the increase in the quantity of waste generated. The hazardous wastes imported and exported form a very small fraction of the total wastes handled and disposed of in the country. However, there have been inconsistencies in the data pertaining to the quantity of hazardous wastes that are imported, which raise serious concerns about the sound handling of such wastes. The commencement of remediation works of contaminated sites has been a landmark step taken towards ameliorating the damage caused to the environment due to the dumping of hazardous wastes and other toxic substances. India has a very high number of contaminated sites, which is posing unknown dangers to people living in these regions. Therefore, the process of investigation and identification of contaminated sites and their subsequent remediation should be prioritized. Hence, while compliance with international environmental norms is a bare minimum necessity for our survival, going beyond them with a progressive approach to protect human health and environment should form an integral part of our futuristic policy.

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REVISTA DE DIREITO INTERNACIONAL
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A proliferação de novos tipos penais: um risco de deslegitimação do atual direito internacional penal?

The proliferation of new criminal norms: a risk to the legitimacy of contemporary international criminal law?

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A proliferação de novos tipos penais: um risco de deslegitimação do atual direito internacional penal?*

The proliferation of new criminal norms: a risk to the legitimacy of contemporary international criminal law?

Estela Cristina Vieira de Siqueira**
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Resumo

Desde a criação do Tribunal Penal Internacional (TPI), consolidaram-se quatro crimes principais: genocídio, crimes contra a humanidade, crimes de guerra e o crime de agressão, que respondem a graves violações aos direitos humanos e possuem definições claras para garantir sua aplicação. Contudo, a proliferação discursiva de novos tipos penais, como ecocídio, etnocídio e domicídio, gera debates sobre riscos à legitimidade e eficácia do sistema jurídico, o que pode diluir a força normativa e enfraquecer a clareza dos tipos penais existentes — a título de exemplo, o genocídio, baseado no *dolus specialis*, já abarca muitos aspectos desses termos. Partindo de Jacques Derida, ressalta-se que, embora o significado das palavras evolua politicamente com o tempo, o Direito exige definições estáveis para sua aplicação. Ainda, o uso da alegoria do coelho-pato por Martti Koskeniemi, reforça que Direito e Política são campos distintos, cuja comunicação indiscriminada pode enfraquecer a legitimidade normativa do Direito. Usando uma abordagem analítico-dedutiva e pesquisa documental, neste estudo, investigam-se as bases históricas do sistema penal internacional e avaliam-se os impactos da criação de novos tipos penais.

Palavras-chave: direito internacional penal; genocídio; ecocídio; etnocídio; domicídio; legitimidade.

Abstract

Since the creation of the International Criminal Court (ICC), four main crimes have been consolidated: genocide, crimes against humanity, war crimes and the crime of aggression, which are serious violations of human rights and have clear definitions to ensure their application. However, the proliferation of new types of crimes, such as ecocide, ethnocide and domicile, generates debates about the risks to the legitimacy and effectiveness of the legal system, which can dilute the normative force and weaken the clarity of existing types of crimes – for example, genocide, based on *dolus specialis*, already encompasses many aspects of these terms. Based on Jacques Der-

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rida, it is worth highlighting that, although the meaning of words evolves politically over time, Law requires stable definitions for its application. Furthermore, Martti Koskenniemi's use of the allegory of the duck-rabbit reinforces that Law and Politics are distinct fields, whose indiscriminate communication can weaken the normative legitimacy of Law. Using an analytical-deductive approach and documentary research, this study investigates the historical foundations of the international criminal system and assesses the impacts of the creation of new criminal types.

Keywords: international criminal law; genocide; ecocide; ethnocide; domicile; legitimacy.

1 Introdução

O Direito Internacional Penal, ao longo de sua construção histórica, enfrentou desafios quanto à definição e extensão de normas capazes de responder a crimes de gravidade extrema. A criação do Tribunal Penal Internacional, em 2002, representou um marco na consolidação de um sistema que visa julgar crimes contra a humanidade, crimes de guerra, genocídio e o crime de agressão, delineados por eventos históricos como as duas Guerras Mundiais e os conflitos na ex-Iugoslávia e em Ruanda.

Os crimes contra a humanidade, conforme definidos no artigo 7º do Estatuto de Roma, consistem em atos sistemáticos ou generalizados contra qualquer população civil, sem a necessidade de serem direcionados a um grupo específico ou motivados por sua identidade intrínseca, como ocorre no crime de genocídio, previsto no artigo 6º do mesmo Estatuto. Este, por sua vez, distingue-se dos crimes contra a humanidade pela intenção deliberada de destruir, no todo ou em parte, um grupo nacional, étnico, racial ou religioso, enquanto tal. Essa intenção específica de aniquilação, fundamental para a caracterização do crime de genocídio, é denominada no Direito Internacional Penal como *dolus specialis*.

Esses crimes, conforme foram tipificados no Estatuto de Roma, são essenciais para garantir a punição dos perpetradores dessas graves violações, em um sistema que visa à preservação da clareza e da eficácia de suas normas — justamente em razão da necessidade de se assegurar uma resposta jurídica adequada e proporcional a crimes de tal magnitude.

Entretanto, nas últimas décadas, tem havido um crescente debate sobre a necessidade de criação de novos tipos penais, como o ecocídio, etnocídio, domicídio e outros “-ídios”, impulsionados por novas demandas políticas e sociais. Embora essas propostas reflitam a necessidade de adaptação do Direito Internacional às novas realidades do século XXI, surgem questionamentos sobre a fragmentação excessiva dos conceitos existentes nos crimes internacionais, sobretudo no conceito de genocídio. A reinterpretação e expansão desses tipos penais pode, paradoxalmente, diluir sua força jurídica e impactar negativamente a coerência do sistema internacional.

Diante disso, surge uma questão fundamental: essas inovações são realmente necessárias para enfrentar novos desafios, ou resultam em uma fragmentação que compromete os princípios centrais do Direito Internacional Penal? A pesquisa, a partir de uma abordagem qualitativa, tendo a revisão bibliográfica e documental como técnica e valendo-se do método analítico-dedutivo, busca responder a essa pergunta, investigando as bases históricas e jurídicas do sistema existente e avaliando as consequências da criação de novos tipos penais para a efetividade e coerência do Direito Internacional.

A reflexão é enriquecida pela filosofia de Jacques Derrida, que, apesar de conhecido por seu uso de neologismos e pela ideia de que o significado das palavras está em constante transformação, reconhece a presença de definições claras e estáveis no campo do Direito. O sistema jurídico, diferentemente de outros campos do discurso, exige uma base sólida para garantir sua eficácia, sobretudo no Direito Penal. Essa posição não contraria, como se poderia imaginar, sua Teoria da “*Différance*”, mas aponta para a distinção necessária entre os domínios da linguagem e do Direito.

Além disso, utiliza-se da Alegoria do Coelho-pato de Wittgenstein, proposta por Martti Koskenniemi para o Direito Internacional, com o objetivo de ilustrar a coexistência, mas não a fusão, entre Direito e Política. A proliferação de neologismos penais em nível internacional, como os diversos “-ídios”, pertence essencialmente ao campo político. Embora Direito e Política possam dialogar, sua confusão pode enfraquecer a solidez das normas jurídicas — um problema mais relevante para o Direito do que para a Política, em termos de eficácia normativa, mas igualmente problemático para a Políti-

ca, quando se pondera as consequências práticas de tal enfraquecimento.

2 Percurso histórico do direito penal internacional: surgimento dos crimes internacionais e do Tribunal Penal Internacional

Na atualidade, o Direito Internacional Penal reconhece quatro crimes internacionais devidamente tipificados e passíveis de serem julgados pelo principal mecanismo da disciplina, o Tribunal Penal Internacional. Todavia, as experiências pretéritas do direito internacional, tendo como principais episódios as duas guerras mundiais, trouxeram fundamentos e questionamentos acerca da natureza dos crimes, da legalidade e da possibilidade de punição para os réus. Ainda no pós-Primeira Guerra Mundial, dúvidas acerca da legalidade e considerações subjetivas e imprecisas acerca dos tipos legais fizeram os Estados Unidos a se posicionarem contrariamente à possibilidade da responsabilização dos líderes do Império Alemão¹. Mesmo assim, internamente na Alemanha, cumprindo o dispositivo do artigo 228 do Tratado de Versalhes, passaram-se a julgá-los, no Tribunal de Leipzig, pelos atos contrários às leis e costumes da guerra, porém, sem conseguir julgar o imperador, que havia encontrado asilo nos Países Baixos².

Apenas após a Segunda Guerra Mundial, a responsabilização individual de criminosos passou à ordem do dia, com a criação dos tribunais (ainda que militares) responsáveis por julgar os crimes cometidos pelos nazistas na Europa e pelos japoneses na Extremo Oriente, respectivamente, os tribunais que passaram a ser conhecidos como Tribunal de Nuremberg e Tribunal de Tóquio, julgando crimes contra paz, crimes de guerra e crimes contra a humanidade, conforme o artigo 6º da Carta do Tribunal de Nuremberg e o artigo 5º da congênere para o tribunal na Ásia. A possibilidade de julgar tais crimes não foi isenta de críticas, como a aplicação de direito *ex post facto* com relação aos crimes contra a humanidade, arguindo as defesas de que se tratava de

caso contrário ao princípio penal *nullum crimen sine lege*³, pois teriam sido tipificados posteriormente aos atos terem ocorrido.

Distanciando-se dessas críticas, evitou-se a aplicação do conceito de crime de genocídio, que já havia sido cunhado, anteriormente à formação dos tribunais em questão, ainda no ano de 1944, de forma doutrinária, no trabalho do jurista polonês Raphael Lemkin, a partir da necessidade de dar nome às atrocidades ocorridas contra a população cristã (armênios, gregos e assírios) no Império Otomano durante a Primeira Guerra Mundial⁴ e na Europa com os judeus. Lemkin formaria um neologismo para criar o nome do crime, somando a ideia de *genos* do grego (raça ou tribo) à *cidium* do latim (assassinato), para traduzir o processo de extermínio de um grupo humano ou as diferentes ações coordenadas para aniquilar a existência desse grupo, observando que mesmo um ataque direcionado apenas a um pequeno grupo de indivíduos teria como objetivo real a eliminação do grupo como um todo⁵.

A tipificação internacional do crime de genocídio somente ocorreu em 1948, a partir da Convenção para a Prevenção e a Repressão do Crime de Genocídio⁶, tratado como atos⁷ cometidos na intenção de, em tempo de guerra, ou em tempo de paz, destruir no todo ou em parte, um grupo nacional, étnico, racial ou religioso⁸,

³ CASSESE, Antonio. *International law*. Oxford: Oxford University Press, 2005. p. 440-441.

⁴ MORRIS, Benny; ZE'EV, Dror. *The Thirty-Year Genocide: Turkey's destruction of its christian minorities, 1894-1924*. Cambridge, MA: Harvard University Press, 2019. p. 486-488.

⁵ LEMKIN, Raphael. *Axix rule in occupied Europe: laws of occupation, analysis of Government, proposals for redress*. 2. ed. New Jersey: Lawbook Exchange, 1944. p. 79.

⁶ Ainda que países como a França tenham insistido em relacionar o genocídio com os crimes contra a humanidade, tendo inclusive advogado por considerar o genocídio como um crime contra a humanidade (humanity), o que foi rejeitado pelo comitê ad hoc, caracterizando o crime contra a espécie humana (mankind), contra o entendimento do país europeu. In: SCHABAS, William A. *Genocide in international law: the crime of crimes*. 2. ed. Cambridge, MA: Cambridge University Press, 2009. p. 73.

⁷ Os atos foram dispostos no artigo 2º da Convenção, tratando do assassinato, lesão física ou mental graves, submissão intencional do grupo a condição capaz de causar destruição física total ou parcial, adoção de medidas para impedir nascimentos ou a transferência forçada de crianças do grupo para outro grupo.

⁸ BRASIL. *Decreto nº 30.822, de 6 de maio de 1952*. Promulga a Convenção para a Prevenção e a Repressão do Crime de Genocídio, concluída em Paris, a 11 de dezembro de 1948, por ocasião da III Sessão da Assembleia Geral das Nações Unidas. Disponível em: https://www.planalto.gov.br/ccivil_03/atos/decretos/1952/d30822.html. Acesso em: 13 set. 2024.

¹ STAHN, Carsten. *A critical introduction to international criminal law*. Cambridge, MA: Cambridge University Press, 2019. p. 11.

² ALAMINO, Felipe Nicolau Pimentel. *Anexação da Crimeia: o conceito de agressão no direito internacional*. Curitiba: Instituto Memória, 2021. p. 174.

havendo, portanto, a condenação do ato criminoso. Porém, durante a Guerra Fria a cultura de impunidade praticamente impediu que o século XX observasse alguma condenação por esse tipo penal, somente ocorrendo em 1998, quando, já com as experiências de tribunais *ad hoc* das Nações Unidas, para os casos de crimes ocorridos na década de 1990 em Ruanda e na antiga Iugoslávia, o primeiro condenado por genocídio fosse sentenciado pelos crimes cometidos em Ruanda, Jean-Paul Akayesu⁹.

Conforme já sinalizado, após as experiências com os tribunais militares no pós-Segunda Guerra Mundial, a criação de tribunais *ad hoc* para o julgamento de crimes relativos às situações de guerra civil em Ruanda e na antiga Iugoslávia, durante a década de 1990, foi outro momento para o amadurecimento e a consolidação do Direito Internacional Penal e da punibilidade de seus crimes.

Os Tribunais *ad hoc* foram criados a partir de resoluções do Conselho de Segurança das Nações Unidas: por meio da Resolução 827, de 1993, criou-se o Tribunal Penal Internacional para a ex-Iugoslávia e, por meio da Resolução 955, de 1994, criou-se o Tribunal Penal Internacional para Ruanda, com competência para julgar crimes de genocídio, crimes contra a humanidade e crimes de guerra, trazidos no corpo da resolução como violações ao direito humanitário contido no artigo 3º comum às Convenções de Genebra, conforme o artigo 4º da Resolução criadora do Tribunal para Ruanda. Esses tribunais tiveram especial importância no julgamento do genocídio de Tutsis cometidos pelos Hutus, em que, aproximadamente, 800 mil pessoas foram assassinadas¹⁰ e no julgamento do genocídio de Srebrenica, na Bósnia e Herzegovina, cujo massacre cometido pelos sérvios da Bósnia contra a população muçulmana, além de crimes de guerra e crimes contra a humanidade, já era conhecido antes de se confirmar o crime por meio da sentença¹¹.

A criação de um tribunal capaz de julgar crimes internacionais de forma permanente, por sua vez, somente surgiu no século XXI. Em 1998, após o longo trabalho diplomático do chamado Comitê Preparatório

para a Criação de um Tribunal Penal Internacional¹², finalmente aprovou-se seu Estatuto, que passou a ser conhecido pelo nome da cidade onde ocorriam as negociações, o Estatuto de Roma, estabelecendo-se que, a partir de sessenta ratificações, o Tribunal passaria a entrar em vigor, o que ocorreu já em 2002.

O Tribunal Penal Internacional foi criado com a proposta de poder julgar indivíduos acerca do cometimento de crimes contra a humanidade, crimes de guerra e genocídio, deixando margem para que o crime de agressão também pudesse ser de competência do Tribunal, desde que fosse acionado em posterior revisão do Estatuto de Roma, conforme o §2º do artigo 5º, sendo aprovada a disposição em que o crime passasse a ser definido e enunciadas as condições em que o Tribunal passaria a ter competência com relação a este crime.

Em 2010, finalmente, após os sete anos previstos no artigo 123, §2º do Estatuto de Roma, na cidade de Kampala, em Uganda, ocorreu a Conferência de revisão de Kampala, sendo aprovada sua Resolução¹³ e incorporando ao Estatuto de Roma o artigo 8 *bis*, trazendo a disposição sobre o crime de agressão¹⁴, que, por sua vez, necessitou aguardar mais alguns anos para que, finalmente, o crime em questão passasse a ser ativado, em 2017, com a aprovação, por consenso, da Resolução ICC-ASP/16/Res.5, em dezembro daquele ano, garantindo que o Tribunal teria competência para decidir sobre casos de agressão a partir do dia 17 de julho de 2018.

Assim, atualmente, o direito internacional penal conta com quatro crimes internacionais de competência de seu principal mecanismo, o Tribunal Penal Internacional, sendo eles, segundo o Estatuto de Roma, após Kampala:

(i) crimes contra a humanidade, que consistem em atos como homicídio; extermínio; escravidão; deportação ou transferência forçada; prisão em violação às normas de direito internacional; tortura; agressão se-

¹² JANKOV, Fernanda Florentino Fernandez. *Direito internacional penal: mecanismo de implementação do Tribunal Penal Internacional*. São Paulo: Editora Saraiva, 2009. p. 29-30.

¹³ A Resolução RC/Res.6, que foi adotada no dia 11 de junho de 2010, por consenso.

¹⁴ Destaca-se que juntamente ao artigo 8 bis, introduziu-se, também, o artigo 15 bis, que tem por objetivo explicar a jurisdição do Tribunal acerca desse crime, estabelecendo seus limites, como em relação à impossibilidade de sua aplicação a Estados que não sejam membros do Estatuto, com relação a seus nacionais e a seu território, e garantindo que os Estados membros do Tribunal possam declarar que não aceitam a jurisdição sobre esse crime.

⁹ AKHAVAN, Payam. *Reducing genocide to law: definition, meaning and the ultimate crime*. Cambridge, MA: Cambridge University Press, 2014. p. 7-8.

¹⁰ BRUNETEAU, Bernard. *Génocides: usages et mésusages d'un concept*. Paris: CNRS Éditions, 2019. p. 95.

¹¹ HONIG, Jan Willem; BOTH, Norbert. *Srebrenica: record of a war crime*. New York: Penguin Books, 1997. p. 65-66.

xual, escravatura sexual, prostituição forçada, gravidez forçada, esterelização forçada; perseguição de grupo ou coletividade identificado por motivos políticos, raciais, nacionais, étnicos, culturais, religiosos ou de gênero, em função de critérios inaceitáveis ao direito internacional; desaparecimento de pessoas; *apartheid* ou outros atos desumanos, desde que sejam estes atos cometidos dentro de um quadro de ataque generalizado ou sistemático contra qualquer população civil;

(ii) crimes de guerra, que consistem em violações graves à Convenções de Genebra de 1949, dirigidos contra pessoas ou bens protegidos, como homicídios dolosos; tortura ou tratamentos desumanos; sofrimento ou ofensas intencionais graves à integridade física ou à saúde, destruição ou apropriação de bens sem haver justificação por necessidade militar; tomada de reféns; deportação; maus tratos a prisioneiros de guerra; ataques intencionalmente direcionados à população civil; ataques a objetivos não militares; ataques a edifícios consagrados para culto religioso, educação, artes, monumentos históricos, hospitais, entre outros;

(iii) crime de agressão, seguindo a resolução da Assembleia Geral das Nações Unidas, de 1974, 3314 (XXIX), que consiste em planejar, preparar, iniciar ou executar um ato de agressão (uso de força armada contra a soberania, integridade territorial ou independência política de outro Estado) em violação à Carta das Nações Unidas, desde que seja cometido por alguém em posição de exercer controle ou dirigir a ação política ou militar de um Estado, podendo ocorrer por invasão, bombardeio, bloqueio dos portos ou costas, ataque efetivado pelas forças armadas, ou o uso das forças armadas no território de outro Estado em descumprimento às condições estabelecidas para sua presença naquele Estado, a permissão de um Estado à utilização de seu território para a perpetração de um ato de agressão a outro Estado por um terceiro, ou o envio em nome de um Estado, de bandos armados, grupos irregulares ou mercenários para realizar atos de força armada contra outro Estado;

(iv) crime de genocídio, por sua vez, desde a Convenção para a Prevenção e a Repressão do Crime de Genocídio, consiste em atos praticados com a intenção de destruir, no todo ou em parte, um grupo nacional, étnico, racial ou religioso enquanto tal, podendo ser cometido por meio de homicídio a membros do grupo; ofensas graves à integridade mental ou física de mem-

bros do grupo; sujeição intencional do grupo a condições de vida objetivando provocar sua destruição física total ou parcial; imposição de medidas destinadas a impedir nascimentos no seio do grupo e a transferência à força de crianças de um grupo nacional, étnico, racial ou religioso para outro grupo.

Feitas as ponderações acerca da evolução dos crimes internacionais de competência do Tribunal Penal Internacional e a evolução do Direito Internacional Penal, apresentam-se as considerações sobre a possibilidade, na atualidade, da criação de novos tipos criminais no plano internacional.

3 A proliferação discursiva de novos tipos penais: análise crítica do ecocídio, etnocídio e domicídio

Um dos conceitos mais questionados e retoricamente fragmentados da atualidade é o de genocídio. No entanto, desde 1948, o conceito do crime, posteriormente foi tipificado no Estatuto de Roma permanece inalterado. O cerne informativo do tipo penal é o *animus* de destruição, no todo ou em parte, de um grupo determinado, mas não apenas de seu extermínio, pura e simplesmente — como, eventualmente poderia ser classificado no crime contra a humanidade — mas, sim de um extermínio motivado por características únicas desse grupo, um contexto, que os coloca como alvo: o *dolus specialis*¹⁵.

É o *dolus specialis*, a intenção na destruição, no todo ou em parte, de determinado grupo, por suas características que afasta o crime de genocídio de outro tipo penal, o crime contra a humanidade, haja vista sua relação com esse crime, tendo sido inclusive, no momento da elaboração da Convenção de 1948, discutida sua existência como um tipo separado — países como a França, por exemplo, advogavam que o genocídio era um crime contra a humanidade¹⁶. Triunfou, porém, a interpretação de que genocídio é mais específico do que viria a ser considerado como atos cometidos dentro de um quadro

¹⁵ SCHABAS, William A. *An introduction to the International Criminal Court*. Cambridge, MA: Cambridge University Press, 2004.

¹⁶ SCHABAS, William A. *Genocide in international law: the crime of crimes*. 2. ed. Cambridge, MA: Cambridge University Press, 2009. p. 73.

de ataque generalizado ou sistemático contra qualquer população civil, devido à presença deste *dolus specialis*.

Atualmente, no entanto, por motivos políticos múltiplos, há uma proliferação de subtipos conceituais de genocídio, politicamente justificados, mas legalmente controversos: ecocídio, etnocídio, domicídio e inúmeros outros “cídios”, servindo o propósito de dar voz a pautas específicas, que tangenciem o conceito de genocídio em alguma medida, buscando, cada um a sua maneira, focar especificamente em um traço de destruição que destaca o pretensão novo tipo penal dos já existentes.

3.1 Ecocídio

A utilização da expressão “ecocídio” ocorreu pela primeira vez na Conferência sobre Guerra e Responsabilidade Nacional, em 1970, por Arthur W. Galston, em razão do impacto ambiental causado pela Guerra do Vietnã, comparando o ocorrido no país asiático ao Holocausto, porém, tratando-se de um *holocausto ambiental*¹⁷.

Inicialmente, o termo foi cunhado justamente em referência à palavra *genocídio*, para o qual já havia um tipo penal desde 1948, como já demonstrado, significando a eliminação no todo ou em parte de um grupo humano específico. Em digressão, Galston propôs a criação de um documento internacional que tipificasse a destruição no todo ou em parte de ecossistemas, pelo impacto causado à humanidade, à fauna e à flora, devendo ser denominada “ecocídio”¹⁸.

Galston, em uma importante referência, foi o criador do Agente Laranja¹⁹, um biorregulador que poderia acelerar o crescimento da soja, mas que, caso utilizado de forma excessiva, convertia-se em um potente desfolhante que seria amplamente utilizado pelos exércitos dos Estados Unidos no Vietnã, na destruição de plantações e florestas no país do Sudeste Asiático. Em razão do trágico uso de sua descoberta, Galston, muito abalado, dedicou sua vida ao combate do uso destrutivo da ciência com fins militares.

O apelo de Galston foi acolhido pela sociedade internacional e amplamente apoiado na Conferência das Nações Unidas sobre o Meio Ambiente Humano de 1972, em Estocolmo²⁰.

Diante desse contexto — e como consequência dele —, Richard A. Falk proporia uma Convenção sobre o Ecocídio²¹, reconhecendo que a humanidade infligiu, consciente e *inconscientemente*, danos irreparáveis ao meio ambiente, tanto em tempos de guerra quanto em tempos de paz. O que, em certa medida, corresponde ao reconhecimento atual relativo aos crimes internacionais, como os crimes contra a humanidade, em que há o claro reconhecimento de não haver a necessidade de seu cometimento em momentos de guerra²².

Posteriormente, em 1974, Arthur Westing explicitou, inadvertidamente, o que seria uma das principais falhas na proposta: a presença da expressão “inconscientemente”²³. Nem sempre o elemento de intencionalidade poderia ser identificado, sendo muitas vezes uma prática omissiva ou um acidente ambiental — o que, legalmente falando, afastaria o “ecocídio” do cerne informativo do genocídio, tendo em vista que não haveria a configuração necessária do dolo especial de eliminação. Destaca-se que a ausência de intencionalidade afasta os atuais crimes internacionais, haja vista serem considerados dolosos por sua natureza, considerando-se erro de fato ou de direito ao se eliminar o dolo do crime analisado, como é a inteligência do artigo 32 do Estatuto de Roma, uma vez que o artigo 30 do mesmo documento traz os elementos psicológicos da conduta dos crimes, devendo possuir conhecimento dos elementos materiais dos crimes e a vontade de cometer, o que é chamado de *mens rea*, mente culpada²⁴.

Esse debate também se desenvolveu no âmbito da Comissão de Direito Internacional das Nações Unidas, durante a discussão do Projeto do Código de Crimes

¹⁷ SHAMLOO, Bagher; GHOLIPOUR, Gholamreza. Galston's legal legacy: re-reading the birth process of the concept of ecocide. *Criminal Law Research*, v. 13, n. 1, p. 225-254, 2022.

¹⁸ GAUGER, Anja et al. *Ecocide project: 'ecocide is the missing 5th crime against peace'*. London: University of London, 2012.

¹⁹ MEHTA, Sailesh; MERZ, Prisca. *Ecocide—a new crime against peace?*. *Environmental Law Review*, v. 17, n. 1, p. 3-7, 2015.

²⁰ MEHTA, Sailesh; MERZ, Prisca. *Ecocide—a new crime against peace?*. *Environmental Law Review*, v. 17, n. 1, p. 3-7, 2015.

²¹ FALK, Richard A. *Environmental warfare and ecocide: facts, appraisal, and proposals*. *Bulletin of Peace Proposals*, v. 4, n. 1, p. 80-96, 1973.

²² AKHAVAN, Payam. *Reducing genocide to law: definition, meaning and the ultimate crime*. Cambridge, MA: Cambridge University Press, 2014. p. 35.

²³ WESTING, Arthur H. *Arms control and the environment: proscription of ecocide*. *Bulletin of the Atomic Scientists*, v. 30, n. 1, p. 24-27, 1974.

²⁴ SCHABAS, William A. *Genocide in international law: the crime of crimes*. 2. ed. Cambridge, MA: Cambridge University Press, 2009. p. 241-242.

contra a Paz e a Segurança da Humanidade²⁵. Em 1986, a Comissão reabriu as discussões sobre a inclusão do crime de ecocídio no futuro Código, que se tornaria o Estatuto de Roma, e um texto para um provável artigo 26 que o mencionasse foi proposto²⁶.

No entanto, não houve consenso sobre a necessidade de intencionalidade no cometimento do ecocídio. Inicialmente, a intencionalidade foi incluída no texto, mas posteriormente, por intervenção da Austrália, Bélgica, Áustria e Uruguai²⁷, a necessidade real de sua inclusão foi questionada. Argumentou-se que, em tempos de paz, a destruição do meio ambiente nem sempre resulta de uma intenção deliberada, podendo ocorrer por omissão ou acidente. Diante da falta de convergência entre os países no debate, o dispositivo foi completamente removido do projeto²⁸.

Apesar da ampla discussão e do envolvimento de comitês de especialistas ao longo de 40 anos, o termo “ecocídio” não foi incluído no texto final do Estatuto de Roma e, para parte da bibliografia especializada, não resta muito claro o motivo da não inclusão²⁹.

No entanto, é importante destacar que, talvez, o motivo seja mais aparente do que se imagine: a destruição intencional de um grupo humano, no todo ou em parte, é genocídio, independentemente dos meios escolhidos para implementá-lo, sobretudo quanto ao prescrito na alínea (c) do Artigo 6, sobre a sujeição intencional do grupo a condições de vida com vista a provocar a sua destruição física, total ou parcial.

Como não há consenso entre especialistas sobre a necessidade da intencionalidade, nesse caso, a ausência de intenção e, conseqüentemente, do dolo especial necessário ao genocídio, impede a configuração do crime de genocídio. Portanto, quando essa intenção não está presente, não se tratando de genocídio, estamos diante de um crime ambiental. Esse crime pode ser incluído

por meio de reforma em outro tipo penal do Estatuto de Roma, mas não no tipo penal de genocídio.

Ainda assim, há, no Estatuto de Roma, uma hipótese de ataque intencional ao meio ambiente, porém, em tempos de guerra, e não de paz, com a provisão do Artigo 8(2)(b)(iv), definindo que será crime de guerra

lançar intencionalmente um ataque, sabendo que o mesmo causará perdas acidentais de vidas humanas ou ferimentos na população civil, danos em bens de caráter civil ou prejuízos extensos, duradouros e graves no meio ambiente que se revelem claramente excessivos em relação à vantagem militar global concreta e direta que se previa;

Mais uma vez, nessa definição, observa-se a menção à intencionalidade do ataque para a configuração do referido tipo da Convenção.

Outra possibilidade de aplicação dos conceitos embrionários de “ecocídio” aos atuais crimes internacionais de competência do Tribunal Penal Internacional pode ser no contexto de crime contra a humanidade, haja vista o Artigo 7 (1) (k) trazer o entendimento de que “[O]utros atos desumanos de caráter semelhante, que causem intencionalmente grande sofrimento, ou afetem gravemente a integridade física ou a saúde física ou mental” também são enquadrados como crimes contra a humanidade, dando ensejo a possibilidade de figurar um eventual “ecocídio”.

Ainda assim, nos anos recentes, há movimentações de Estados e organizações como a *STOP ECOCIDE FOUNDATION*, composto por especialistas na área desde 2021, com o objetivo de tipificar o crime de ecocídio, trazendo-o como o quinto crime internacional (figurando como Artigo 8 ter.), sendo considerado como “qualquer ato ilícito ou arbitrário perpetrado com conhecimento de que existe uma probabilidade substancial de que cause danos graves que sejam extensos ou duradouros ao meio ambiente”³⁰.

No mês de setembro de 2024, a partir do conceito elaborado pela Fundação *STOP ECOCIDE*, Fiji, Samoa e Vanuatu, três países insulares do Pacífico, apresentaram uma proposta de emenda ao Tribunal Penal Internacional, com o objetivo de que esse crime passe a ser da competência da corte³¹.

²⁵ CARDOSO, Elio. *Tribunal Penal Internacional: conceitos, realidades e implicações para o Brasil*. Brasília: Fundação Alexandre de Gusmão, 2012.

²⁶ GAUGER, Anja *et al.* *Ecocide project: ‘ecocide is the missing 5th crime against peace’*. London: University of London, 2012.

²⁷ GAUGER, Anja *et al.* *Ecocide project: ‘ecocide is the missing 5th crime against peace’*. London: University of London, 2012.

²⁸ GAUGER, Anja *et al.* *Ecocide project: ‘ecocide is the missing 5th crime against peace’*. London: University of London, 2012.

²⁹ GAUGER, Anja *et al.* *Ecocide project: ‘ecocide is the missing 5th crime against peace’*. London: University of London, 2012.

³⁰ STOP ECOCIDE FOUNDATION. *Legal definition*. [2021]. Disponível em: <https://www.stopecocide.earth/legal-definition>. Acesso em: 28 set. 2024.

³¹ PERSICO, Christina. Vanuatu, Fiji and Samoa say ‘ecocide’ should be an international crime’. *RNZ*, 10 set. 2024. Disponível

Essa movimentação alinha-se com a manifestação europeia de fevereiro de 2024, quando o Parlamento Europeu aprovou a recomendação de que os Estados membros da União Europeia incluam, em suas legislações nacionais, a tipificação do crime de ecocídio, seguindo a definição criada pela Fundação *STOP ECOCIDE*, em 2021³². Todavia, como crime internacional, ainda não há um consenso.

3.2 Etnocídio

Diferentemente do crime de ecocídio, a expressão “etnocídio” remonta à proposição do termo “genocídio” por Raphael Lemkin, em 1944³³. No entanto, sua utilização é consideravelmente menos difundida do que a do termo atualmente adotado na legislação, por um motivo simples: o etnocídio está, em parte, abrangido pelo crime de genocídio. Lemkin, em seu trabalho, propunha que genocídio também poderia possuir a vertente cultural, seja com a proibição do uso do idioma de determinado grupo, seja com a proibição da expressão artística por membros desses grupos, como literatura, música, rádio, cinema entre outras, ou mesmo com a destruição de bibliotecas, monumentos, galerias de arte e arquivos que contenham a reserva cultural de um determinado grupo humano, como ocorreu durante o regime nazista na Europa, na ocupação da França, da Polônia ou de Luxemburgo³⁴.

Essa vertente cultural, porém, não foi abrangida na Convenção de 1948, ainda que os trabalhos iniciais, para a Convenção, trouxessem o conceito de “genocídio nacional-cultural”³⁵, tampouco sendo considerada no processo de criação do Estatuto de Roma que criaria o Tribunal Penal Internacional. Assim, passou, inicial-

mente, na academia, a ser utilizada a expressão “etnocídio” para resgatar o conceito de genocídio cultural³⁶ — esquecido nos principais tratados.

Outrossim, é possível entender que a destruição ou o ataque a monumentos culturais, ou ações direcionadas contra a cultura de determinado grupo, podem ser considerados tanto como um crime de guerra pelo Estatuto de Roma, como também como forma de acusações de apoio a casos de alegação de genocídio físico e de perseguição no caso de crimes contra a humanidade³⁷.

A expressão seria utilizada também pela UNESCO, em 1981, na Declaração de San José sobre Etnocídio e Etnodesenvolvimento, focada nos direitos dos povos indígenas no contexto interamericano, e que definiu etnocídio como a privação do “direito de um grupo étnico de desfrutar, desenvolver e transmitir sua própria cultura e sua própria língua, seja coletiva ou individualmente”³⁸ ou “genocídio cultural”³⁹. Ainda assim, a UNESCO considerou que o cometimento do etnocídio abrangeria a Convenção para a Prevenção e a Repressão do Crime de Genocídio, de 1948, conforme a proposta de Raphael Lemkin — ou seja, a definição de genocídio já o abrangia, uma vez que, como desde 1948 há a previsão da lesão à integridade mental de membros do grupo (art. 2, b), a desagregação social, em razão da questão da destruição cultural, pode causar dano à integridade mental, com o objetivo de sua destruição enquanto grupo⁴⁰.

Dessa forma, como observa Martin Shaw⁴¹, se cada subtipo de genocídio, conforme a Convenção de 1948, tivesse uma designação específica, haveria uma prolife-

em: <https://www.rnz.co.nz/international/pacific-news/527573/vanuatu-fiji-and-samoa-say-ecocide-should-be-an-international-crime>. Acesso em: 28 set. 2024.

³² HENKISEN, Mette Mølgaard. ‘Revolutionary’: EU Parliament votes to criminalise most serious cases of ecosystem destruction. *Euronews*, 27 fev. 2024. Disponível em: <https://www.euronews.com/green/2024/02/27/revolutionary-eu-criminalises-the-most-serious-cases-of-ecosystem-destruction>. Acesso em: 28 set. 2024.

³³ LEMKIN, Raphael. *Axis rule in occupied Europe: laws of occupation, analysis of Government, proposals for redress*. 2. ed. New Jersey: Lawbook Exchange, 1944.

³⁴ LEMKIN, Raphael. *Axis rule in occupied Europe: laws of occupation, analysis of Government, proposals for redress*. 2. ed. New Jersey: Lawbook Exchange, 1944. p. 84-85.

³⁵ STAHN, Carsten. *A critical introduction to international criminal law*. Cambridge, MA: Cambridge University Press, 2019. p. 46.

³⁶ SCHABAS, William A. *Genocide in international law: the crime of crimes*. 2. ed. Cambridge, MA: Cambridge University Press, 2009. p. 220.

³⁷ STAHN, Carsten. *A critical introduction to international criminal law*. Cambridge, MA: Cambridge University Press, 2019. p. 47.

³⁸ UNESCO. *Réunion d’experts sur l’ethno-développement et l’ethnocide en Amérique Latine*. San José, 1981. Disponível em: https://unesdoc.unesco.org/ark:/48223/pf0000049951_spa. Acesso em: 29 jul. 2024. p. 32.

³⁹ UNESCO. *Réunion d’experts sur l’ethno-développement et l’ethnocide en Amérique Latine*. San José, 1981. Disponível em: https://unesdoc.unesco.org/ark:/48223/pf0000049951_spa. Acesso em: 29 jul. 2024. p. 33.

⁴⁰ RIBEIRO, Diógenes V. Hassan; SILVA, Rodrigo de Medeiros. Genocídio cultural ou etnocídio: uma violação de direito não superada no Brasil. In: BRASIL. Ministério Público Federal. *Povos indígenas: prevenção de genocídio e de outras atrocidades*. Brasília: MPF, 2021. p. 224.

⁴¹ SHAW, Martin. *What is genocide?* Cambridge, MA: Polity Press, 2015.

ração de termos — “politicídio, religicídio, racicídio”⁴² — que apenas fragmentariam a discussão. A expressão “genocídio” já engloba todas essas modalidades. E, ainda, de forma específica, no caso do etnocídio, parece “supérfluo usar um termo especial para a destruição de grupos étnicos, quando estes são um dos principais tipos entendidos como alvos de genocídio”⁴³.

3.3 Domicídio

O termo *domicídio* foi cunhado, pela primeira vez, pelos geógrafos Douglas Porteous e Sandra Smith na obra *Domicide: The Global Destruction of Home*, de 2001⁴⁴, quando eles definiram a expressão como “a destruição deliberada do lar que causa sofrimento aos seus habitantes”⁴⁵. Os autores fizeram referência também ao memoricídio, no que “diz respeito a tentativas deliberadas de expurgar a memória humana, principalmente por meio da destruição do suporte físico da memória, a paisagem cultural”⁴⁶, um conceito relacionado ao domicídio, mas que não é explorado pelos autores na mesma obra.

Nessa obra de 2001, no entanto, eles exploram diferentes formas de destruição de lares e o impacto sobre indivíduos e os deslocamentos forçados (expulsão, exílio, expropriação, deslocamento e realocação)⁴⁷ oriundos das ditas formas, destacando o prejuízo profundo, tanto pessoal quanto social, causado pela destruição de lares e comunidades⁴⁸.

Os autores também categorizam o domicídio em duas formas principais: o “domicídio extremo” e o “domicídio cotidiano”. O domicídio extremo⁴⁹ envolve operações de grande escala, feitas com planejamento estratégico e que não ocorrem com tanta frequência, sendo eventos atípicos, mas que afetam extensas áreas e alteram a vida de um número significativo de pessoas.

Esses eventos não fazem parte do cotidiano da maioria das pessoas — por isso sua contraposição ao “domicídio cotidiano” —, e costumam ser considerados, tanto nas histórias pessoais dos indivíduos quanto na memória coletiva, como episódios muito marcantes, em larga-escala, massivos e anormais⁵⁰, e que definem uma era.

Como um dos exemplos, os autores citam o bombardeio estratégico do Vietnã, também conhecido como *carpet bombing*, o “tapete de bombas”, uma tática militar de bombardeio aéreo de saturação, em que uma grande área é completamente coberta por bombas, sem focar em alvos específicos. Essa técnica tem como objetivo destruir tudo em uma vasta extensão, afetando tanto alvos militares quanto infraestruturas civis. O termo “tapete” refere-se à imagem de uma área sendo “coberta” por explosões de forma tão densa e indiscriminada quanto um tapete cobrindo o chão. Sob o aspecto estratégico, destruir toda uma área constitui menos “moralmente danoso” para o agressor do que bombardear uma única casa, por exemplo⁵¹.

Um outro exemplo é o da realocação de populações inteiras em lugares diferentes daqueles de origem, fazendo com que abandonem seus lares, cultura e história — estratégia utilizada “do Afeganistão e Argélia ao Vietnã e Zimbábue”⁵².

Posteriormente, Porteous e Smith abordam o impacto das formas cotidianas de domicídio, afirmando que, ao contrário do “domicídio extremo”, o “domicídio cotidiano” ocorre em pequena-escala, em eventos

⁴² SHAW, Martin. *What is genocide?* Cambridge, MA: Polity Press, 2015. p. 65.

⁴³ SHAW, Martin. *What is genocide?* Cambridge, MA: Polity Press, 2015.

⁴⁴ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001.

⁴⁵ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001.

⁴⁶ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001.

⁴⁷ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 12.

⁴⁸ “Pois a guerra também mata lugares – veja Guernica de Picasso – e sem lugares amados (lares, comunidades, paisagens, nações), uma pessoa sem-teto e pessoas sem face perdem facilmente a identidade e a razão de ser” In: SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 65, tradução nossa.

⁴⁹ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 64.

⁵⁰ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 21.

⁵¹ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 67.

⁵² SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 69.

frequentes e “normais”. Esse tipo de domicídio, embora de escala mais local, ainda resulta em grandes perdas e sofrimento para as comunidades afetadas, e pode ser causado por mudanças econômicas e industriais em áreas rurais e urbanas, como a transferência de comunidades inteiras para o alagamento de porções de território para a construção de barragens e diques⁵³, apagando lugares e lares.

Além do produzido por Porteous e Smith, o conceito de “domicídio” continuou a ser explorado por pesquisadores e especialistas em direito internacional, ainda que alguns, como Rajagopal, entendam inicialmente que o crime de “domicídio” seja um tipo específico de crime contra a humanidade, com a destruição de vizinhanças inteiras por meio do uso de armas explosivas, trazendo, graças à sua posição de Relator Especial das Nações Unidas sobre o direito à moradia adequada, números que impactam com relação à escala de destruição que tem sido empregado nos conflitos mais recentes, seja em Gaza com mais de 70 mil casas destruídas e mais de 290 mil parcialmente danificadas, com destruição superior às sofridas, durante a Segunda Guerra Mundial, em Dresden e Roterdã, quando 25 mil casas foram destruídas em cada uma das cidades⁵⁴.

Ressalta-se que as escalas de destruição de domicílios, especificamente, têm sido muito grandes nos últimos conflitos. Em Aleppo, na Síria, durante os cinco anos de conflito, aproximadamente 65% das casas foram danificadas ou destruídas, ao passo que, em Gaza, mais recentemente, na sua porção norte, 84% das casas foram danificadas ou destruídas, em poucos meses. Já em Mariupol, na Ucrânia, aproximadamente 32% das casas sofreram danos ou foram totalmente destruídas entre o ano de 2021 e 2022. Após a Segunda Guerra, para restaurar as cidades destruídas no conflito, foram necessárias duas décadas e bilhões de dólares, a recuperação, apenas de Mariupol é calculada atualmente custando mais de 14 bilhões de dólares e um total de tempo de aproximadamente 10 anos⁵⁵. A situação ucraniana,

inclusive, somada às calamidades sofridas na Palestina e no Afeganistão, fez com que as esferas internacionais, sobretudo com o trabalho do Relator Especial, considerassem a possibilidade da tipificação do crime de “domicídio”⁵⁶.

Mesmo com o documento surgido em 2022, os ataques cometidos pelo Estado de Israel à região de Gaza reacenderam o alarme acerca do tema “domicídio”, havendo estimativas das Nações Unidas que, uma vez terminado o conflito, aproximadamente 30% da população de Gaza não terá casas para poder habitar⁵⁷. Assim, mesmo sabendo da possibilidade da adequação da tipificação do crime de “domicídio” no contexto de crime contra a humanidade, os esforços por codificar autonomamente o tipo penal continuam, o que reacende o debate acerca da sua necessidade *vis à vis* sua capacidade de implementação nas condições atuais juntamente ao Tribunal Penal Internacional.

4 Impacto da fragmentação conceitual no direito internacional penal: o potencial enfraquecimento do conceito dos crimes internacionais

A discussão sobre a criação de novos tipos penais derivados do genocídio precisa considerar um ponto importante: a fragmentação excessiva do conceito central do “crime dos crimes”, e o fato de que, em alguns casos, há uma maior pertinência na compreensão dessas novas expressões enquanto modalidades de crime contra a humanidade, ao invés de, propriamente dito, genocídio, como já afirmado anteriormente.

Se o conceito de genocídio for expandido demais, a ponto de quase tudo poder ser classificado como genocídio, isso pode acabar enfraquecendo o próprio crime

v. 36, n. 3, jan./mar. 2024. Disponível em: <https://fnl.mit.edu/january-march-2024/domicide-the-mass-destruction-of-homes-should-be-a-crime-against-humanity/>. Acesso em: 14 out. 2024.

⁵⁶ UNITED NATIONS. General Assembly. *Adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context*. 77th session. Disponível em: <https://documents.un.org/doc/undoc/gen/n22/431/55/pdf/n2243155.pdf?OpenElement>. Acesso em: 15 out. 2024. p. 11-12; 21.

⁵⁷ SULLIVAN, Becky. What is ‘domicide’, and why has war in Gaza brought new attention to the term? *NPR*, 9 fev. 2024. Disponível em: <https://www.npr.org/2024/02/09/1229625376/domicide-israel-gaza-palestinians>. Acesso em: 15 out. 2024.

⁵³ SMITH, Sandra E.; PORTEOUS, J. Douglas. *Domicide: the global destruction of home*. Montreal: McGill-Queen’s University Press, 2001. p. 114-115.

⁵⁴ RAJAGOPAL, Balakrishnan. Domicide: the mass destruction of homes should be a crime against humanity. *MIT Faculty Newsletter*, v. 36, n. 3, jan./mar. 2024. Disponível em: <https://fnl.mit.edu/january-march-2024/domicide-the-mass-destruction-of-homes-should-be-a-crime-against-humanity/>. Acesso em: 14 out. 2024.

⁵⁵ RAJAGOPAL, Balakrishnan. Domicide: the mass destruction of homes should be a crime against humanity. *MIT Faculty Newsletter*,

em vez de fortalecê-lo, não somente no plano interno de cada legislação que o tipifica, mas, sobretudo, no plano internacional, com o conseqüente enfraquecimento e perda de relevância do Tribunal Penal Internacional, único de seu gênero.

Caso o genocídio, que é um crime muito específico e grave, seja diluído em múltiplas variações, sua importância e impacto na legislação podem ser diminuídos. Além disso, o potencial inibitório essencial do Direito Penal em prevenir a ocorrência de novos crimes — a prevenção geral negativa, que, em teoria, deveria desestimular potenciais infrações — não está necessariamente vinculado à quantidade de tipos penais existentes, mas sim à clareza, aplicabilidade e efetividade das normas já tipificadas. Assim, é crucial avaliar se essa expansão realmente contribui para inibir o seu cometimento ou se, na verdade, compromete a efetividade e a clareza do conceito do tipo penal.

Para ilustrar como a fragmentação de um conceito pode enfraquecê-lo, pode-se recorrer ao pensamento do filósofo franco-argelino Jacques Derrida e seu conceito de “*différance*”⁵⁸. Derrida argumenta que a linguagem e o significado não possuem um centro estável ou um ponto de referência fixo. Em outras palavras, o texto escrito não tem um significado intrínseco; esse significado é atribuído por meio da fala e da interpretação.

O conceito de *différance* de Jacques Derrida é uma ideia central em sua filosofia, particularmente no campo da desconstrução. Trata-se de um neologismo que se utiliza da palavra *différer* — que significa tanto “adiar” como “diferir”⁵⁹. O termo é criado de forma deliberada para capturar a complexidade da linguagem, do significado e da representação, em duas palavras que soam de forma bastante semelhante no francês.

Derrida argumenta que o significado na linguagem não é fixo, mas está sempre em processo de adiantamento e diferenciação. Quando se utiliza a linguagem para expressar um conceito ou uma palavra, precisa-se de outras palavras para defini-las (o que é o céu? é uma imensidão azul, abobadada etc..). Cada uma dessas outras palavras, por sua vez, precisam de mais palavras para serem definidas, criando uma cadeia interminável

de diferenças e adiamentos⁶⁰ — o que é o azul? o que é imenso? etc. —, gerando, assim, *rastros* que *remetem* à origem desses conceitos, sobre os quais se podem debruçar, mas que jamais resumirão a origem de nenhum dos conceitos — “a origem não desapareceu sequer [...], ela jamais foi reconstruída a não ser por uma não-origem, o rastro, que se torna, assim, a origem da origem”⁶¹.

Dessa forma, a linguagem funciona como um sistema de diferenças, em que cada palavra ou sinal ganha significado em relação às diferenças com outras palavras. Assim, o significado está sempre em movimento e nunca é completamente estável ou definitivo⁶².

Nesse sentido, em relação à palavra genocídio, há um conjunto de outras palavras que a acompanham, de forma a explicar seu significado (genocídio é a eliminação, no todo ou em parte...), sobretudo na linguagem falada, na qual a interpretação adquire contornos muito mais fluidos do que a linguagem escrita, e também porque nenhuma palavra tem significado em si mesma (o que talvez somente seja possível ao resgatar a intenção de quem a criou no momento em que a criou, o que é, de fato, impossível; o que surge após a criação de uma palavra, o momento inicial de seu proferimento ou escrita, é novo e diferente da primeira vez em que esta foi cunhada; quaisquer centralizações ou definições hegemônicas são imposição violenta de um centro de autoridade que confere àquela palavra um significado “único”).

As obras de Derrida, portanto, desafiam a concepção de um centro de significado fixo ou estável⁶³, sim, mas, como se pretende argumentar aqui, isso não significa que esse significado fixo ou estável não deva existir no mundo real. Ele argumenta que a linguagem e o pensamento não têm um ponto de referência final ou um centro absoluto. Em vez disso, o significado está sempre em um estado de fluxo e é moldado pelo contexto em que existe. Mas a palavra, em si, não muda. Alteram-se o contexto e as palavras que a circundam e, portanto, seu significado.

Ele afirma, ainda, que não há, e nem poderia haver, correspondência perfeita entre um conceito e o signo

⁵⁸ DERRIDA, Jacques. *Margens da filosofia*. Campinas, SP: Papirus, 1991.

⁵⁹ DERRIDA, Jacques. *Margens da filosofia*. Campinas, SP: Papirus, 1991. p. 40.

⁶⁰ MONTEIRO, Silas Borges; TRINDADE, Dionéia da Silva; SOUZA, Edilma de. Derrida e Nietzsche: mulher e *différance*. *Revista de Educação Pública*, v. 29, p. 1-5, 2020.

⁶¹ DERRIDA, Jacques. *Gramatologia*. São Paulo: Perspectiva, 1973. p. 75.

⁶² DERRIDA, Jacques. *Gramatologia*. São Paulo: Perspectiva, 1973.

⁶³ DERRIDA, Jacques. *Gramatologia*. São Paulo: Perspectiva, 1973.

linguístico que o representa, a palavra escrita. A linguagem sempre fica aquém de capturar a essência completa de um conceito, e essa lacuna (*différance*) entre o conceito e o significante permite múltiplas interpretações e perspectivas. O que o Direito faz, com a sua autoridade, por exemplo, é centralizar uma definição única, porque essa estabilidade, em nosso mundo, é necessária.

A *différance* leva à ideia de que qualquer texto ou discurso pode gerar múltiplas interpretações⁶⁴. A ausência de um centro fixo e o constante adiamento de significado significam que a linguagem é inerentemente aberta a leituras diversas e, às vezes, contraditórias, e é aqui que surge um problema, um dilema indecifrável, um outro conceito importantíssimo nas obras de Derrida, e emprestado de Aristóteles em Kant: a aporia⁶⁵.

A ideia de aporias de Derrida destaca as contradições e dilemas inerentes a qualquer sistema de pensamento, incluindo o Direito. As aporias revelam, grosso modo, as discrepâncias e complexidades que surgem quando se examinam os limites e fronteiras de conceitos. A respeito do Direito, as aporias se manifestam quando se tenta conciliar a lacuna entre realidade e utopia, autoridade e emancipação. É importante pensar no micro, mas sem desconsiderar o fato de que há um contexto macro “para além de todas as reapropriações determinadas e particulares do Direito Internacional”⁶⁶.

Derrida reconhece que o Direito está fundamentalmente conectado à noção de autoridade⁶⁷ — e uma leitura rasa poderia levar um descuidado leitor a pensar que ele absolutamente a despreza, querendo implodir estruturas fixas, ou que a desconstrução representa um absoluto estado de caos jurídico-apocalíptico desprovido de leis, o que certamente não é o caso. O que o autor franco-argelino propõe é uma *visão crítica* do Direito.

É fato, no pensamento derridiano, que os sistemas legais exigem uma fonte autoritária para estabelecer e aplicar normas, e há a reflexão sobre a busca de um ideal no qual essa “violência” (da imposição) da norma não esteja presente⁶⁸. Porém, como os conceitos

somente existem em abstração e não em si mesmos, a norma é, condicionalmente, necessária, exatamente porque somente se pode definir a delimitação de “algo” em contraposição ao que esse “algo” não é.

Considerando-se o presente texto, o tipo penal do genocídio, e os outros três tipos de competência do TPI, somente existe porque o Direito centralizou em si a autoridade de definir o que é tal crime e o que não é. E o conceito de genocídio existe porque, pela sua oposição, existe algo que não o é. E é essa virtual estabilidade conferida pela expressão “fixa” que é *conditio sine qua non* da aplicação do Direito Penal, diante dos princípios da legalidade e da anterioridade.

Sem essa definição, a coerência e eficácia do Direito seriam comprometidas na realidade. Tentar transcender conceitos representa um risco de mergulhar os sistemas legais no caos, pois não haveria meios para legitimar ou aplicar regras — ainda que haja boas intenções em fazê-lo. E não apenas do Direito como um todo, mas especificamente do Direito Penal, no qual a especificidade do tipo é vital à sua aplicação.

Ideais utópicos, impulsionados pelo desejo de justiça, igualdade e emancipação, frequentemente desafiam a autoridade das estruturas legais existentes. Embora esses ideais sejam admiráveis e politicamente necessários, a perspectiva de Derrida nos lembra que a busca pela utopia pode levar a aporias, uma vez que Derrida questiona a ideia de utopia a partir do momento em que ela também seria um conceito fixo, de um futuro distante que somente seria possível a partir de um diastema: uma falha, uma ruptura na realidade presente, que ninguém sabe se ocorrerá ou não⁶⁹. A tensão surge quando se tenta conciliar a visão utópica de um mundo sem normas fixas com a necessidade prática de tais normas no Direito.

No contexto do Direito Internacional, a proliferação excessiva⁷⁰ pode ser compreendida como uma aporia,

2010.

⁶⁹ DERRIDA, Jacques. *Specters of Marx: the state of the debt, the work of mourning and the new international*. Nova York: Routledge, 1994.

⁷⁰ A fragmentação no direito internacional ocorre devido à natureza dinâmica das relações internacionais e ao crescente número de atores envolvidos nos assuntos globais. Embora a especialização seja necessária para lidar com questões globais complexas, a excessiva fragmentação pode levar a consequências prejudiciais, como argumenta Martti Koskenniemi. In: KOSKENNIEMI, Martti; LEINO, Päivi. Fragmentation of international law? Postmodern anxieties. *Leiden Journal of International Law*, v. 15, n. 3, p. 553-579, 2002.

⁶⁴ DERRIDA, Jacques. *Gramatologia*. São Paulo: Perspectiva, 1973.

⁶⁵ DERRIDA, Jacques. *Margens da filosofia*. Campinas, SP: Papyrus, 1991.; DERRIDA, Jacques. *Anne Dufourmantelle comida Jacques Derrida a falar da hospitalidade*. São Paulo: Escuta, 2003.

⁶⁶ DERRIDA, Jacques. *Força de lei*. São Paulo: Martins Fontes, 2010. p. 57.

⁶⁷ DERRIDA, Jacques. *Força de lei*. São Paulo: Martins Fontes, 2010.

⁶⁸ DERRIDA, Jacques. *Força de lei*. São Paulo: Martins Fontes,

em que a busca de especialização excessiva nas normas legais inevitavelmente leva a contradições e tensões entre vários regimes e princípios especializados, pela ausência de precisão do recorte de aplicação (algo que Derrida via com cautela) — o que não é possível no Direito Penal.

Esse fenômeno se reflete nas múltiplas elucubrações quanto à criação de outros tipos penais, supostamente derivados do genocídio, como ecocídio, domicídio, etnocídio, entre outros que eventualmente venham a surgir (e certamente irão), por questões políticas, mas para os quais já há tipificação: o próprio crime de genocídio, ou tipo mais abrangente: crime contra a humanidade.

Há uma peculiaridade do crime de genocídio conforme aparece no Estatuto de Roma: são genocídio as modalidades descritas e comportamentos com o objetivo de exterminar um grupo *enquanto tal* — uma inserção que, desde 1948, denota que o contexto do genocídio não depende apenas do elemento da intencionalidade, mas de um *motivo*⁷¹.

O prefixo nesses neologismos — eco, demo, etno — nada mais é do que o motivo pelo qual o crime ocorreu, não há, porém, a necessidade de novas tipificações, haja vista os tipos genocídio e crimes contra a humanidade já incorporam, em larga medida, esses novos tipos surgentes. Caso eles sejam incluídos textualmente como linguagem no e do Direito, a sua fragmentação seria da ordem dos números irracionais, o que enfraqueceria o próprio conceito dos crimes internacionais já existentes, e até mesmo do Tribunal Penal Internacional.

Pode soar estranha a opção por Derrida para fazer essa análise, tendo em vista que Derrida justamente se vale dos neologismos para a sua desconstrução. No entanto, mais uma vez, o autor o faz em sede de sua análise do discurso, de forma extremamente coerente com o que é possível na linguagem do Direito, que provém de centros de autoridade.

No entanto, ao considerar os distintos sistemas de origem dessas diversas conceituações (Direito e Política), é necessário refletir sobre o exercício retórico e político que permite a afirmação de que o ecocídio, o memoricídio, o politicídio, o etnocídio, o domicídio (entre outros “cídiós”) pertencem ao campo político. Nesse contexto, deve-se reconhecer que o Direito e a Políti-

ca, embora não sejam mutuamente excludentes, representam lógicas e linguagens distintas, mas interligadas. Trata-se, portanto, de dois espaços que se sobrepõem e se interpenetram⁷².

Martti Koskeniemi, ao abordar a ontologia do Direito Internacional na obra *Speaking the language of international law and politics: or, of ducks, rabbits, and then some*⁷³, vale-se da alegoria do Coelho-Pato de Wittgenstein. Há quem veja na imagem a seguir um pato, há quem veja um coelho. A imagem continua sendo a mesma. Nesse sentido, o autor afirma que

perguntar se o mundo internacional é ‘realmente’ um mundo do direito ou um mundo da política é como perguntar se a imagem de Wittgenstein é ‘realmente’ um pato ou um coelho. Claro que é ambos ao mesmo tempo. A única questão interessante diz respeito à escolha entre eles. Qual estrutura deveríamos adotar, qual linguagem pode ser mais justa, produzir o melhor resultado, ser mais útil, e assim por diante? Isso pode ser traduzido em uma questão de autoridade institucional também (e geralmente é assim entendido pelos próprios especialistas jurídicos/políticos).⁷⁴

Quem vê o pato quer puxar para si a autoridade de afirmar que é um pato. Quem vê o coelho, quer puxar para si a autoridade de afirmar que é um coelho. A imagem não é, no entanto, nem totalmente coelho nem totalmente pato. O fato é que o cérebro sequer permite que a mesma operação nos faça ver coelho ou pato ao mesmo tempo.

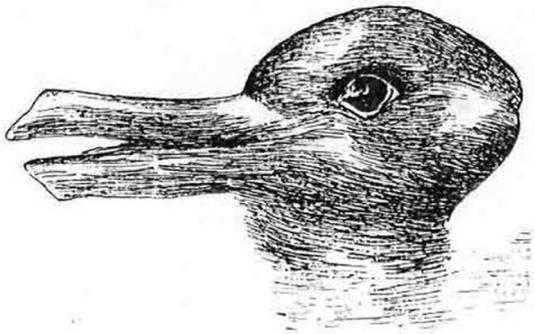
⁷² DERRIDA, Jacques. *Força de lei*. São Paulo: Martins Fontes, 2010. p. 56.

⁷³ KOSKENIEMI, Martti. *Speaking the language of international law and politics: or, of ducks, rabbits, and then some*. In: HANDMAKER, Jeff; ARTS, Karin (ed.). *Mobilising international law for ‘global justice’*. Cambridge, MA: Cambridge University Press, 2020. p. 22-45.

⁷⁴ “Asking whether the international world is ‘really’ a world of law or a world of politics is like asking whether the Wittgenstein image is ‘really’ one of a duck or a rabbit. Of course it is both at the same time. The only interesting question concerns the choice between them. Which frame should we adopt, what language might be more just, produce the better outcome, be more useful, and so on? This can be translated into a question of institutional authority as well (and is usually so understood by the legal/political experts themselves)” In: KOSKENIEMI, Martti. *Speaking the language of international law and politics: or, of ducks, rabbits, and then some*. In: HANDMAKER, Jeff; ARTS, Karin (ed.). *Mobilising international law for ‘global justice’*. Cambridge, MA: Cambridge University Press, 2020. p. 22-45. p. 28, tradução nossa.

⁷¹ SCHABAS, William A. *An introduction to the International Criminal Court*. Cambridge, MA: Cambridge University Press, 2004. p. 40.

Figura 1 - Coelho-Pato de Wittgenstein



Fonte: JASTROW, J. *Fact and fable in psychology*. New York: D Appleton & Company, 1900. p. 275-295.

A questão é: quem vê pato, vê um pato. Quem vê coelho, vê um coelho. Só que trazer o coelho (a Política) para o universo do pato (o Direito) — ou tratá-los como uma coisa só, ou como pertencentes a uma mesma linguagem — faz ambos, conceitualmente, deixarem de existir. E se esvaziarem de significado. Não se pode ser simultaneamente, na mesma linguagem, coelho e pato. O mesmo ocorre ao tentar fragmentar conceitos fixos — e importantes — como é o caso do genocídio. Nas palavras de Koskeniemi, “quando se pleiteia perante o Tribunal Penal Internacional, tudo o que você diz é Direito, enquanto, ao atuar como um decisor de política externa no governo, grosso modo, tudo o que você faz é Política”.⁷⁵

Quando Derrida aborda a aporia da hospitalidade, ao tratar do ideal de incondicionalidade em Kant⁷⁶, ele demonstra como esse conceito, ainda que idealmente desejável, é inevitavelmente limitado pela necessidade de ser condicionado pelo Direito. Caso contrário, a hospitalidade incondicional perderia sua funcionalidade prática e seu sentido jurídico. Essa reflexão, embora melancólica e resignada, destaca a importância de limites claros e operacionais para garantir a eficácia normativa.

De forma análoga, a proliferação de novos tipos penais, como ecocídio, domicídio e etnocídio — e os demais cídios — representa um exercício politicamente

legítimo de desconstrução e busca por justiça em contextos específicos, o que é compreensível, desde que permaneça no âmbito da retórica política.

Contudo, ao adentrar no campo do Direito Internacional Penal, esses neologismos não devem perdurar, pois podem enfraquecer a autoridade das normas já estabelecidas, especialmente os tipos penais da jurisdição do Tribunal Penal Internacional (TPI), o que ameaça a clareza e a eficácia do sistema.

5 Considerações finais

A existência dos quatro crimes que podem ser julgados pelo TPI — crimes contra a humanidade, crimes de guerra, genocídio e o crime de agressão — revela um panorama normativo que, ao longo de décadas, foi moldado por eventos históricos de extrema gravidade. A trajetória para a consolidação desses tipos penais centrais foi longa e marcada por discussões jurídicas sobre a natureza e a legalidade de seus conceitos, em inúmeras tentativas nas quais, antes de se existir um sistema permanente, a realidade conclamou os Estados a definir punições para graves acontecimentos. As primeiras tentativas de julgamento de crimes internacionais, logo após a Primeira Guerra Mundial, mostraram as dificuldades de se definir e aplicar normas penais a crimes cometidos em um contexto internacional, em uma era na qual a imprecisão ainda impedia de se levar adiante qualquer tentativa mais robusta de punição internacional.

Apenas após a Segunda Guerra Mundial, com os julgamentos de Nuremberg e Tóquio, crimes contra a paz, crimes de guerra e crimes contra a humanidade passaram a ser julgados, embora não sem críticas. A questão do direito *ex post facto* e os debates sobre o Princípio da Legalidade, no caso dos crimes contra a humanidade, demonstram que o caminho para o processamento de tipos penais comuns à sociedade internacional foi repleto de obstáculos teóricos e, sobretudo, fundamentalmente políticos.

O genocídio, em particular, ganhou destaque no direito internacional penal, sendo alcunhado de “crime dos crimes”, trazendo consigo uma definição que mudaria permanentemente a postura internacional quanto à matéria, especialmente pelo elemento do *dolus specialis* — a intenção específica de destruir, no todo ou em parte, um grupo racial, étnico, nacional ou religioso. Entre-

⁷⁵ “when pleading in the ICC, everything you say is law, whereas when you are a foreign policy decision maker in government grosso modo all that you do is politics” — Tradução nossa. In: KOSKENIEMI, Martti. Speaking the language of international law and politics: or, of ducks, rabbits, and then some. In: HANDMAKER, Jeff; ARTS, Karin (ed.). *Mobilising international law for 'global justice'*. Cambridge, MA: Cambridge University Press, 2020. p. 22-45. p. 28.

⁷⁶ DERRIDA, Jacques. Anne Dufourmantelle convida Jacques Derrida a falar da hospitalidade. São Paulo: Escuta, 2003.

tanto, as décadas subsequentes, particularmente durante a Guerra Fria, testemunharam uma cultura de impunidade que impediu que muitos desses crimes fossem julgados, exceto em contextos excepcionais, como nos tribunais *ad hoc* para Ruanda e a ex-Iugoslávia.

A criação do TPI em 2002 representou um marco na evolução do Direito Internacional Penal, ao estabelecer um tribunal permanente, evitando-se, em parte, as críticas anteriormente tecidas nas experiências jurisdicionais anteriores. E nesse contexto de consolidação do direito internacional penal, o surgimento de novos conceitos, na esfera política, como é o caso do ecocídio, do etnocídio e do domicídio, reflete a tentativa de adaptar o sistema jurídico internacional às novas demandas do século XXI, como a proteção do meio ambiente e dos direitos culturais de povos e minorias, propondo uma ampliação no âmbito do discurso à abrangência do genocídio, sem que, no entanto, isso possa encontrar respaldo na tipificação formal do crime no Estatuto de Roma.

Como discutido, essa proliferação de novos tipos penais, muitas vezes impulsionada por importantes razões políticas, levanta questões quanto à eficácia e à fragmentação do conceito central dos crimes já tipificados. A tentativa de dar destaque a excepcionalidades já, por vezes, contidas nos tipos penais existentes, tipificando-os como crimes autônomos, pode, paradoxalmente, enfraquecer sua definição e diluir seu impacto no ordenamento jurídico internacional.

Aqui, a análise filosófica proposta por Jacques Derrida se faz pertinente, pois o autor argumenta que o significado das palavras está sempre em fluxo e depende do contexto e das diferenças em relação a outros conceitos. No entanto, o Direito Penal, especialmente no contexto internacional, necessita de definições claras e estáveis para garantir a aplicação eficaz da lei, o que não contraria, de maneira alguma, a visão derridiana de linguagem — trata-se de campos distintos. A fragmentação conceitual de crimes como genocídio pode gerar ambiguidades que enfraquecem sua aplicação prática e minam a coerência do sistema jurídico internacional, algo que o direito penal não pode, em razão de sua própria lógica, admitir.

A Alegoria do Coelho-pato de Wittgenstein é utilizada como uma analogia para ilustrar como Direito e Política são campos distintos, mas frequentemente sobrepostos, com interpretações que dependem da perspectiva de quem os observa. Assim como a imagem do

coelho-pato pode ser vista como um pato ou um coelho, dependendo da percepção do observador, o contexto internacional pode ser compreendido tanto à luz do Direito quanto da Política.

Destaca-se, assim, que, embora ambos possam coexistir, não podem ser completamente integrados ou compreendidos simultaneamente da mesma forma. Trazer conceitos fundamentalmente políticos diretamente para o universo do Direito, sem manter essa distinção, enfraquece a clareza e a função do Direito, semelhante à confusão que ocorreria ao tentar ver o pato e o coelho ao mesmo tempo — uma impossibilidade. Não significa que não possuam suas funções e que não se comuniquem, enquanto perspectivas da mesma imagem, mas não podem ser vistos simultaneamente sem que haja prejuízo ao vislumbre completo de um ou outro — ao coelho ou ao pato, ao Direito ou à Política.

A consideração de novos tipos penais — que, nos casos abordados, não parece pertencer ao âmbito do Direito — exige uma análise criteriosa, a fim de evitar uma fragmentação desnecessária que comprometa a coerência e a eficácia do sistema jurídico internacional. É essencial garantir que a tipificação penal preserve sua capacidade de punir com rigor os crimes mais graves, sem, no entanto, enfraquecer os tipos penais já existentes, ou ainda, criar dúvidas quanto à capacidade do principal órgão responsável por investigar e punir tais crimes, o Tribunal Penal Internacional. O equilíbrio entre a tipificação de novos tipos penais e o fortalecimento dos mecanismos já existentes é delicado e não pode ser menosprezado, pois isso poderia levar ao descrédito desse importante ramo do Direito Internacional, cujo desenvolvimento é relativamente recente.

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Judicial corruption in Africa: Senegal and Madagascar in comparative perspective*

Corrupção judicial na África: Senegal e Madagascar em perspectiva comparativa Título em outro idioma

Santiago Basabe-Serrano**

Abstract

This article examines the factors that led Senegal and Madagascar, two African countries with similar levels of judicial corruption at a specific historical period, into different trajectories in terms of this social phenomenon. While Senegal reduced cases of judicial corruption, Madagascar increased them. The article argues Senegal, unlike Madagascar, developed institutional stability, which allowed for the consolidation of the democratic regime. Senegal also built an independent public policy to combat corruption with the participation of international organizations, while in Madagascar, attempts at reform were quickly co-opted by political actors. In addition, just in Senegal judicial proceedings were held to prosecute corruption cases, which helped develop changes in the judiciary which were beneficial for the judges themselves. In sum, greater democratic stability, anti-corruption policies led by actors external to the government, and positive signals of change within the judiciary are the factors that contribute to a country reducing its levels of judicial corruption.

Keywords: judicial corruption; Senegal; Madagascar; judicial politics; judicial reforms.

Resumo

Este artigo examina os fatores que levaram Senegal e Madagascar, dois países africanos com níveis semelhantes de corrupção judicial em um determinado período histórico, a seguirem trajetórias diferentes em relação a esse fenômeno social. Enquanto Senegal conseguiu reduzir os casos de corrupção judicial, Madagascar viu um aumento nesse tipo de prática. O artigo argumenta que, ao contrário de Madagascar, Senegal desenvolveu uma estabilidade institucional que permitiu a consolidação do regime democrático. Além disso, Senegal implementou uma política pública independente de combate à corrupção, com a participação de organizações internacionais, enquanto, em Madagascar, as tentativas de reforma foram rapidamente cooptadas por atores políticos. Ademais, somente em Senegal foram realizados processos judiciais para julgar casos de corrupção, o que ajudou a promover mudanças no judiciário que beneficiaram os próprios juizes. Em suma, maior estabilidade democrática, políticas anticorrupção conduzidas por atores

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externos ao governo e sinais positivos de mudança dentro do judiciário são os fatores que contribuem para a redução dos níveis de corrupção judicial em um país.

Palavras-chave: corrupção judicial; Senegal; Madagascar; política judicial; reformas judiciais.

1 Introduction

Why do some countries succeed in reducing judicial corruption and others fail to do so? This is one of the most important research questions in judicial politics studies. Few answers are available to this question. Studies on judicial corruption tend to focus on (i) describing the actors and interactions involved in this type of behavior, (ii) identifying the effects of judicial corruption on other political, economic, or social variables, or (iii) pointing out the variables that explain why some countries have more corrupt judiciaries than others. At this last level, the assessment of causal factors tends to be synchronic, which ignores the extent to which certain variables have influenced some countries over time to reduce the number of cases of judicial corruption while others have seen their situation worsen with respect to this social phenomenon.

Precisely, this article seeks to answer the above research question arguing that the greater stability of the democratic regime, combined with anti-corruption policies led by external actors, such as the UN, and high-profile trials that send strong signals to members of the judiciary that change is a real possibility, would contribute to reducing levels of judicial corruption. To this end, in the first part I review the writings from various fields on judicial corruption. In the second part, I identify the different courses that judicial corruption can take over time. In the third part, I propose a comparative study of Senegal and Madagascar, two countries that, despite having maintained similar levels of judicial corruption about a decade ago, have taken different paths. Conclusions are drawn in the fourth part.

2 Judicial Corruption: An Evaluation

The approaches to the study of judicial corruption include those that describe the actors involved in this social phenomenon, those concerned with the interac-

tions between them and, finally, those interested in the type of exchanges. Related papers are found on Perú¹, Ecuador² or Colombia³. Other studies describe the dynamics under which corruption operates, but these are usually works that deal with the phenomenon in general, without reference to the judicial sphere⁴. In this respect, there are classic works from the perspective of historical sociology or in the field of economic sociology⁵.

¹ BARAYBAR, Viviana; GONZÁLEZ-OCANTOS, Ezequiel A. Prosecutorial Agency, Backlash and Resistance in the peruvian chapter of Lava Jato. In: BOTERO, Sandra; BRINKS, Daniel; GÓNZALEZ-OCANTOS, Ezequiel A. (ed.). *The limits of judicialization: from progress to backlash in Latin America*. Cambridge: Cambridge University Press, 2022. p. 314-340. GONZÁLEZ-OCANTOS, Ezequiel A.; BARAYBAR, Viviana. Lava Jato beyond borders the uneven performance of anticorruption judicial efforts in Latin America. *Taiwan Journal of Democracy*, [S. l.], v. 5, n. 1, p. 63-89, 2019. MUJICA, Jaris. Actores y escenarios de los sistemas de microcorrupción en el Palacio de Justicia del centro de Lima, Perú. *Relaciones: estudios de Historia y Sociedad*, [S. l.], v. 32, n. 126, p. 87-117, 2011.; POOLE, Deborah. Los dos cuerpos del juez: Comunidad, justicia y corrupción en el Perú de los neoliberales. In: UGARCHETE, Oscar (ed.). *Vicios públicos: poder y corrupción*. Cidade do México: Fondo de Cultura Económica, 2005.

² BASABE-SERRANO, Santiago. La corrupción judicial en América Latina: Ecuador en perspectiva comparada. *Perfiles Latinoamericanos*, [S. l.], v. 32, n. 63, p. 1-26, 2023. BASABE-SERRANO, Santiago. Judicial corruption: the Constitutional Court of Ecuador in comparative perspective. In: BOTERO, Sandra; BRINKS, Daniel; GÓNZALEZ-OCANTOS, Ezequiel A. (ed.). *The limits of judicialization: from progress to backlash in Latin America*. Cambridge: Cambridge University Press, 2022. p. 217-241. BASABE-SERRANO, Santiago. Corrupción judicial: concepto, actores y dinámicas. *Andamios, Revista de Investigación Social*, [S. l.], v. 21, n. 56, p. 377-405, 2024.

³ BADEL, Martha. *La corrupción judicial en Colombia: una aproximación al mapa de riesgos*. Bogotá: Auros, 2008.

⁴ HUBER, Ludwing. *Romper la mano: una interpretación cultural de la corrupción*. Lima: Instituto de Estudios Peruanos, 2008; MUJICA, Jaris. Estrategias de corrupción: poder, autoridad y redes de corrupción en espacios locales. In: UGARCHETE, Oscar (ed.). *Vicios públicos: poder y corrupción*. Cidade do México: Fondo de Cultura Económica, 2005. p. 165-224; VARGAS-HAYA, Héctor. *Perú: 184 años de corrupción e impunidad*. Lima: Rocío, 2005. GUPTA, Sanjeev. *Corruption and military spending*. Washington: IMF, 2001. GUPTA, Sanjeev. *Corruption and the provision of health care and education services*. Washington: IMF, 2000.; HIBOU, B.; TOZY, M. Une lecture d'anthropologie politique de la corruption au Maroc. *Revue Tiers Monde*, [S. l.], v. 41, n. 161, p. 23-47, 2000. MEDARD, Jean. Clientélisme politique et corruption. *Revue Tiers Monde*, [S. l.], v. 41, n. 161, p. 75-87, 2000. QUIROZ, Alfonso. Historia de la corrupción en el Perú: ¿es factible su estudio??. In: FONDO EDITORIAL DE LA UNIVERSIDAD CATÓLICA. *Homenaje a Félix Denegri Luna*. Lima: Fondo Editorial de la Universidad Católica, 2000. p. 684-690.; KLAIBER, Jeffrey. Ética, abusos del poder y corrupción en el Perú: una perspectiva histórica. In: KLAIBER, Jeffrey (ed.). *Violencia y crisis de valores en el Perú*. Lima: Fondo Editorial de la Universidad Católica, 1998. p. 95-14.

⁵ HOBBSBAWN, Eric. *Rebeldes primitivos*. Buenos Aires: Crítica,

Some researchers refer to the proliferation of corruption cases from the private sector or the usefulness of new legal technologies to combat the lack of transparency⁶. Other scholars analyze the relationship between corruption and the protection of Human Rights⁷, or criticizes the composition of transnational indicators on environmental corruption⁸.

Research that describes judicial corruption from a legal perspective takes up the most space in the limited existing literature. In this field, discussions are essentially about legal norms and their possible reforms to reduce cases of judicial corruption⁹. Unfortunately, most of these works lack empirical evidence, although there are case studies with systematically collected information. To understand this, the main idea is that judicial corruption has various interacting causes of which the most studied are those of an economic nature¹⁰. Although there is contradictory empirical evidence, the specialized literature suggests that the unvarying salaries of judges, which are generally low, together with the progressive increase in the workload, encourage judicial corruption¹¹.

At the political level, the fundamental premise is that as political power gets distributed among fewer actors, the likelihood of judicial corruption increases¹². In relation to institutional variables, the main factor influencing the increase in judicial corruption is the higher transaction costs involved in obtaining a judicial decision¹³. Finally, judicial corruption can also be explained as a reflection of the social context in which judges and prosecutors operate. In this regard, Luhmann's theory¹⁴ suggests that judicial corruption results from communications considered illegitimate – based on the binary construction of the autopoietic code of the legitimate/illegitimate - that are self-reproduced in the legal subsystem.

From a somewhat different perspective, other research on judicial corruption indicates that the factors

2000. GAMBETTA, Diego. *La mafia siciliana: el negocio de la protección privada*. Cidade do México: Fondo de Cultura Económica, 1993.

⁶ CASTRO, José Miguel Camacho. El papel de las instituciones de control financiero sobre los derechos humanos en el contexto latinoamericano. *Revista de Direito Internacional*, Brasília, v. 13, n. 1, p. 156-168, 2016. ARAUJO, Felipe Dantas de. Corrupção e novas concepções de direito punitivo: rumo a um direito de intervenção anticorrupção?. *Revista de Direito Internacional*, Brasília, v. 8, n. 2, p. 205-253, 2011.

⁷ VIERA, Gabriela Alves Mendes; VARELLA, Marcello Dias. A conexão entre a corrupção e os direitos humanos. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, p. 476-494, 2014.

⁸ STAFFEN, Márcio Ricardo. Indicadores transnacionais de corrupção ambiental: a opacidade na transparência internacional. *Revista de Direito Internacional*, Brasília, v. 17, n. 2, p. 351-363, 2020.

⁹ PEÑA, Saul. *Psicoanálisis de la corrupción: política y ética en el Perú contemporáneo*. Lima: Peisa, 2005. PORTOCARRERO, Gonzalo. *Rostros criollos del mal. Cultura y transgresión en la sociedad peruana*. Lima: Red para el Desarrollo de las Ciencias Sociales en el Perú, 2004. OLIVERA, Mario. *Sociología de la corrupción: una base científica para emprender reales políticas anticorrupción*. [S. l.]: CECDS, 2002.

¹⁰ ROSE-ACKERMAN, Susan; LUCE, Henry. *International handbook on the economics of corruption*. Tallinn: Edward Elgar, 2006. BUSCAGLIA, Edgardo; DAKOLIAS, María. *An analysis of the causes of corruption in the judiciary*. Washington: The World Bank, 1999. WANG, Yuhua. Court funding and judicial corruption in China. *The China Journal*, [S. l.], v. 69, p. 43-63, 2013. BARRET, Kathleen. *Corrupted courts: a cross-national perceptual analysis of judicial corruption*. 2005. Dissertation (Master of Arts) - Georgia State University, Atlanta, 2005.

¹¹ SÁNCHEZ-URIBARRI, Raúl. Characteristics of the judiciary vs. corruption perception. *Sistemas Judiciales*, [S. l.], v. 13, p. 88-99,

2008. YANG, Vincent; EHRICHS, Linda. The professionalism of judges: education, salaries and career structure in Asia. *Global Corruption Report 2007*, Cambridge, p. 48-55, 2007. VOIGT, Stefan. When are judges likely to be corrupt?. *Global Corruption Report 2007*, Cambridge, p. 296-301, 2007.

¹² RIOS-FIGUEROA, Julio. Justice system institutions and corruption control: evidence from America Latina. *The Justice System Journal*, [S. l.], v. 2, n. 33, p. 195-214, 2012.; HAMMERGREN, Linn. Fighting judicial corruption: a comparative perspective from Latin America. *Global Corruption Report 2007*, Cambridge, p. 138-146, 2007. MELGAR-PÉÑA, Carlos. Judicial corruption and the military legacy in Guatemala. *Global Corruption Report 2007*, Cambridge, p. 35-39, 2007.; BEGOVIC, Boris; MIJATOVIC, Bosko; HIBER Dragor. *Corruption in Judiciary*. [S. l.]: Center for Liberal Democratic Studies, 2004. MONTINOLA, Gabriella; JACKMAN, Robert. Sources of corruption: a cross-country study. *British Journal of Political Science*, [S. l.], v. 32, n. 4, p. 147-170, 2002.

¹³ MUJICA, Jaris. *Micropolíticas de la corrupción: redes de poder y corrupción en el Palacio de Justicia*. Lima: Asamblea Nacional de Rectores, 2011.; CARBONELL, Miguel. *El régimen constitucional de la transparencia*. Cidade do México: UNAM, 2008.; CARBONELL, Miguel. Judicial corruption and impunity in Mexico. *Global Corruption Report 2007*, Cambridge, p. 225-228, 2007.; HARASIC, David. Chile's partial success. *Global Corruption Report 2007*, Cambridge, p. 187-189, 2007.; ROSE-ACKERMAN, Susan. Judicial Independence and Corruption. *Global Corruption Report 2007*, Cambridge, p. 15-24, 2007.; PEPYS, Noel. Corruption within the judiciary: causes and remedies. *Global Corruption Report 2007*, Cambridge, p. 3-11, 2007.; BUSCAGLIA, Edgardo. An analysis of judicial corruption and its causes: an objective governing-based approach. *International Review of Law and Economics*, [S. l.], v. 2, n. 21, p. 233-249, 2001.; BUSCAGLIA, Edgardo. *Judicial corruption in developing countries: its causes and economic consequences*. Berkeley: Berkeley Program in Law and Economics, 1999.; NORTH, Douglas. *Instituciones, cambio institucional y desempeño económico*. Cidade do México: Fondo de Cultura Económica, 1999. GLOPPEN, Siri. Courts, corruption and judicial independence. In: SOREIDE, Tina; WILLIAMS, Aled (ed.). *Corruption, grabbing and development: real world challenges*. Tallinn: Edward Elgar, 2014. p. 68-80.

¹⁴ LUHMANN, Niklas. *Sociología del Derecho*. Bogotá: Universidad Libre, 2012.

in the social environment that could influence acts of judicial corruption include the public's tolerance and even legitimization of unethical conduct. In other words, in those countries where the culture of illegality is more deeply rooted in society, cases of judicial corruption would be but a reflection of what happens throughout the social environment¹⁵. This relationship has been documented for several Latin American cases such as Paraguay, Ecuador, Argentina, or Venezuela¹⁶. Along the same line related to the influence of the social environment, the specialized literature mentions that the presence of irregular armed groups would favor the sedimentation of illegitimate behaviors within the judiciary¹⁷.

As both descriptive and explanatory studies of judicial corruption show, there is a relative absence of studies that analyze this phenomenon over time and essentially capture the variations observed. Indeed, there are countries where judicial corruption has increased and others where it has decreased. In other cases, variations are minimal. To discuss the different courses taken by judicial corruption, the following is a description of the three main patterns of behavior of this variable that can be observed empirically.

3 Three stories on judicial corruption

The evolution of judicial corruption has different stories, to which I have assigned three analytical categories

in this article. In the first, called “downward judicial corruption,” even if the social phenomenon is present, over time it tends to decline due to normative reforms or changes in the actors' behavior. In the second story, called “upward judicial corruption,” the opposite is true, judicial corruption increases in quantitative and/or qualitative terms. With or without institutional or other reforms, in this scenario judicial corruption is on the rise. The third story, defined as “static judicial corruption,” is characterized by the absence of change. Here there are three subtypes. Some countries have high levels of judicial corruption and remain so over time. Other countries face minor problems with respect to judicial corruption and stay there. A third group has moderate judicial corruption problems and does not leave that dynamic over time.

Conversely, in countries where judicial corruption has been on the rise, in some cases the decline in transparency in the provision of judicial service has been steeper. Indeed, the intensity of the variation in judicial corruption, whether upward or downward, depends on the country's initial situation in this regard. So, in countries where judicial corruption has gained substantial ground, any improvement will be noticeable. From another perspective, if judicial corruption is not a serious social problem, any positive change will be less evident.

With that said, in what follows I set out the strategy used to identify when judicial corruption declines or rises “noticeably” over time. Given that the data I use contains ten values for each country, one per year between 2012 and 2021, the simplest way to measure this is to compare the initial year (2012) with the final year (2021) and then look at the differences. By the nature of the interval used in the World Justice Project surveys, which are the ones I use, I assume that an improvement or deterioration of “0.10” or more accounts for a country in which the course of judicial corruption has changed “notoriously.” Of course, not all countries have a linear course of decreasing or increasing judicial corruption over the analyzed ten years. In fact, in some countries where judicial corruption is on the decline, there may be some years of a slight decline and then resume the original trend. The same could happen in the opposite direction, countries with an increase in judicial corruption but with a slight decrease in certain years that serves as a prelude to a return to the initial trend.

¹⁵ LÓPEZ, Diego. La cultura de la legalidad como discurso académico y como práctica política: un reporte desde América Latina. In: WENCES, I; CONDE, R.; BONILLA, Adrián (ed.). *Cultura de la legalidad en Iberoamérica: desafíos y experiencias*. Lima: Flacso Ecuador, 2014. p. 47-82.

¹⁶ BASABE-SERRANO, Santiago. Informal institutions and judicial independence in Paraguay, 1954–2011. *Law and Policy*, [S. l.], v. 37, n. 4, p. 350-378, 2015.; LLANOS, Mariana. Acción estratégica y cultura de la informalidad: la reforma judicial en Argentina. In: WENCES, I; CONDE, R.; BONILLA, Adrián (ed.). *Cultura de la legalidad en Iberoamérica: desafíos y experiencias*. Quito: Flacso Ecuador, 2014. p. 77-298; SÁNCHEZ-URIBARRI, Raúl. Courts between democracy and hybrid authoritarianism: evidence from the Venezuelan Supreme Court. *Law & Social Inquiry*, [S. l.], v. 36, n. 4, p. 854-884, 2011.

¹⁷ LLANOS, Mariana; TIBI, Cordula; HEYL, Charlotte; STROH, Alexander. Informal interference in the judiciary in new democracies: a comparison of six African and Latin American cases. *Democratization*, [S. l.], v. 23, n. 7, p. 1236-1253, 2016.; BASABE-SERRANO, Santiago. ¿Cuáles países han ganado la batalla a la corrupción judicial y cuáles no?: una perspectiva a nivel mundial. *Brazilian Journal of Empirical Legal Studies*, [S. l.], v. 11, p. 1-31, 2024.

To keep homogeneity among the studied units of analysis, I excluded those countries that lack the complete 2012-2021 time series from the analysis, making a total of ninety-seven (97) countries. Table 1 shows the countries where judicial corruption has decreased, in accordance with the above-mentioned methodological decisions. This shows that only twenty-one countries in the world register a considerable reduction in judicial corruption over time. Within this subset, which represents only 21.64% of the ninety-seven analyzed countries, those with the most noticeable progress are Moldova, Belarus, Kazakhstan, Kyrgyzstan, Senegal, and Uzbekistan.

Table 1 - Downward judicial corruption (2012-2021)

Country	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Range
Moldavia	0.17	0.17	0.24	0.20	0.25	0.36	0.36	0.35	0.39	0.41	24
Belarusia	0.47	0.47	0.56	0.61	0.60	0.74	0.74	0.70	0.73	0.71	24
Kazakhstan	0.36	0.36	0.40	0.39	0.41	0.48	0.48	0.53	0.57	0.58	22
Kyrgyzstan	0.17	0.17	0.22	0.32	0.30	0.33	0.33	0.37	0.39	0.35	18
Senegal	0.46	0.46	0.43	0.52	0.54	0.56	0.56	0.60	0.60	0.62	16
Uzbekistan	0.29	0.29	0.40	0.42	0.36	0.32	0.32	0.40	0.44	0.45	16
Guatemala	0.28	0.28	0.39	0.36	0.37	0.44	0.44	0.48	0.45	0.43	15
Japan	0.84	0.84	0.82	0.92	0.96	0.97	0.97	0.97	0.97	0.98	14
China	0.40	0.40	0.34	0.40	0.51	0.58	0.58	0.57	0.55	0.53	13
Jamaica	0.70	0.70	0.60	0.63	0.71	0.81	0.81	0.83	0.81	0.82	12
Thailand	0.58	0.58	0.61	0.61	0.61	0.71	0.71	0.67	0.71	0.70	12
Russia	0.42	0.42	0.41	0.46	0.45	0.54	0.54	0.57	0.55	0.54	12
Macedonia	0.40	0.40	0.43	0.42	0.40	0.55	0.55	0.53	0.49	0.51	11
Bulgaria	0.47	0.47	0.46	0.47	0.50	0.57	0.57	0.57	0.58	0.58	11
Uruguay	0.81	0.81	0.78	0.83	0.86	0.91	0.91	0.92	0.91	0.91	10
Arab Emirates	0.78	0.78	0.79	0.83	0.86	0.77	0.77	0.87	0.88	0.88	10
Ukraine	0.38	0.38	0.41	0.37	0.37	0.43	0.43	0.46	0.49	0.48	10
Greece	0.71	0.71	0.64	0.73	0.76	0.81	0.81	0.81	0.80	0.81	10
Portugal	0.77	0.77	0.73	0.81	0.83	0.88	0.88	0.88	0.88	0.87	10
Bangladesh	0.25	0.25	0.29	0.30	0.32	0.30	0.30	0.33	0.35	0.35	10
Malaysia	0.66	0.66	0.66	0.68	0.67	0.76	0.76	0.74	0.76	0.76	10

Source: World Justice Project.¹⁸

Senegal is a remarkable case as it is the only country in Africa that belongs to the set of those where judicial corruption has decreased. It would have been useful to establish a comparison of Senegal with other African countries that have followed a similar trajectory in the fight against judicial corruption, but unfortunately, this is not possible.

Table 2 presents the countries where judicial corruption has increased during the analyzed decade. Fortunately, there are few cases around the world that fall into this analytical category. In fact, only 11.34% of the total number of analyzed countries are currently in a worse situation with respect to judicial corruption than they were a decade ago. Madagascar, Hungary, Liberia, Egypt, Malawi, and Uganda are in this situation. Except for Hungary, all the countries in this group are African. This characteristic allows for a comparison of Madagascar with other countries in its continent where judicial corruption has increased. Specifically, patterns of behavior could be established between Madagascar, Uganda, and Malawi, as the population sizes of these three countries are relatively similar, unlike Egypt and Liberia. In the following section I will compare the cases of Senegal and Madagascar to establish the variables that may have contributed to the decline in judicial corruption in Senegal and the clear opposite trend in Madagascar.

Table 2 - Upward judicial corruption (2012-2021)

Country	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Range
Madagascar	0.43	0.43	0.36	0.27	0.28	0.31	0.31	0.26	0.28	0.25	18
Hungry	0.82	0.82	0.69	0.65	0.71	0.68	0.68	0.69	0.71	0.67	15
Liberia	0.45	0.45	0.44	0.28	0.27	0.32	0.32	0.30	0.33	0.31	14
Egypt	0.58	0.58	0.50	0.59	0.62	0.47	0.47	0.47	0.46	0.44	14
Malawi	0.65	0.65	0.57	0.49	0.53	0.52	0.52	0.54	0.53	0.54	11
Uganda	0.43	0.43	0.42	0.39	0.39	0.34	0.34	0.35	0.33	0.33	10

Source: World Justice Project.¹⁹

4 Senegal and Madagascar: similar origins with different results

According to the data used in this article, Senegal and Madagascar are two African countries that in 2012 showed a similar value for judicial corruption. Although

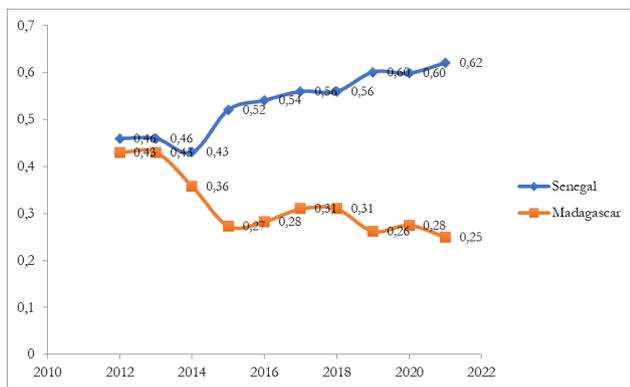
¹⁸ WORLD JUSTICE PROJECT. *Measuring the rule of law*. 2019. Available at: <https://worldjusticeproject.org/>. 23 July 2024.

¹⁹ WORLD JUSTICE PROJECT. *Measuring the rule of law*. 2019. Available at: <https://worldjusticeproject.org/>. 23 July 2024.

the former was better placed (0.46) than the latter (0.43), the difference was minimal. In this context, corruption, broadly and systemically considered, also showed similar results for 2012 in Senegal and Madagascar. According to Transparency International and its annual corruption perception index, in 2012 Senegal had a score of 36/100 while Madagascar registered 32/100. Senegal ranked ninety-fourth and Madagascar one hundred eighteenth out of one hundred seventy-six countries examined. The previous description would intuitively lead one to think that judicial corruption in both countries would tread similar paths in the immediate future.

However, over time, the course taken by Senegal and Madagascar took such different directions that, by 2021, the first country is one of the benchmarks of noticeable improvement in terms of transparency in the performance of its courts of justice (0.46 to 0.62) while the second is also a typical case, albeit in terms of exponential increase in judicial corruption (0.42 to 0.25). From the above, the research question that arises relates to the factors or variables that would have played a role in the fact that two countries with similar characteristics and, above all, with a very similar position in terms of judicial corruption at a specific historical moment, find themselves in such different situations after a decade. As Figure 1 shows, the trends in judicial corruption in Senegal and Madagascar are clearly different over the analyzed decade.

Figure 1 - Judicial corruption in Senegal and Madagascar, 2012-2021.



Source: World Justice Project.²⁰

At the methodological level, the following analysis refers to two units of analysis - Senegal and Madagascar - which, despite presenting similar values in a se-

ries of factors, have very different results in terms of the dependent variable - judicial corruption. As Figure 1 shows, both countries start in 2012 from a very similar position in terms of the degree of transparency in the performance of their courts of justice; however, over time each country takes on very different paths. My interests here is to investigate the factors that, over a decade, have led judicial corruption to take on such different values in each country. The selection of cases is not random and is made precisely because, after ten years, the paths of Senegal and Madagascar are markedly different in terms of transparency in the provision of judicial services.

Given the type of research proposed, I am interested in tracing the political processes that took place in both Senegal and Madagascar, which could be the cause of different results in terms of the current state of judicial corruption. To this end, I describe the different events that mark the evolution of both countries and that would have a direct relationship with the behavior of the courts of justice and, specifically, with transparency in the management and services they offer. In this task, I identify those critical junctures that would lead to a change in the course followed by judicial corruption in one country and in the other, and which, viewed as a whole, account for historical phenomena that mark the subsequent trajectory of the countries in a specific dimension of reality²¹.

For the account of events in both countries, I resort to historical narratives in which I note a series of discrete social and essentially political events that, together, shed light on the reasons why, over a similar period and under similar initial conditions, judicial corruption declined significantly in Senegal while in Madagascar it grew considerably worse. To capture information on the two countries under analysis, I resorted to different sources. First, I accessed academic papers on Senegal and Madagascar. At the same time, I considered various reports from international institutions that have

²⁰ WORLD JUSTICE PROJECT. *Measuring the rule of law*. 2019. Available at: <https://worldjusticeproject.org/>. 23 July 2024.

²¹ HOGAN, John. The critical juncture concept's evolving capacity to explain policy change. *European Policy Analysis*, [S. l.], v. 5, n. 2, p. 170-189, 2019; CAPOCCIA, Giovanni; KELEMEN, Daniel. The study of critical junctures: theory, narrative, and counterfactuals in historical institutionalism. *World Politics*, [S. l.], v. 59, n. 3, p. 341-369, 2007. GREIF, Avner; LAITIN, David. A theory of endogenous institutional change. *American Political Science Review*, [S. l.], v. 98, n. 4, p. 633-652, 2004. THELEN, Kathy. Historical institutionalism in comparative politics. *Annual Review of Political Science*, [S. l.], v. 2, n. 1, p. 369-404, 1999.

assessed the situation of both countries at different historical moments. These included documents from the United Nations, the International Criminal Court, and the African Union. I also considered information from the media and non-governmental agencies that focus their work on Africa. This group includes organizations such as Transparency International, Freedom House or the BBC news website. Finally, I gathered data on the behavior of the main socioeconomic variables of both countries from the websites of international financial organizations, mainly the World Bank.

Senegal and Madagascar are two relatively small African countries in terms of population and moderate in terms of population density, which became independent republics in the early 1960s. Both share the historical legacy of being part of the French colonies in Africa, which is reflected not only at the cultural level but also in the similarities found in the institutional structure of their respective political systems. In fact, Senegal and Madagascar adopt presidentialism as a form of government and, although the former has a unicameral legislature compared to the Malagasy double chamber, both have a president and a prime minister. These countries, hence, share responsibilities both within the executive branch and with the National Assembly and the Senate, in the case of Madagascar. In terms of political representation, the party system in both countries has several organizations registered in their respective electoral offices, so there are competitive features.

Regarding the judiciary, the Supreme Court, consisting of thirteen magistrates, including its president, is at the apex of the Senegalese administration of justice. The judges of the intermediate and lower courts report to this court in hierarchical and administrative terms. In terms of competencies, the Supreme Court essentially focuses on the resolution of cassation and review appeals, following the French tradition of judicial organization. In addition, Senegal has a Constitutional Council made up of seven judges, whose main task is to monitor compliance with the Constitution and respect for citizens' rights and guarantees. As for the appointment mechanisms, the supreme judges are proposed by the president on the recommendation of the Superior Council of the Judiciary, while five of the seven judges of the Constitutional Council are appointed by the president and the other two are appointed by the legislature.

In Madagascar, the Supreme Court, made up of eleven members, primarily fulfills administrative and control functions. A higher court, of similar hierarchical rank, performs jurisdictional functions, especially in the field of prosecution of crimes committed by high-level public officials. Like Senegal, Madagascar has both a Constitutional Court, with the power to interpret the supreme law and made up of nine members, and a Council of Magistrates. As for the rest of the Judiciary's organization, Madagascar follows the French tradition, also adopted by Senegal, of having intermediate or appellate courts above the courts of first instance. The President of Madagascar has direct influence over the appointment of supreme and constitutional judges. The dual legislative chamber and the Council of Magistrates also have a share of influence over the appointment. In general, both countries have a similar institutional matrix for the appointment of judicial positions.

Economically, the performance of Senegal and Madagascar throughout the first decade of the 21st century was relatively similar. For example, according to World Bank data, Senegal's inflation rate in 2008 was 7.34, while Madagascar's was 9.29. In terms of gross domestic product (GDP), during the same year, Senegal recorded \$16.85 billion and Madagascar \$11.57 billion. Since the former's economy has historically been stronger, the differences in terms of GDP figures are not large. In terms of foreign direct investment, expressed as a percentage of GDP, the figure for Senegal in 2008 was 2.70 while for Madagascar it stood at 10.57. As shown in this last macroeconomic indicator, Madagascar's position was better than that of Senegal. Finally, the balance of trade in goods and services as a percentage of GDP was also relatively similar in both countries in 2008, albeit with negative values. In Senegal this indicator was -21.06 while in Madagascar it was -18.94²².

In summary, and despite the similarities between Senegal and Madagascar at the cultural, institutional, and economic levels, since 2012 the political history of the two countries has taken different directions. On the one hand, Madagascar fell into virulent political confrontation, attempts to destabilize governments, and social confrontation. On the other hand, Senegal opted for political institutionalization and the possibility of

²² Rice production in Madagascar is vast. In fact, the main economic activities of about eighty percent of the population are concentrated around rice production and marketing.

consolidating the democratic regime in the midst of its difficulties. In fact, in 2012 Senegal appointed Macky Sall as its president, after twelve years of hegemony of Abdoulaye Wade, elected in 2000 and reelected in 2007, whose real intentions were to run for a third presidential term amid doubts about the legality of such a decision. After months of internal disputes, Sall's government finally managed to hold on and thus alternate political power and a moderately fair competition between party groupings took hold. This was a decisive event for the political future of Senegal.

On this last point, it should be noted that the Socialist Party had governed Senegal uninterruptedly since its independence in 1960 and for forty years²³. In this context, the fact that Wade, representative of the "Alternative" movement, became president in 2000 was the first sign that a comprehensive democratization process could begin for the country. In 2007, Wade was re-elected with a large legislative majority voted in 2001, and in the midst of a recent process of constitutional reforms aimed at strengthening the presidential form of government. However, when his term came to an end in 2012, criticism of the long stay in power that Wade himself had raised with respect to the Socialist Party became a thing of the past as he sought the means to remain in government for an additional term, based on the popularity he still maintained.

Therefore, a change in the government's political orientation in 2012 was a key factor. The arrival of Sall is thus a critical juncture that shows a country that, without the changeover, could revert to the recent past of concentrated power. In terms of causal analysis of a counterfactual nature, the event described above might suggest that, if Sall had not won the election, the course of Senegal's institutionalization process would eventually have changed to one marked by upheaval and chaos. Judging by Senegal's political and social past, one could doubt whether if certain stability would have been achieved in the decades that followed, if Wade had held on to power. In any case, since this is an analysis based on what did not happen or under the "what

if" reasoning, there is room for speculation as to the importance of Sall's electoral victory on the course of the democratic regime and judicial corruption. In any case, there seems to be enough theoretical arguments to show that this event was sufficiently relevant for what will happen in the following years.

It should be added that during Sall's government two critical processes contributed both to the stability of the democratic regime and to a decrease in judicial corruption. Firstly, the implementation of a sustained economic development program oriented to the energy and agricultural sectors and infrastructure provision. As a result, Senegal's macroeconomic indices improved and support from various international organizations, both in terms of economic resources and technical support, also grew considerably. In addition, the democratic regime was consolidated and support for the government increased rapidly²⁴. In fact, with the legislature dominated by the ruling "Benno Bokk Yakaara" party by nearly seventy percent, Sall was re-elected with 58% of the vote for a second and final five-year term in the 2019 presidential elections.

As for the decline of judicial corruption, the Sall government tackled the problem through several decisions. On the one hand, it created the "National Office Against Fraud and Corruption;" on the other hand, it proposed a specialized criminal court called the "Court for the Repression of Illicit Enrichment," in charge of prosecuting crimes related to public resources mismanagement. Since that institutional reform, two relevant legal processes underpinned the government and together they account for another critical juncture key to understanding the decline in the levels of judicial corruption in Senegal. First is the criminal trial against Karim Wade, son of former President Wade, known as "Mr. 15%". Second is the court case brought against the mayor of Dakar, Khalifa Sall. Both cases involved criminal proceedings for corruption scandals and abuse of public resources, which, after several years of legal wrangling, resulted in convictions.

In 2015, Wade was sentenced to six years in prison for illicit enrichment and ordered to pay two hundred and forty-one million dollars as a pecuniary penalty. In 2019, Khalifa Sall received a five-year prison sentence

²³ During the forty years of the Senegalese Socialist Party's hegemony, only in 1978 was a party system with three political groupings formed. This is the legacy of Leopold Sedar Senghor, ruler between 1960 and 1981. Between 1981 and 2000, former Prime Minister Abdou Diouf took over the presidency. As mentioned above, the Socialist Party's hegemony was altered in 2000 with the arrival of Wade to power.

²⁴ SAPPLETON, Shan. Is Senegal a consolidated democracy?: alternations, corruption and cultural relativism. *Afrika Focus*, [S. l.], v. 34, n. 1, p. 75-105, 2021.

for irregular use of public funds while serving as mayor. The social and judicial anti-corruption repercussions of both judicial decisions were notorious despite the fact that President Macky Sall subsequently granted pardons to both sentenced persons. This, together with increased freedom of press and society's opening to different forms of organization aimed at observing the Judiciary's behavior, show a scenario that favored making the provision of judges and prosecutors' services in Senegal more transparent. In addition, the Sall administration was wise to appoint Aminata Touré, a human rights and anti-corruption activist, first as Minister of Justice and then as Minister of Politics. Symbolic acts such as these, together with the previous actions, explain to a large extent why the Senegalese judicial system is still considered one of the most effective and transparent in sub-Saharan Africa ²⁵²¹.

As for Madagascar, it should be noted that, despite the abundance of natural resources and the vast possibilities for agricultural development, the permanent instability of governments has led not only to a deterioration in macroeconomic indicators but also in the performance of the main democratic institutions. In the case of justice, as we have seen, judicial corruption has increased exponentially over the last decade. Once again on the political level, it is necessary to point out that Madagascar's institutional weakness is not new. As early as 1972, the country's first president, Philibert Tsiranana, in office since 1960, was forced to relinquish power to the then Chief of Staff of the National Army, Gabriel Ramanantsoa. Indeed, after a wave of demonstrations and social protests, Ramanantsoa took over the country's leadership until 1975, when his Minister of Foreign Affairs, Didier Ratsiraka, came to power as leader of the Charter of the Socialist Revolution (CSR).

In 1976, Ratsiraka became constitutional president after the approval of Madagascar's socialist constitution, as it is called. Re-elected in 1982 and 1989, Ratsiraka faced two coup attempts - the first in 1989 and the second a year later in 1990. Although the President successfully escaped both attacks against the country's institutions, demands for structural reforms in view of the poor results of the proposed socialist model were on the rise. In fact, in 1990, opposition leader Arbert Zafy was elected leader of the "Fuerzas Vivas," a coalition of

opposition parties that advocated a new Constitution and an early call for presidential elections. The political and social pressure was such that by 1992 Madagascar had a new Constitution which, among other things, called for immediate elections. Ratsirak was unable to complete his third term in office and in 1993 Zafy became president amidst social turbulence and uncertainty about the country's political future.

The hopes raised among the population by the change in the country's economic orientation were soon dashed by the government's blunders. On top of this, there was a tense relationship with the legislature, which essentially resulted in President Zafy's decision that the Prime Minister should no longer be appointed by the legislature but by himself. Popular discontent, as evidenced by a considerable decrease in the president's popularity, together with political decline in the National Assembly, led to initiating and approving, in mid-1996, a legislative process to remove the head of state, known as a motion of impediment. The government was thus temporarily placed in the hands of the Vice President, Norbert Ratsirahonana. Faced with this new case of institutional instability, early elections were called, and Didier Ratsiraka returned to power, this time for the 1996-2002 term. Presidential elections were called in December 2001, with Ratsirak running for reelection and the young mayor of Antananarivo, the country's capital, Marc Ravalomanana, as his main opponent.

In a tense electoral process due to the minimal support differences between the two candidates, the High Constitutional Court issued an official statement on the results of the first round more than a month after election day. With this, the already existing doubts about the elections' transparency became more entrenched among the population. Although Ravalomanana (46.8%) had beaten President Ratsirak (41.9%), his share of the vote was not enough to win the presidency and a run-off election was required. However, Ravalomanana refused to accept the decision of the constitutional court of justice and called for demonstrations and strikes of different social sectors of the country. With that support and the fact that local electoral observers, as international organizations were not allowed to be present, agreed on the victory of the mayor of Antananarivo with 53% of the votes, Ravalomanana self-proclaimed himself president of Madagascar on February 22, 2002. In response, the Ratsirak Administration decreed a state

²⁵ SHIPLEY, Thomas; KANINDA, Samuel. *Country profile*. Senegal: overview of corruption and anti-corruption. 2018.

of national emergency and a few days later martial law came into force.

As a consequence of the above scenario, internal disputes became increasingly difficult to control to the point that Madagascar came close to civil war. In fact, in addition to armed clashes between civilian sides loyal to Ratsirak or Ravalomanana, there was the real threat of a conflict over ethnic issues. In the midst of the social upheaval and serious fractures within the Armed Forces, the economy took a considerable downturn, especially considering that international cooperation, which represented 40% of the state budget and 75% of the public investment program, was withdrawn in the face of the political instability observed. France, the United States, and the Organization of African Unity (OAU) tried to mediate in the conflict and after several negotiations, on April 18, 2002, they achieved a ceasefire and a mutual cessation of hostilities. The disputing parties agreed to accept a recount of votes by the High Constitutional Court, the presence of a transitional government and, if necessary, the holding of a second round of elections.

On April 29, 2002, the High Constitutional Court declared Ravalomanana President of Madagascar after he won 51.5% of the valid votes. However, Ratsirak refused to accept the Court's decision, labeled it biased, and prompted his loyalists to keep up the belligerent attitude. The confrontations continued for more than two months, and the agreements became more and more distant until, at the end of June, the United States Government, and immediately afterwards the French Government, officially declared that they recognized Ravalomanana's Government as legitimate. With the international support that followed, Ratsirak left the country and took refuge in France. The political conflict was thus settled; Ravalomanana tried to put the national economy in order and concluded his first term in office (2002-2006). However, in 2003 and 2006, there were further coup attempts, and the call for elections in December 2006 was again held amidst political tensions and institutional instability. At the same time, macroeconomic performance remained poor and corruption, especially judicial corruption, increased over time.

Despite the convulsive political scenario, Ravalomanana won reelection in a single round and achieved a legislative majority that gave him some leeway during the first months of his second presidential term. However,

in March 2009 and after two months of violence, looting and riots of various kinds, the mayor of Antananarivo, Andry Rajoelina, proclaimed himself the leader of the "transition's supreme authority." After accusing the Head of State of embezzlement of public resources and supported by a faction of the national army, Rajoelina took office even though he did not meet the minimum age requirement of forty years of age established by the Constitution of Madagascar. In part for political reasons, in part as a response to the closure of a Rajoelina media outlet in December 2008, ordered by Ravalomanana, the fact is that the institutional crisis and violence returned to Madagascar with equal or greater force than before.

In this context, in July 2009 Ravalomanana was sentenced to four years in prison for embezzlement of public funds and was also ordered to pay seventy million dollars as a pecuniary penalty. Other criminal proceedings were filed against the former president for the death of twenty-seven people at the hands of the police, during the social protests of February 2019. In spite of the above, the international resistance to recognize Rajoelina's government was generalized, not only the European Union, but also Western governments, the Southern African Development Community (SADC), and the Organization of African Unity (OAU) itself, which in March 2010 suspended Madagascar's membership. In September 2010, fifteen political parties and organizations close to both Rajoelina and former presidents Ravalomanana and Zafy agreed on a formula to return in some measure to democratic channels, through the SADC mediation, with the aim of finding a way out of the paralysis in which Madagascar found itself.

The consensual option was that Rajoelina would remain as transitional president until the December 2013 general elections, in which neither he nor Ravalomanana would run as candidates. In the meantime, a prime minister close to former President Zafy's movement was appointed. At the end of 2013, Hery Rajaonarimampianina, a member of Rajoelina's ministerial cabinet, won the presidency, thus completing the democratization process in Madagascar. Added to the above was the fact that in July and December 2015, both communal and Senate renewal elections were verified without major setbacks, respectively. However, in April 2018, the political conflict resurfaced after a package of electoral reforms proposed by Rajaonarimampianina and approved by the legislature that were not well regarded by the political

opposition. In fact, violence grew on the streets to levels seen only in 2013, when clashes broke out between Rajoelina and Ravalomanana supporters. The climax of the tensions was the petition for Rajaonarimampianina's resignation, filed by various opposition forces before the High Constitutional Court.

In May 2018, with the support of the army and by provision of the High Constitutional Court, new Prime Minister Christian Ntsay was appointed and formed a coalition cabinet in order to calm the heated times that were once again raging in Madagascar. Although Rajaonarimampianina remained as President, tensions eased with the call for general elections at the end of that year. There, in a run-off election, Andry Rajoelina returned to power, after defeating Ravalomanana, who contested the results through court actions. However, in January 2019 Rajoelina began his second presidential term, not without tensions and several revolts aimed at removing him from power. Moreover, in mid-July 2021, an assassination attempt against Rajoelina was reported. Within the judicial process brought against him, the presumed responsibility of French military personnel in passive service, Malagasy gendarmes, two executives of the "Madagascar Oil" company, the archbishop of Antananarivo, and a singer close to the president are currently being investigated. Preliminary investigations point to the link between this criminal act and a new coup attempt.²⁶

5 Conclusions

As described in this article, Madagascar, a country rich in natural resources such as coffee, vanilla, cloves, and sugar, and once one of the most prosperous in Africa, has been declining over time not only in terms of the quality of its economy but also in terms of the stability of its democratic institutions. As shown in Figure 1, judicial corruption has been on the rise and this phenomenon can be analyzed in terms of the above-mentioned context. In this regard, if the historical narratives of Senegal and Madagascar are compared, at least three elements or factors can be used to infer

a possible causal link with respect to the behavior of the judicial corruption variable. First, political stability. Second, the implementation of public policies to fight corruption. In third place, the presence of relevant events that are critical junctures that help alter the Judiciary's course of action.

In other words, the presence of institutional stability, public policies aimed at combating corruption, and the emergence of key political and judicial events would explain why Senegal has considerably reduced the levels of corruption in its courts over the last decade. Conversely, the absence of these three variables would have contributed to the fact that Madagascar, over a similar period and despite having started with initial conditions comparable to those of Senegal in 2012, has sharply increased judicial corruption levels to date. Of course, if the three variables mentioned above were not present in Senegal or were also present in Madagascar, and judicial corruption in both countries nevertheless took different paths, then the answer as to why such changes occurred must be sought in other factors.

In addition, two of the three variables mentioned as decisive for judicial corruption have to do with factors external to the courts of justice. I am referring specifically to the agreement among political actors to maintain institutional stability and to the presidential decision to promote a series of regulatory arrangements or public policies aimed at reducing judicial corruption. In the first case, Senegal's narrative shows a country that was able to resolve the existing political conflict in some way and, therefore, the government's continuity was not greatly altered by the opposition forces. Although this should by no means be taken to mean that Senegal is a benchmark for the stability of institutions in the world, the country's track record in terms of political hegemony of a single party grouping, the smooth presidential succession of the last decade is worth noting. As I have described, Madagascar is at the antipode, between the early exit of presidents and electoral process contestation.

As for the implementation of anti-corruption policies in Senegal, although there are several actors that surround the designed regulations, a decisive fact is that without the political decision of the head of state, this type of undertaking would hardly have come to fruition. As in most presidential forms of government, the impetus for public policies of this nature, and in general

²⁶ GÜNDEM Cumhurbaşkanı Erdoğan: Çanakkale'de bir kez daha görülmüştür ki hiçbir silah vatan sevgisine galip gelemez. *Anadolu Agency*, 2021. Available at: <https://www.aa.com.tr/>. Accessed on: 23 July 2024.

for initiatives for institutional change, comes from the head of the Executive. In this regard, the collaboration of international organizations, the symbolic effect of placing in key positions of power people historically recognized for their fight against corruption in general and judicial corruption in particular, were facts that show that what happened in Senegal is not only about creating institutions, courts of justice, and policies to fight corruption, but also that all this must be preceded by the political will to generate change. Therefore, the political decision added to other elements can shape changes that benefit the increase of transparency in the provision of judicial services.

Finally, the third variable identified as decisive in the decline of judicial corruption in Senegal is internal to the courts of justice. Unlike the two previous ones, in which actors outside the judiciary are the ones who carry them out, here it is the judges and prosecutors themselves who are responsible for them. In this regard, the third factor that would influence the decrease in judicial corruption would not be related to the environment of the courts of justice, but rather to the internal alteration of the dynamics governing the relationship between the operators of justice and between them and their clients. Some judicial decisions that can be seen as references - and that could be considered critical junctures - from which the judicial corruption course could have taken a different direction in Senegal, are the sentences of imprisonment and economic compensation in favor of the State and against the son of a former president or the mayor of the country's capital city. Such declarations by the judiciary not only had a positive effect on the population, but also on justice operators. These rulings, therefore, are "triggers" that have effects in different areas, mainly in the internal life of the Judiciary.

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Automated weapons systems & lethal autonomous weapons system and new international legal and humanitarian issues*

Sistemas de armas automatizados & sistemas de armas letais autônomos e as novas questões jurídicas e humanitárias internacionais

Rahul J Nikam**

Bhupinder Singh***

Abstract

New tactics and tools of warfare, including Automated Weapons Systems (AWS), Lethal Autonomous Weapons System (LAWS), cyberattacks, armed drones, and robots, have been made possible by technological advancements and the use of artificial intelligence (AI). These innovations have created new legal and humanitarian issues. A State must consider whether it conforms with international humanitarian law before creating or purchasing any new weapon, tool, or tactic of conflict driven by AI. The current article addresses whether existing legal norms apply to new technology and may prompt readers to consider whether the provisions of Customary International Law, International Law, and International Humanitarian Law are sufficiently clear in light of the unique features of the technology and its potential humanitarian implications. It also examines the positions taken by different nations about these weapons and whether or not AWS and LAWS should be outright prohibited or made legal via regulations and transparency in their usage. It concludes that these new technological weapons must adhere to the ethical norms and existing international legal frameworks that should regulate their creation and deployment and that either significant human participation or a restriction on the use of AWS and LAWS is necessary. This article analyses the assumption that AWS and LAWS create unprecedented legal and humanitarian challenges requiring robust international regulations. A doctrinal study of applicable laws, case studies, and expert views are utilized to examine compliance with international humanitarian law. The findings highlighted serious gaps in accountability, ethics, and human oversight and called for internationally unified governance as a matter of urgency. The article suggests that whilst AWS may be beneficial to military efficiency, the potential for indiscriminate harm caused by a lack of clear delineation of legal responsibility means that there is an urgent need for international discourse and policies to counter humanitarian threats caused in its deployment.

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Keywords: automated weapons systems; Lethal Autonomous Weapons System; international law; international humanitarian law; international criminal law; artificial intelligence; The Martens Clause.

Resumo

Novas táticas e ferramentas de guerra, incluindo os Sistemas de Armas Automatizados (SAA), os Sistemas de Armas Letais Autônomos (SALA), os ciberataques, os drones armados e os robôs, tornaram-se possíveis graças aos avanços tecnológicos e à utilização da inteligência artificial (IA). Essas inovações suscitam novas questões jurídicas e humanitárias. Antes de desenvolver ou adquirir qualquer arma, ferramenta ou tática de combate baseada em IA, um Estado deve avaliar se ela está em conformidade com o direito internacional humanitário. O presente artigo examina se as normas jurídicas existentes são aplicáveis às novas tecnologias e convida o leitor a refletir sobre a suficiência das disposições do Direito Internacional Costumeiro, do Direito Internacional e do Direito Internacional Humanitário diante das características específicas dessas tecnologias e de suas potenciais implicações humanitárias. Analisa ainda as posições adotadas por diferentes Estados quanto a essas armas, bem como o debate sobre se os SAA e os SALA devem ser proibidos por completo ou regulamentados mediante normas claras e mecanismos de transparência em seu uso. Conclui-se que essas novas armas tecnológicas devem obedecer às normas éticas e aos marcos jurídicos internacionais já existentes que regulamentam sua criação e utilização, sendo essencial assegurar uma participação humana significativa ou impor restrições à sua utilização. O artigo parte da hipótese de que os SAA e os SALA representam desafios jurídicos e humanitários sem precedentes que exigem regulamentações internacionais robustas. Para isso, adota-se uma abordagem doutrinária, com o exame das normas aplicáveis, estudos de caso e pareceres de especialistas, a fim de avaliar a conformidade com o direito internacional humanitário. Os resultados apontam lacunas sérias em termos de responsabilidade, ética e controle humano, e defendem a necessidade urgente de uma governança internacional unificada. Embora os SAA possam trazer ganhos em termos de eficiência militar, o risco de danos indiscriminados causado pela ausência de uma definição clara de responsabilidade jurídica revela

a urgência de um debate internacional e da formulação de políticas capazes de mitigar as ameaças humanitárias associadas à sua implementação.

Palavras-chave: sistemas de armas automatizados; sistemas de armas letais autônomos; direito internacional; direito internacional humanitário; direito penal internacional; inteligência artificial; Cláusula Martens.

1 Introduction

Artificial Intelligence (AI) will drive the Fourth Industrial Revolution, which may have a profound effect on every aspect of life, including foreign policy, technology advancement, public policy, government, security, and even minute daily tasks like finding the nearest petrol stations. AI has both beneficial and harmful uses, with the potential to cause enormous, long-lasting, disruptive creative, and destructive disturbances. When AI is used for good, technology could mitigate climate change and enhance lifestyle, health, and educational outcomes.

Since there is no international agreement on foreign policy, national security, and other matters, as well as without regulation, there is a great deal of potential for abuse of such an unknown and formidable AI based technology. Furthermore, a lack of knowledge about the problems, risks, and uses of new technology like AI is caused by imprecise or vague definitions of terminology. Therefore, cooperation between the social sciences and hard sciences is imperative to address the moral, ethical, and legal issues that AI raises¹. Even military systems have been swept by the AI revolution, with AI-driven autonomy emerging as the new face of combat.

Wars have been a part of human culture for generations. As civilizations have developed, so too have conflicts, to the point where the development of technology has had a significant influence on military tactics. The effect of AI on the battlefield has increased significantly following the proliferation of AWS and LAWS, also known as revolutionary fire-and-forget weapons power-

¹ MCGANN, James G. 2019 *artificial intelligence and think tanks report*. Palo Alto, California: Think Tanks and Civil Societies Program, 2019. Available at: https://static1.squarespace.com/static/593e8c54e3df286fa006bd85/t/605660e17e7c406eebe88aa2/1616273633571/Copy+of+Palo+Alto_AI+Forum+Report.pdf. Access on: 14 Mar. 2024.

red by AI in its primary operations. Without human assistance, these weapons detect, track, and strike targets by processing data from on-board sensors and algorithms. Because AWS is considered deadly, it becomes LAWS when it targets people².

Though there is much promise for these autonomous weapons, the controversy around AWS and LAWS has escalated. Recently, the UN Secretary-General called for a worldwide prohibition on killer robots, describing their use as ethically repugnant³. There's no universal agreement on what constitutes a deadly or killer robot in the future due to disagreements over the meaning of autonomous and the receding of lines between acceptable usage and misuse. Therefore, conformity with International Humanitarian Law (IHL) is widely acknowledged as an essential criterion for determining the permissible use of AWS. However, in several critical areas, the extent to which existing IHL standards constrain the advancement and utilization of AWS & LAWS is still debated or unknown.

The present article aims to assist governments create and express their opinions on the legal measures that presently do or should control the advancement and use of AWS, notably in terms of the needed type and degree of human-machine interaction. It maps the constraints that IHL already sets on the advancement and usage of AWS & LAWS. What IHL requires from users of AWS & LAWS to fulfill and satisfy IHL responsibilities, whether those obligations are of a state, an individual, or both. Threshold issues about the type and extent of human-machine interaction necessary for IHL compliance.

The paper's findings and suggestions do not pre-judge the legislative response that should control AWS & LAWS. Instead, it seeks to provide an analytical framework for governments and experts to analyze how the normative and operational framework governing the development and use of AWS & LAWS might need to be clarified and expanded.

1.1 Research problem

The emergence of Automated Weapons Systems (AWS) and Lethal Autonomous Weapons Systems (LAWS) in the military field has triggered heated discussion on its legality and humanitarian law risks. These emerging technologies, which can independently select and engage targets without human involvement, have sparked significant ethical and legal implications related to accountability, adherence to international humanitarian law (IHL), and the concepts of proportionality and distinction in military engagement. The main research problem of this article is the currently not established comprehensive international regulatory framework on AWS and LAWS, blanket legal uncertainties of determining responsibility for the unlawful deeds, risk of breach of human rights, and obstacles to implementation of the already-established international regulations. This article goes in-depth to explore the many legal and humanitarian gaps surrounding AWS and LAWS including the implications for compliance with IHL, ethical dilemmas and accountability of military forces and developers. The study will look at whether existing legal instruments—like the Geneva Conventions and customary international law—are adequate to govern these technologies' complexities, or whether global treaties need to be made. Through a critical analysis of these elements, this essay hopes to impart some insight as to the need for stricter governance mechanisms to address the growing humanitarian risks accompanying the increasing autonomy of modern warfare systems.

2 Comprehending AI

AI is a branch of computer science focused on simulating aspects of human intelligence using computer algorithms. AI is the capacity of a computer to mimic intelligent human behavior. It is an all-encompassing word that covers a variety of technologies, such as computer vision, natural language processing, machine learning, neural computing, deep learning, machine reasoning, and powerful AI.⁴ AI is becoming more and more

² ROBOTICS: ethics of artificial intelligence. *Nature*, v. 521, n. 7553, p. 415-418, May 2015. Available at: <https://doi.org/10.1038/521415a>. Access on: 14 Mar. 2024.

³ PADHY, N. P. *Artificial intelligence and intelligent systems*. Oxford: Oxford University Press, 2005.

⁴ VALUATES REPORTS. Artificial Intelligence (AI) Software System Market Size to Grow USD 156800 Million by 2029 at a CAGR of 31.5%. *PR Newswire*, 9 Nov. 2013. Available at: <https://www.prnewswire.com/news-releases/artificial-intelligence-ai-soft>

integrated into every aspect of our daily lives, from healthcare to self-driving cars to everything in between. AI is becoming more and more commonplace in both the military and civilian spheres, which indicates that it cannot be restrained. The use of AI in combat zones is covered in the following section, with an emphasis on the technology that underlies it as well as several moral, ethical, and legal issues.

2.1 AI in the combat zone

By 2025, AWS and LAWS are expected to be integrated into warfare strategies by many countries, with global spending on AWS reaching \$16 billion.⁵ Between 2017 and 2021, UAVs and drone-based LAWS cost over 17 billion dollars in the US. Lingering weapons like Switchblade and Harop are used by countries like Israel, China, Iran, Russia, Germany, India, South Korea, and Azerbaijan and the USA.

The term LAWS is an extension of AWS and is used to refer to weapon systems designed to target humans. LAWS refers to those AWS utilized in this study to target humans, as opposed to AWS used to target non-human subjects such as Israel's Iron Dome defense system. While the fundamental technology is similar for both weapon systems, LAWS is a specific example of AWS, with some sophisticated algorithms for target identification. More details on LAWS technologies will be discussed in the next part.

2.2 Technology foundations

LAWS is a combination of advanced computers and armaments, using AI and computational vision (CV) to extract data from visual sources. Popular CV methods include facial recognition algorithms. LAWS differs from traditional weapon systems by executing compute-intensive algorithms. Various sensors are used to process data, distributed throughout an interconnected system for maximum effectiveness. The data is then used as ammo, such as underwater, ground-based, or

aerial-based LAWS, depending on the type of weapon being used.

In order to complete a job more quickly and effectively, LAWS may potentially cooperate with other weapon systems. In 2020, Turkish troops used autonomous drones to eliminate Libyan National Army Troops/ Forces (LNAF), using LAWS's collaborative capability. The drones used onboard weaponry to identify and kill LNAF members. To cooperate with other drones, one drone could identify a high concentration of LNAF members and communicate its GPS coordinates to them, allowing for faster and more effective elimination.

2.3 LAWS may be divided into three general classes depending upon autonomy

Weapons that can be controlled remotely: These weapons may be mounted on a variety of military vehicles, both manned and unmanned. These guns are remotely handled, but they include some automatic characteristics that help them be as accurate as possible in difficult situations. Kongsberg, for example, has created a range of weaponry that includes military tank guns and handguns of various calibers.⁶

Partially autonomous weapons: This kind of system is also known as human in the loop. Target identification and detection may fall within the purview of this weapon system, or it may be handled by it. But before anything can be done, a person must give the go-ahead; a weapon cannot fire without human consent. One of the world's most advanced semi-autonomous weapons is the unmanned aircraft Taranis, which was created by BAE Systems⁷. It can detect targets, conduct wide-area surveillance, and get information about hostile regions. However, a human operator oversees every step and ultimately determines how things should be done.

Completely autonomous weapons: Have complete autonomy. For moral and legal reasons, many of the advancements in this field are proprietary and hotly debated. Should the Turkish drones under discussion indeed

ware-system-market-size-to-grow-usd-156800-million-by-2029-at-a-cagr-of-31-5--valuates-reports-301983669.html. Access on: 15 Mar. 2024.

⁵ MCMAHON, Bryan. The rise of "killer robots" and the race to restrain them. *SkyNet Today*, 7 Sept. 2020. Available at: <https://www.skynettoday.com/overviews/killer-robots>. Access on: 15 Mar. 2024.

⁶ ATHERTON, Kelsey. Commentary loitering munitions preview the autonomous future of warfare. *Brookings*, 4 Aug. 2021. Available at: <https://www.brookings.edu/articles/loitering-munitions-preview-the-autonomous-future-of-warfare/>. Access on: 15 Mar. 2024.

⁷ TARANINS: Taranis is an unmanned combat aircraft system advanced technology demonstrator programme. *Bae Systems*, c2025. Available at: <https://www.baesystems.com/en/product/taranis>. Access on: 15 Mar. 2024.

function without a human operator present, they would represent one of the first applications of fully autonomous LAWS. Another example is the SGR-1 weapon from South Korea, which is mainly a defensive tool but can also detect, target, and fire intruders from a distance of more than two miles.⁸ Following are the difficulties with the underlying technology

2.4 Range of independence

A major factor in the controversy surrounding semi-autonomous weaponry is the absence of human decision-making. Individuals are in position to justify why they choose to target a certain individual. The rationale doesn't matter provided the target was chosen appropriately. But if the incorrect individual is targeted, the person who chose the target will often be interrogated in detail and forced to justify their choice of target. On the other hand, to choose the target, LAWS uses AI algorithms that carry out several intricate mathematical optimizations. It is vital to design these algorithms so that their output can be understood, particularly when choosing targets.

LAWS, advanced weaponry, are limited by their imprecise algorithms, making mistakes inevitable. Therefore, explainability is crucial for algorithm-based identification of target systems. Performance measures like 95% face feature match, gun-in-hand identification, and target location matching can provide insights. The Defence Advanced Research Projects Agency states that AI-driven decision-making is a critical stage in combating future threats, emphasizing the importance of explaining AI-driven decision-making⁹.

2.5 Explainability

Explainability is critical due to an inherent bias present in every AI algorithm. There may be severe repercussions if biased algorithms make choices for LAWS. When biased data is used to train and feed an AI sys-

⁸ PRADO, Guia Marie Del. These weapons can find a target all by themselves: and researchers are terrified. *Business Insider*, 30 July 2015. Available at: <https://www.businessinsider.com/which-artificially-intelligent-semi-autonomous-weapons-exist-2015-7?IR=T>. Access on: 15 Mar. 2024.

⁹ DEFENSE ADVANCED RESEARCH PROJECTS AGENCY. *Broad Agency Announcement Explainable Artificial Intelligence (XAI)*. Vancouver: DARPA, 2016. Available at: <https://www.darpa.mil/attachments/DARPA-BAA-16-53.pdf>. Access on: 15 Mar. 2024.

tem, the outcome is algorithmic bias. The problem is that the majority of real-world data is biased. Scientists from Harvard University showed that because humanity used to be racist, AI algorithms taught using historical data also tended to be racist. This finding provides a well-known and vivid example of algorithmic prejudice¹⁰. When used in combat, this kind of prejudice may cause innocent civilians to be mistakenly killed as the intended target.

2.6 Danger of cyberattack

Apart from the previously highlighted safety concerns about AI algorithms, there exists a possibility of adversarial hacking of these weapons. Collaboratively working with modern technology, LAWS needs a way to interact with one another. Their whereabouts would be revealed if the signals used for communication were somehow intercepted. Even worse, it is possible to modify the signals to confuse the LAWS, making them misfire or attack the incorrect target. An opponent may be able to access very sensitive data on LAWS's hard disc and pose a serious threat to national security if they manage to take it over.

2.7 Challenges in law and ethics

The increasing use of AWS and LAWS has raised ethical and legal concerns due to the lack of an agreed-upon legal framework for these technologies. The global discussion centers on initiatives advocating for the prohibition or restriction of LAWS, arguing that regulation is crucial for controlling advanced technology that could threaten global peace and security.¹¹ However, concerns include algorithmic prejudice, inconsistent computer programs, and unpredictable communication, which could endanger life and potentially lead to genocide or ethnic cleansing when used improperly.¹²

¹⁰ NAJIBI, Alex. Racial discrimination in face recognition technology. *Harvard University*, 24 Oct. 2020. Available at: <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>. Access on: 15 Mar. 2024.

¹¹ GARCIA, Denise. Killer robots: why the US should lead the ban. *Global Policy*, v. 6, n. 1, p. 57-63, Jan. 2015. Available at: <https://doi.org/10.1111/1758-5899.12186>. Access on: 15 Mar. 2024.

¹² PIPER, Kelsey. Death by algorithm: the age of killer robots is closer than you think. *Vox*, 21 June 2019. Available at: <https://www.vox.com/2019/6/21/18691459/killer-robots-lethal-autonomous-weapons-ai-war>. Access on: 15 Mar. 2024.

AI-based combat robots may prove more reliable and precise than human combat robots, but moral concerns remain about whether algorithms can choose and execute targets appropriately. LAWS are susceptible to issues like hacking, virus incursions, and signal jamming. In a crisis, lack of human intervention could compromise programmers' ability to halt or rework missions. Reduced human oversight during combat operations could lead to potential violations of war laws and compromise efforts. In the future, autonomous systems like airborne, ground, and surface units may work together. Legal regulatory frameworks should be examined to protect human rights and the use of AI-based combat robots.

3 IHL and AWS

The use of AWS in combat has been a topic of global academic debate, with IHL being used to analyze arguments for and against its use. IHL's normative structure, or *jus in bello*, is based on fundamental ideas for its legitimacy and ability to impact state practices. The principles may be summarised as follows.

Humanity ensures dignity and protection from abuse or intimidation. It's crucial to differentiate between combatants and civilians objectively. Military operations should be proportional, using force related to the intended goal. Avoidable injury or suffering, especially to civilians not actively participating in the fight is essential. Before the assault, all parties must confirm the target is not a civilian or under special protection.

The need arises to find effective methods to balance military requirements with humanitarian concerns, as IHL governs combat and government behavior during conflict, unlike International Humanitarian Rights Laws, which focus on forbidding it.

The 1949 Geneva Conventions and Additional Protocol I, are the foundation of customary international law, emphasizing the obligation to respect¹³ and ensure adherence to IHL in all circumstances. This duty inclu-

des both a positive duty¹⁴ to comply with applicable rules during peace or armed conflict, and a negative duty for states to refrain from violating humanitarian law including the duty not to encourage, aid, or assist the commission of a violation.

IHL places humans at the centre of how its principles are applied, and if protecting people is the primary goal, then states that abide by the law must take responsibility for that protection since robots and AWS cannot be fully relied upon to do so for a variety of reasons. In modern battlefields, human participation would be necessary to uphold the fundamental IHL principles.

AI-related technology in armed conflict may implicate numerous responsibilities in IHL and other relevant law disciplines, including State-responsibility notions of violation. Article 48¹⁵ of Additional Protocol I of 1977 requires parties to distinguish between civilian objects, military objectives, civilian populations, and combatants. As a result, they shall limit their operations to targeting military objectives. As a result, while using AWS technologies in warfare, it is essential to ensure the following: the distinct characteristics of the four categories of discernibility—civilian population, combatant, civilian object, and military goal. It may be argued that any use of AWS in a military action that is devoid of one or more of those characteristics is prohibited.¹⁶ This is due to the uncertainty around the AWS's ability to discern between legitimate and illegal targets based on information. Such judgments, particularly in combat zones where soldiers often try to hide their identities. This falls under the IHL's notions of differentiation and precautions.

¹³ INTERNATIONAL COURT OF JUSTICE. *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*: decision [1986] ICJ rep 14. 26 Nov. 1984. Available at: <http://www.icj-cij.org/sites/default/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>. Access on: 15 Mar. 2024.

¹⁴ NASU, Hitoshi. *Artificial intelligence and the obligation to respect and to ensure respect for international humanitarian law (accepted for publication by Routledge)*. Exeter, UK: Exeter Centre for International Law, 2019. Available at: https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/research/Nasu_-_AI_and_IHL_-_ECIL_WP_2019-3.pdf. Access on: 15 Mar. 2024.

¹⁵ INTERNATIONAL HUMANITARIAN LAW. *Protocol Additional to the Geneva Conventions of 12 August 1949*: article 48 - basic rule. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-48>. Access on: 15 Mar. 2024.

¹⁶ LEWIS, Dustin. International legal regulation of the employment of artificial-intelligence-related technologies in armed conflict. *Moscow Journal of International Law*, n. 2, p. 53-64, Nov. 2019. Available at: https://www.researchgate.net/publication/347075873_International_legal_regulation_of_the_employment_of_artificial-intelligence-related_technologies_in_armed_conflict. Access on: 15 Mar. 2024.

Additional Protocol I of 1977 states that an attack must be dismissed or suspended if the target is not military-related, under special protection, or if there is a reasonable expectation of incidental civilian casualties, injuries, or property damage outweighing any expected direct military advantage.¹⁷ State parties waging war with the AWS must ensure cancellability, suspensibility, distinctions regarding distinctions to non-military-objective and non-special-protection status, incidental civilian loss, harm, and damage, concrete military advantage, and the ability to determine if damage exceeds the anticipated military advantage, all based on the IHL «Proportionality» concept. States have various tools to ensure the application of IHL, including providing directives, providing legal counsel accessible to military commanders, and disseminating Geneva Conventions for good faith implementation.

The High Contracting Party must determine if a new weapon, means, or warfare method is prohibited by this Protocol or an alternative international law rule, as stated in Article 36 of Additional Protocol I to the Geneva Conventions. Because of this, the nations must make sure that the use of AWS in international conflict does not result in needless suffering, harm, or indiscriminate use of force. As a result, conducting a weapons review will be required for any integration of AI within the current weaponry system or weapon development initiatives to create new capabilities. This has several drawbacks, too, such as the fact that only a few countries are believed to have a systematic method for the legal evaluation of new weapons.¹⁸

Since several countries that aren't typically recognised for developing weapons have begun experimenting with using AI in combat, it's possible that these countries don't have advanced mechanisms in place for reviewing weapons. Furthermore, due to this need for legal clearance, many AI applications could not be considered «weapons» or tools of war. The Additional Protocol I's Article 36 does not define these words.

¹⁷ INTERNATIONAL HUMANITARIAN LAW. *Protocol Additional to the Geneva Conventions of 12 August 1949: article 57 - precautions in attack*. Available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-57>. Access on: 15 Mar. 2024.

¹⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS. A guide to the legal review of new weapons, means and methods of warfare: measures to implement article 36 of additional protocol i of 1977. *International Review of The Red Cross*, Geneva, v. 88, n. 864, Jan. 2006. Available at: https://www.icrc.org/en/doc/assets/files/other/irrc_864_icrc_geneva.pdf. Access on: 15 Mar. 2024.

3.1 Export control

The Geneva Conventions and its Protocols allow state parties to regulate the export of weapons without any control. Nonetheless, the application of the Arms Trade Treaty may guarantee the fulfilment of the IHL's requirements.

The Arms Trade Treaty prohibits the transfer of conventional weapons if they are expected to be used for genocide, atrocities against humanity, serious violations of the 1949 Geneva Conventions, assaults on civilian targets, or other war crimes specified by international treaties. States Parties must determine whether the weapons or other goods have the potential to be used in a way that would seriously violate IHL or to assist in one.¹⁹ Common Article 1 of the Geneva Conventions mandates High Contracting Parties to cease supplying weapons if they anticipate they will be used to violate the Conventions. There are several issues with this law, the first being that it only applies to certain types of conventional weapons. Secondly, it is impossible to supervise how these weapons are ultimately used, particularly in the case of AWS. In *R (Campaign Against Weapons Trade) v. Secretary of State for International Trade*²⁰ the UK High Court rejected a challenge to the legitimacy of weapons shipment to Saudi Arabia, citing serious IHL violations. The Court of Appeal later disregarded the High Court's ruling, stating that a final legal evaluation of Saudi Arabia's armed conflict behavior was necessary for a logical judgment. In addition, the Commission on International Law lists Cessation and Reparation as two legal repercussions of internationally illegal conduct that may fall within a state's purview. According to the general State responsibility notion of cessation, a State accountable for internationally unlawful conduct has to stop the act if it is ongoing and,

¹⁹ UNITED NATIONS. *Treaties XXVI-8 Arms Trade Treaty*. New York, 24 Dec. 2014. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26#:~:text=The%20Treaty%20was%20adopted%20on,until%20its%20entry%20into%20force. Access on: 15 Mar. 2024.

²⁰ UNITED KINGDOM. Royal Courts of Justice Strand. London. *Case No: CO/1306/2016: Decision [2017] EWHC 1726 (QB) (Campaign Against Arms Trade) v. Secretary of State for International Trade*. 10 July 2017. Available at: <https://www.judiciary.uk/wp-content/uploads/2017/07/r-oao-campaign-against-arms-trade-v-ssfit-and-others1.pdf>. Access on: 15 Mar. 2024.

in some situations, to provide suitable assurances and guarantees of non-repetition²¹.

3.2 International criminal law and personal accountability

Personal responsibility stems from the objectives of criminal law as well as the particular obligations imposed by IHL and human rights law. *Mens rea*, or the mental aspect, attribution, forbidden behaviour, and other broad notions falls under individual responsibility. Regarding attribution, Article 25(I) of the International Criminal Court (ICC) legislation states that natural people are subject to ICC jurisdiction. ICC law prohibits certain actions and inactions that may be considered war crimes under Article 8.²² AI-enhanced AWS may be subject to these laws, which require *mens rea* or other mental components to be established under Article 30. This means that individuals must consider their choices and the effects of their actions while using AI-enhanced AWS in combat.

Critics argue that current legal frameworks hinder accountability for AI weapon use in combat, as fully autonomous weapons are not liable for crimes due to lack of intentionality, and are not natural persons, thus would not be subject to international court jurisdiction. Furthermore, unless it can be shown that human commanders had the *mens rea* to use autonomous weapons to commit crimes, it would be unreasonable to hold them accountable for the wrongdoings of a completely autonomous weapon. A different strategy would be to hold a programmer or a commander accountable for their carelessness in the illegal actions of robots that were reasonably foreseeable—even if they weren't planned. The amount of obligation imposed in this situation would differ from what should have been imposed on the person in question. The following legal framework, in addition to the one given above, may be used to control how AWS is used and deployed in contemporary combat.

²¹ UNITED NATIONS. International Law Commission. *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*. 2001. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Access on: 15 Mar. 2024.

²² INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. The Hague: International Criminal Court, c2021. Available at: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. Access on: 15 Mar. 2024.

3.3 International Customary Law (ICL)

ICL is the body of norms that, apart from codified treaty laws, comprise common practice that is recognized as law. *Opinio Juris* and state practice are its two main constituents.²³ State practice refers to uniform, consistent, and established laws implemented by states over time, promoting the belief that they are required by the rule of law. *Opinio Juris* is the term used to describe the international community's arbitrary recognition of practice as law. It's noteworthy to note that LAWS remain in their infancy. As a result of the Martens Clause, governments are more likely to rely on verbal state practice and *opinio juris*, even as they continue to spend in LAWS. However, there is a lack of substantial state practice since it is opaque.²⁴

3.4 The Martens Clause

It is a special clause in IHL that creates a standard of protection for combatants and civilians in situations when there is no applicable treaty or body of law.²⁵ Fyodor Fyodorovich Martens presented it, and it has since been defined in the Geneva Convention's²⁶ Additional Protocol II (Article 1) and the preamble to the Hague Convention II (1889–23).²⁷ It means that as technology advances, there will come a day when robots will decide who lives and dies in wars without taking into account

²³ INTERNATIONAL COURT OF JUSTICE. *North Sea Continental Shelf (Federal Republic of Germany/ Denmark; Federal Republic of Germany/Netherlands)*: decision [1968] ICJ rep 9. 20 Feb. 1969. Available at: <https://www.icj-cij.org/case/52>. Access on: 15 Mar. 2024.

²⁴ CASSESE, Antonio. *Cassese's international law*. 2nd ed. [S. l.]: OUP Oxford, 2004.

²⁵ SONI, Anoushka; DOMINIC, Elizabeth. *Legal and policy implications of autonomous weapons systems*. India: The Centre for Internet and Society, India, 2020. Available at: <https://cis-india.org/internet-governance/legal-and-policy-implications-of-autonomous-weapons-systems>. Access on: 15 Mar. 2024.

²⁶ UNITED NATIONS. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*: Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. 1977. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0#:~:text=This%20Protocol,%20which%20develops%20and,12%20August%201949,%20and%20relating>. Access on: 15 Mar. 2024.

²⁷ TICEHURST, Rupert. The Martens Clause and the laws of armed conflict. *International Review of the Red Cross*, v. 317, p. 125-134, 1996. Available at: <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>. Access on: 15 Mar. 2024.

the needs of people. IHL regulations and the Martens Clause's extra requirements must be followed by AWS.

The two pillars of the Martens Clause are the humane principle and the public conscience's rules. AWS must act as sentient beings and uphold certain human rights, such as treating people with compassion and respecting human life and dignity. AWS must make situation-sensitive decisions and use proportionate force to avoid unnecessary loss of lives and targets while adhering to the public conscience's moral precepts by developing a legal and ethical judgment threshold for complex case-by-case actions.

The use of AI in warfare has prompted a review of IHL norms to determine their application to AI's role in battlefield tasks. The need for due diligence should be examined whether it applies to military personnel and private citizens within a state's jurisdiction, or to non-state actors like terrorist organizations and mutants.

3.5 International Human Rights Law (IHRL) and AWS

IHRL mandates states to protect civilian rights, requiring them to assess their commitments to citizens. AI's use in law enforcement is seen as a reflection of a state's success, but its use in foreign conflicts has been a topic of debate. In 2016, Dallas police used a remotely controlled bomb disposal robot to kill a public order threat. This is just one example of how armed robots, also known as drones, have been used in domestic law enforcement instances.²⁸ South Korea uses Samsung's SGR-A1 AI robotic weapon system to protect its demilitarized zone from North Korea²⁹, while also monitoring borders through robots in other regions. For example, the Gaza Strip³⁰ boundary between Israel and Palestine is patrolled by robots, which have lately been

used in what Israel is promoting as the first AI battle in history. The first policing robot was deployed and made public in Dubai in May 2017. Although it is only capable of a few tasks, it may nevertheless be useful in locating wanted individuals, gathering evidence, policing crowded sections of the city, and other tasks.³¹

IHRL mandates that state actors must protect the fundamental rights of inhabitants, including the right to life, bodily integrity, and privacy, even in states with large populations or difficult terrain, where human deployment poses a threat.³²

The cornerstone of the laws controlling the usage of force by law enforcement is the right to life. This is the fundamental and natural right that sets contemporary countries apart from the savage era of antiquity. Life deprivation is only acceptable when it takes place within the bounds of the law. The word «arbitrarily» is used by the ICCPR and the ACHR to denote circumstances in which taking a life is not acceptable. The European Convention on Human Rights is more specific: No one may be purposefully deprived of their life unless it is in carrying out a court order after they have been found guilty of an offence for which they are legally punished. Three main human rights treaties have one thing in common: the first criteria controlling the use of force in IHRL stipulate that deprivation of life may only be accepted if it has a «sufficient legal basis.» A proper legal foundation is a difficult standard; in fact, the ECHR's jurisprudence set the standard high, requiring that every law enforcement action be both duly authorised by the law and adequately governed by it³³.

The right to life is fundamentally protected by the stringent necessity premise in addition to the legality principle. Even if a deprivation has a strong legal foundation, it may nevertheless be ruled to be unlawful if it is not required. Force should only be used as a last option, when all other non-violent methods have failed,

²⁸ SINGER, Peter W. Police used a robot to kill – the key questions. *CNN*, 16 July 2016. Available at: <https://edition.cnn.com/2016/07/09/opinions/dallas-robot-questions-singer/index.html>. Access on: 15 Mar. 2024.

²⁹ VELEZ-GREEN, Alexander. The foreign policy essay: the South Korean sentry—a “killer robot” to prevent war. *Lawfare*, 1 Mar. 2015. Available at: <https://www.lawfaremedia.org/article/foreign-policy-essay-south-korean-sentry—killer-robot-prevent-war>. Access on: 15 Mar. 2024.

³⁰ ROGERS, James. Robot patrol: Israeli Army to deploy autonomous vehicles on Gaza border. *Fox News*, 1 Sept. 2016. Available at: <https://www.foxnews.com/tech/robot-patrol-israeli-army-to-deploy-autonomous-vehicles-on-gaza-border>. Access on: 15 Mar. 2024.

³¹ ROBOT police officer goes on duty in Dubai. *BBC News*, 24 May 2017. Available at: <https://www.bbc.com/news/technology-40026940>. Access on: 15 Mar. 2024.

³² SPAGNOLO, Andrea. Human rights implications of autonomous weapon systems in domestic law enforcement: sci-fi reflections on a lo-fi reality. *Questions of International Law Journal*, v. 1, n. 43, p. 33-58, 2014. Available at: http://www.qil-qdi.org/wp-content/uploads/2017/10/03_AWS_Spagnolo_FIN-3.pdf. Access on: 15 Mar. 2024.

³³ EUROPEAN COURT OF HUMAN RIGHTS. *Makaratzis v. Greece [GC]*: 50385/99. 20 Dec. 2004. Available at: <https://hudoc.echr.coe.int/eng?i=002-4066>. Access on: 15 Mar. 2024.

due to need. The ECHR's Article 2(2) enshrines such a notion. It's also critical that the use of force adhere to the proportionality principle, which calls for State agents to choose tactics to prevent undue injury.

Every established or developing nation that has permitted the penalty that violates this principle has, in one way or another, justified the action. Similarly, the right to life is protected in India under Article 21 of Chapter III, Fundamental Rights of the Indian Constitution. While the death penalty is permitted, it must be used in line with the legal process. The level of automation of the machine determines the extent of the States' affirmative responsibility to defend the right to life while using AWS. In actuality, it is well recognised that IHRL puts affirmative obligations on governments to safeguard citizens from abuses of human rights, particularly those about the right to life, in addition to restricting the use of state power³⁴.

States have a responsibility to look into claims of life deprivation as part of their positive responsibilities to safeguard life. Even further, the proposed general observation on the right to life stipulates that inquiries into claims of Article 6 violations must always be impartial, independent, timely, full, efficient, trustworthy, and open.³⁵ Automated procedures may be used if robots are empowered to carry out police officer tasks. Algorithms will be used to gather, store, analyse, and utilise data to make such decisions. As AI lacks the fundamental human qualities of empathy, suffering, shame, feeling, emotions, love, caring, etc., They can only make decisions based on software that assists them in anticipating the possibility of a certain event. Therefore, it makes sense to question whether a computer could determine the need, proportionality, and, finally, legality of any given activity. To provide an example, the following situation may be investigated: A is a thief, taking water for its little kid, who would perish from thirst if left without it. Additionally, B is a robber who is taking a costly perfume bottle from the same multi-purpose shop. When it comes to stealing liquid from a

shop, A and B are on an equal footing for an AI, yet one is unnecessary and may go unnoticed by a human enforcement agency. It is unrealistic to expect AI to possess such subtle emotional and mental abilities. The lives of civilians would therefore be in danger if machines were given law enforcement responsibilities because their decision-making processes may prove unpredictable and their autonomy can range from a low degree of dependence to a high degree of independence, all of which are combined with a lack of human comprehension.

3.6 Right to individual privacy and body integrity

The primary concerns about the right to privacy in today's digital world are related to the rapid and ongoing advancement of technology, which will make it possible for people everywhere to use new ICTs while also enhancing government capabilities for data collection, monitoring, and interception³⁶. IHRL states that States may only impose restrictions on the right to privacy if their actions adhere to the principles of legality, legitimacy, and proportionality. Art. 17 of the ICCPR forbids any unjustified or illegal interference with privacy.

It is indisputable that if AWS were to be used for continuous surveillance, people would be the target of ongoing government monitoring and surveillance operations. This is a serious issue that is the topic of intense global discussion and debate. There are incidents, which claimed that the current administration was spying on judges and opposition leaders among other individuals using this software. The behavior in question is likely considered profiling, an automated data processing technique that applies a profile to an individual for decision-making or analysis of their preferences, behaviors, and attitudes, as recommended by the Council of Europe.³⁷ Profiling individuals' personal information might potentially violate their right to privacy, right to

³⁴ EUROPEAN COURT OF HUMAN RIGHTS. *Case of Öner yildiz v. Turkey*: Application 48939/99. Strasbourg, 30 Nov. 2004. Available at: <https://hudoc.echr.coe.int/fre?i=001-67614>. Access on: 15 Mar. 2024.

³⁵ UNITED NATIONS. International Covenant on Civil and Political Rights. *General comment No. 36*: article 6: right to life. 2019. Available at: <https://documents.un.org/doc/undoc/gen/g19/261/15/pdf/g1926115.pdf?token=9vSeEuSYk4RWkod2ca&mp;fe=true>. Access on: 15 Mar. 2024.

³⁶ UNITED NATIONS. General Assembly. *Resolution adopted by the General Assembly on 18 December 2013*: The right to privacy in the digital age: resolution: A/RES/68/167. 21 Jan. 2014. Available at: <https://digitallibrary.un.org/record/764407?ln=en&v=pdf>. Access on: 15 Mar. 2024.

³⁷ THE PROTECTION of individuals with regard to automatic processing of personal data in the context of profiling: recommendation CM/Rec(2010)13 and explanatory memorandum. Strasbourg: Council of Europe Publishing, 2011. Available at: <https://rm.coe.int/16807096c3>. Access on: 15 Mar. 2024.

life, and right against discrimination.³⁸ Article 17 of the ICCPR and Article 8 of the ECHR prohibit discrimination in human rights treaties. However, algorithm-based decision-making may be biased towards certain factors like colour, caste, gender, and states with clear legislative frameworks have a greater obligation to prevent such incidents.

The AWS usage regulations for domestic law enforcement must adhere to the quality of law standard to safeguard both life and privacy rights. A standard that is satisfied by easily available domestic legislation that sets a precedent for future government acts and provides a sufficient and reliable safeguard against misuse.

4 The Convention on Conventional Weapons (CCW Convention) regulates the use of weapons that may be deemed harmful or discriminatory

One of the most important tools for putting IHL principles into practice is the CCW, which was implemented under the UN between 1979 and 1980. Its origins may be found in the principles of IHL. It acknowledges that political preferences exist and has an impact on the developing human-machine interaction. It also acknowledges the significance of the human-in-the-loop AWS paradigm as well as the comprehensive nature of research, development, and evaluation.

The Fifth Review Conference of UN Member States discussed the use of AWS, leading to the formation of an open-ended Group of Governmental specialists.³⁹ These concerns range from ensuring compliance with IHL, IHRL, and moral and ethical issues.⁴⁰

³⁸ UNITED NATIONS. General Assembly. *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere*. 20 Apr. 2015. Available at: <https://www.refworld.org/reference/mission/unhrc/2015/en/105383>. Access on: 15 Mar. 2024.

³⁹ CONVENTION ON CERTAIN CONVENTIONAL WEAPONS. *Fifth Review Conference of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*. Geneva, 12-16 Dec. 2016. Available at: [https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Fifth_Review_Conference_\(2016\)/FinalDocument_FifthCCWRevCon.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Fifth_Review_Conference_(2016)/FinalDocument_FifthCCWRevCon.pdf). Access on: 15 Mar. 2024.

⁴⁰ HUMAN RIGHTS WATCH. *Losing humanity the case against killer*

The CCW currently has 125 high-contracting parties and has added additional protocols for certain types of conventional weapons. Because of its adaptability, it can better adapt to technological advancements, which might result in the creation of new armaments, ammo, and associated military supplies. The five Additional Protocols to the Convention on the Prohibition of the Use of Mines, Booby-Traps, Incendiary Weapons, Blinding Laser Weapons, and Explosive Remnants of War addressed member nations' concerns.⁴¹

Participating nations at the informal CCW discussions on deadly AWS began in 2014. However, since decisions were made by consensus vote and because the process was informal as the name implies, very little to no advancement was accomplished. At first, China was the only one of the 55 permanent members of the UN Security Council that was willing to debate openly the possibility of creating a framework that would effectively control the use of AWS in combat. Following its formation, the Group of Governmental Experts' 2017 Report's suggestions provided some hope. This was mostly because of how the issue was framed, even though there was still no clear plan for international discussions. The 2017 CCW report emphasizes the application of IHL to all weapon systems and states' responsibility for deployment during armed conflicts. It also emphasizes the need for accountability for lethal action following international law, particularly IHL. The report also stresses the need for discussions on the characterization of LAWS to address humanitarian and international security challenges, considering past, present, and future proposals.

Russia and the US rejected a new convention on AWS weapons at the CCW conference in August 2019 as AWS is at a premature stage. The opportunity presented by the September 2020 conference on deadly autonomous weapons systems for supporters of a new treaty to express support for certain elements of the agreement and pinpoint areas of agreement was significant. Although these parties will have to work out the details of their differing perspectives, the fundamental

robots. New York: The International Human Rights Clinic (IHRC) at Harvard Law School, 2012. Available at: https://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf. Access on: 15 Mar. 2024.

⁴¹ GARCIA, Eugenio. Artificial intelligence, peace and security: challenges for international humanitarian law. *Cadernos de Política Exterior*, Brasília, n. 8, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595340. Access on: 15 Mar. 2024.

ideas behind their plans to outlaw and control autonomous weapon systems are similar and might serve as the cornerstone of a new agreement. Finding these points of agreement is essential to moving on to the next stage of the procedure, which is approving a negotiating mandate at the Review Conference or, should that fail, adopting a legally enforceable document outside of the CCW.⁴²

Given the trends of international conflict that we are currently seeing—a growing number of deadly civil wars, complex asymmetric conflicts, bloody urban battles, and various forms of intrastate conflagrations—it is possible that developing nations and underdeveloped nations will be the most impacted by future deployments. Given these circumstances, it is thus necessary to create a legally enforceable agreement governing AWS that requires the state parties to abide by the accepted principles of IHL and IHRL. Let us understand various countries positions on AWS.

5 States' positions regarding AWS

The geopolitical positioning of various State parties determines why certain State parties' favour or reject the notion of utilising entirely AWS in conflict. States that have installed AWS on their borders, like South Korea and Israel, are under continual pressure to keep up a combat defensive system on their borders because they are engaged in a conflict with their close neighbors. Yet, in their quest to become the world's superpowers, some States are trying to reach the pinnacle of AWS perfection. The disparate stances taken by various State parties on the regulation and use of AWS set them apart from one another. This section will examine the positions made by several States on the usage and regulation of AWS.

⁴² CONVENTION ON CERTAIN CONVENTIONAL WEAPONS. *Meeting of the high contracting parties to the convention on prohibitions or restrictions on the use of certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects*. Geneva, 15-17 Nov. 2023. Available at: [https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-Meeting_of_High_Contracting_Parties_\(2023\)/CCW_MSP_2023_7_Advance_version.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-Meeting_of_High_Contracting_Parties_(2023)/CCW_MSP_2023_7_Advance_version.pdf). Access on: 15 Mar. 2024.

5.1 USA

DODD 3000.09 defines AWS categories for US military use and outlines US doctrine on autonomy in weapon systems, focusing on the human operator's role in target selection and engagement choices, rather than technical complexity.⁴³ All systems, including Lethal AWS, must be built in a way that permits commanders and operators to employ reasonable degrees of human judgment when deciding how much force to deploy, according to DODD 3000.09. Human judgment on force use does not require manual control of weapon systems but requires greater involvement in decisions about weapon usage. DODD 3000.09 mandates that system operators and commanders have access to sufficient training and doctrines to understand the system's autonomy under practical operating conditions. The weapon's human-machine interface must be easily comprehensible for skilled operators to use the weapon with knowledge and discretion.

In May 2013, the US highlighted at the Human Rights Council that autonomous weapons systems pose significant ethical, legal, and policy issues. It suggested further debate of these problems in a global human rights law forum. The US issued a warning in August 2019 against stigmatizing deadly autonomous weapons systems, citing their potential military and humanitarian uses. The US contends that the current IHL is sufficient and views plans to establish a new international convention on these weapons systems as premature.⁴⁴

The U.S. government has addressed ethical issues about the systems in a white paper published in March 2018 titled Humanitarian Benefits of Emerging Technologies in the Area of Lethal Autonomous Weapons, although it does not yet advocate a ban on the weapons. The article highlights how automated target engagement, tracking, identification, and selection features may improve the accuracy with which weapons hit military targets while lowering the possibility of collateral harm or civilian fatalities.

⁴³ CONGRESSIONAL RESEARCH SERVICE. *Defense primer: U.S. policy on lethal autonomous weapon systems*. 2023. Available at: <https://sgp.fas.org/crs/natsec/IF11150.pdf>. Access on: 15 Mar. 2024.

⁴⁴ STOPPING killer robots country positions on banning fully autonomous weapons and retaining human control. New York: Human Rights Watch, 2020. Available at: https://www.hrw.org/sites/default/files/media_2021/04/arms0820_web_1.pdf. Access on: 15 Mar. 2024.

5.2 Russia

Russia's president, Vladimir Putin, asserted in 2017 that the country that leads AI development will be the world's leader. He emphasized the necessity of AI, hypersonic weapons, and other advanced technologies for Russia's future.⁴⁵ Russia claims that current international law, including IHL, has significant constraints on high-autonomous weapons systems, leading to its rejection of proposals for legally binding instruments. Russia disputes the GGE's assertion that deadly autonomous weapons will materialize anytime soon. Russia said in November 2019 that the ideas of human engagement and control are meaningless and based on subjective judgments.

Whatever Russia's efforts inside the GGE, its actions outside of it also spoke volumes. In 2019, Russia pushed to construct unmanned aerial vehicles (UAVs) for use in the Arctic and to deploy autonomous ice-breakers, both of which may be operational for up to 60 hours and four days, respectively.⁴⁶ Furthermore, according to TASS,⁴⁷ the Russian government had also started using an AI system on Mi-28N attack helicopters that could destroy targets chosen by pilots without their involvement. This indicated Russia's ambitions to introduce AI into the air. However, Russia's extremely limited financial resources ultimately severely limit its programmes that push for intense AI development. Russia's military spends an estimated \$12.5 million annually on AI, or just 0.01 percent of the US military's unclassified AI budget.⁴⁸ This issue is made worse by the fact that, according to a 2018 poll, there are just 17

⁴⁵ LAIRD, Burgess. The risks of autonomous weapons systems for crisis stability and conflict escalation in future U.S.-Russia confrontations. *Rand*, 3 June 2020. Available at: <https://www.rand.org/pubs/commentary/2020/06/the-risks-of-autonomous-weapons-systems-for-crisis.html>. Access on: 15 Mar. 2024.

⁴⁶ UPPAL, Rajesh. As melting ice bringing Arctic into geostrategic prominence, Russia quickly establishes its military dominance over it. *International Defense, Security & Technology Inc*, 25 June 2021. Available at: <https://idstch.com/geopolitics/darpa-implementing-us-arctic-strategy-to-counter-russian-dominance-in-arctic/>. Access on: 15 Mar. 2024.

⁴⁷ NEW onboard system with AI on Mi-28N helicopters capable of destroying targets selected by pilots. *Russian Aviation*, 21 Feb. 2019. Available at: <https://www.ruaviation.com/news/2019/2/21/12985/?h>. Access on: 15 Mar. 2024.

⁴⁸ HANER, Justin; GARCIA, Denise. The artificial intelligence arms race: trends and world leaders in autonomous weapons development. *Global Policy*, v. 10, n. 3, p. 331-337, Sept. 2019. Available at: <https://doi.org/10.1111/1758-5899.12713>. Access on: 15 Mar. 2024.

AI companies in Russia overall, compared to over 100 in Israel and over 2000 in the US⁴⁹. Considering these aspects, Russia's position seems to be driven mostly by the desire for global domination, in contrast to South Korea or Israel, which maintain ongoing relations with their local neighbours.

5.3 China

China's People's Liberation Army aims to advance AI and other cutting-edge technology in future military conflicts with the US, fearing a generational divide between its capabilities and those of the US military. China supported the Human Rights Council's commencement of international discussions on complex autonomous weapons systems in May 2013. China has drawn attention to how completely autonomous weapons may disturb the global strategic balance and have an impact on arms control. China said in December 2016 that it would want to take preventative steps and that such weapons provide substantial challenges for adhering to IHL, citing the precedent set by the prohibition on blinding lasers. China demanded an embargo on fully autonomous arms in April 2018, although it subsequently made it clear that the country was only calling for their use, not their research and manufacture. China has not specifically reiterated its demand for a fresh international convention banning fully autonomous weapons since then.

5.4 Israel

The latest operation Guardian of the Walls was executed by the Israel Defence Forces (IDF), which said that it made extensive use of machine learning and data collection. At least 100 of Hamas's senior operatives were killed by the IDF's targeted airstrikes on the rival group during the two-week conflict between the two organizations. Israeli aeroplanes demolished the infrastructure that Hamas and Islamic Jihad had created in the Gaza Strip.⁵⁰ 20 Palestinian health authorities alleged

⁴⁹ CHINA INSTITUTE FOR SCIENCE AND TECHNOLOGY POLICY. *China AI development report 2018*. Beijing: CISTP, 2018. Available at: https://indianstrategicknowledgeonline.com/web/China_AI_development_report_2018.pdf. Access on: 15 Mar. 2024.

⁵⁰ ISRAEL claims to have fought the world's first 'AI' war. *INDIAAi*, 1 June 2021. Available at: <https://indiaai.gov.in/news/israel-claims-to-have-fought-the-world-s-first-ai-war>. Access on: 15 Mar. 2024.

that Israeli bombardment on Gaza killed people, including children, and this accusation drew criticism from human rights organizations and most Arab nations.⁵¹

Israel said in November 2013 that there are presently no deadly autonomous weapons systems in existence. It concludes that future autonomous weapons systems may enhance adherence to armed conflict rules, while Israel rejects calls for a new international convention to limit or prohibit fully autonomous weapons. It is creating, testing, manufacturing, and deploying military systems with independent operations.

5.5 India

The topic of autonomous weaponry is hotly debated worldwide. This debate stems from the moral, ethical, and legal conundrum raised by the issue of whether computers should be able to choose who to murder and carry out killings without any tangible human oversight. Experts and states disagree vehemently about whether or not to prohibit AWS beforehand. Human Rights Watch (HRW), several non-governmental organizations, and the majority of the⁵² governments that are parties to the CCW are all firmly in favor of outlawing AWS. As discussed in the previous section, their main claim is that these weapons are forbidden under IHL because they cannot adhere to their fundamentals. Global powers like the US and the UK, on the other hand, as well as certain academics like Prof. Michael Schmitt,⁵³ of the US Naval War College, believe that the prohibition would be premature and counterproductive to scientific growth.⁵⁴

⁵¹ KUMON, Takeshi. The first AI conflict? Israel's Gaza operation gives glimpse of future. *Nikkei Asia*, 28 June 2021. Available at: <https://asia.nikkei.com/Politics/International-relations/The-first-AI-conflict-Israel-s-Gaza-operation-gives-glimpse-of-future>. Access on: 15 Mar. 2024.

⁵² CAMPAIGN to Stop Killer Robots: Country Views on Killer Robots. 7 July 2020. Available at: https://www.stopkillerrobots.org/wp-content/uploads/2020/05/KRC_CountryViews_7July2020.pdf. Access on: 15 Mar. 2024.

⁵³ CROOTOF, Rebecca. The killer robots are here: legal and policy implication. *Cardozo Law Review*, v. 36, p. 1837-1915, 2015. Available at: <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2605&context=law-faculty-publications>. Access on: 15 Mar. 2024.

⁵⁴ VINER, Katharine. UK, US and Russia among those opposing killer robot ban. *The Guardian*, 26 Mar. 2019. Available at: <https://www.theguardian.com/science/2019/mar/29/uk-us-russia-opposing-killer-robot-ban-un-ai>. Access on: 15 Mar. 2024.

It is interesting to note that India, as revealed while on the 2016 UN Conference on Disarmament (CD), has adopted a wait-and-watch strategy on AWS. India did not take a hard stance on LAWS, saying that it was too early to make a final decision, even though it maintained that LAWS should adhere to IHL. Subsequently, similar positions were adopted on both local and international forums. India's March 2019 statement to the Convention on Conventional Weapons Group of Governmental Experts emphasized that, while the state should be responsible for developing, manufacturing, and using LAWS, the risks of proliferation must be addressed through international regulations.

As India must maintain its offensive and defensive capabilities on par with its neighbours, given that it is a net importer of weapons. India needs to deal with non-state forces within its borders in addition to governmental authorities. This calls for the deployment of artificial intelligence-driven solutions to guarantee operational readiness and reduce the casualty rate among military personnel stationed in severely hostile environments. India's posture is anticipated to follow the evolution of asymmetric warfare worldwide and the actions taken by nations possessing AWS technology, given the current state of technical breakthroughs.

In October 2013, India supported a proposal to initiate multilateral negotiations on deadly AWS at the UN General Assembly. India has often maintained that disagreements over weapons of mass destruction must be settled in a way that prevents nations from becoming more technologically advanced than they already are or from being more likely to resort to using military force to resolve international conflicts. India has voiced concerns that it may be possible to legitimize such weapons systems by using the idea of meaningful human control. India stated in March 2019 that the responsible state should oversee the development, manufacturing, and use of deadly autonomous weaponry. However, the country also stated that the state should bear dual responsibility for mitigating the risks of such systems' proliferation, including to non-state actors, and that international regulations should be strengthened. India is making investments in the creation of different autonomous weaponry. However, according to reports from September 2019, Defence Minister Rajnath Singh said that military personnel should decide on the ultimate course of action before AI does. India chaired

the CCW meetings in 2017–2018 and took part in each CCW meeting on killer robots from 2014–2019.

Considering India's national security, it is crucial to be pragmatic while creating LAWS and adhering to IHL norms. Although it is acknowledged that control and regulation of the AI interface in warfare are necessary, the urgent requirement is to have a clear strategy on LAWS for India to be at the forefront of the game. India's attitude and perspective about these weapon systems have also been influenced by the introduction of the new drone regulations in 2021.

In 2021, the Indian government revised the civilian drone framework and issued the Drone Rules, marking a significant regulatory milestone. The much-maligned and unduly restricted Unmanned Aircraft System Rules, 2021 (previously Rules), which were released in March 2021, have been replaced by the New Rules. The government has now significantly liberalized the drone legislation, eliminating certain restrictions on Indian businesses that are owned and managed by foreign entities and expediting the drone certification and registration procedure under the New Rules, among other things.⁵⁵ In summary, the New Rules have the potential to drastically change India's drone market in the years to come.

6 International Humanitarian Action (IHL) to AWS and LAWS: gaps and critical analysis on the applicability of the law

International Humanitarian Law (IHL) and its application to AWS/LAWS is a potentially contentious area of law. Although IHL defines basic principles such as distinction, proportionality and military necessity, the independence of AWS and LAWS in combat creates difficulties regarding such concepts. Accountability for its use is one of the biggest gaps in IHL relating to AWS and LAWS. States, military commanders, and operators are responsible for violations of IHL under existing legal regimes. But with fully automated weapons, accountability is difficult to attribute because there is

no one directly choosing targets and engaging. The absence of human oversight will complicate accountability in cases of unlawful attacks or illegitimate levels of civilian harm.

A serious gap that the IHL has is its heavy reliance on combatants and potential combatants to make ethical and moral choices during the heat of battle. Military PRINCIPLES of distinction and proportionality. AI-driven AWS and LAWS may not interpret complex battlefield circumstances requiring nuances like understanding human emotions, surrendering troops, or discretionary decision-making. Current AI systems are not able to engage in moral reasoning, thus the lawfulness of AWS and LAWS with respect to these basic tenets of IHL cannot be determined. The principle of meaningful human control is still a disputed domain in the legal discourse. Customary international law, embodied in the Martens Clause, states that in the absence of specific treaties, military technologies should be regulated by the laws of humanity and the dictates of the public conscience. Nonetheless, these systems prevail over this clause since their autonomy creates a separation between intent and action. Unstoppable human oversight in weapon systems poses a risk of indiscriminate attacks that may contravene not only the letter, but also the essence of IHL, which in fact requires a human judgment.

AWS and LAWS currently operate under an incoherent and inadequate regulatory framework. Although some legal instruments, most notably the Geneva Conventions and Additional Protocols, outline general rules on how to behave in wartime, they do not address the autonomy of weapon systems. The United Nations and multiple international organizations have called to ban or heavily regulate fully autonomous weapons, but no treaty that binds nations governs their use even as rules of war evolve. This gap in regulation can result in varying national policies and allows for the development and deployment of AWS and LAWS with some states even running such equipment with little prospective intervention by law. But some of these shortcomings also call for new legal frameworks that clarify the importance of human oversight and accountability structures, and adherence to IHL. Such a binding treaty would detail ethical conduct of AWS and LAWS, build mechanisms of right oversight, and define actual legal accountability in violation cases. Inadequate consideration of both the accelerating autonomy of military

⁵⁵ RAJAGOPALAN, R.; KRISHNA, R. India's drone policy: domestic and global imperatives. *ICAO Scientific Review: Analytics and Management Research*, v. 1, p. 53-68, 2019. Available at: <https://www.informingscience.org/Articles/v1p053-068Rajagopalan5144.pdf>. Access on: 15 Mar. 2024.

technologies and their intrinsic risk to creating humanitarian protections that have been built into IHL could have grave consequences on the future of global security and human rights.

7 Conclusion

Regarding how AWS and LAWS are treated internationally, there are two main schools of thought: some from certain nations want an outright ban on all AWS & LAWS, whereas those from other countries are against it and in favour of rules and openness. Approximately 30 nations and 165 non-governmental organisations have pushed for a preventative prohibition on LAWS, citing moral objections.⁵⁶ They believe that there are sufficient safety dangers associated with the use of LAWS, in addition to additional worries over adherence to the rules of IHL on difference and proportionality, to justify a total pre-emptive ban on the use of LAWS altogether.

Experts in the fields of artificial intelligence and robotics, as well as members of the general public, share similar opinions. The idea of losing human authority over the use of force has incited moral outcry from the Holy See, religious authorities, and Nobel Peace Prize winners. The International Committee of the Red Cross and civil society have underlined that human control over a weapon's vital functions is necessary for law and ethics. The main justification for opposing LAWS is the absence of human oversight in the utilisation of force. The other reasons center on the safety issues associated with operational usage, such as malfunctions, failures, and hacking, which would worsen if there is no human involvement in the kill chain. In this context, references have also been made to the Martens Clause and international humanitarian law.

Nonetheless, some nations disagree with these preventative prohibitions on LAWS. Most of them are industrialised nations, and they justify their continued research into the topic by pointing to the civilian applications of LAWS. They also discuss the usefulness of

these weapons in hostile and hostile environments and enumerate their advantages in terms of fewer human losses. Moreover, they claim that since LAWS are more accurate than humans and may lessen collateral damage during combat, they offer humanitarian advantages.

Since 2013, the United Nations Convention on Certain Conventional Weapons in Geneva has been the primary venue for debates on LAWS, with the Group of Governmental Experts on Emerging Technologies approving eleven non-binding LAWS Guiding Principles. These Principles stated that the Group's ongoing work will be guided by pertinent ethical viewpoints and international law, namely the United Nations Charter and IHL.

Using these guiding principles, the CCW aimed to develop an operational and normative framework in 2021, perhaps resulting in a lawfully or politically binding agreement. The positive duty of human oversight over anti-personnel weapons would be covered, and weapons that cannot fulfill the control requirement would be prohibited. While this is a positive beginning, the ultimate objective should still be to draft legislation or a convention that would require all States Parties to uphold IHL in all their endeavours. It should be taken into consideration that some countries, such as China, Russia, and the USA, may object to this.

An alternative to a complete prohibition has also been put out, according to which the international community should concentrate on increasing openness in the creation of weapons and exchanging best practices for the procedures involved in reviewing weapons. Consequently, there would be less disparity in weapon depots, and there would be far less chance of a worldwide arms race for LAWS. France and Germany have proposed a non-binding political declaration affirming that International Human Rights Law governs LAWS and that States Parties maintain human control over lethal weapon systems. This may help allay concerns over potential breaches of IHL, but the declaration's non-legal status does not give people much reason for optimism.

7.1 Suggestions

The usage of autonomous weapons systems is growing, and it's time for nations to work together to find a solution. The following are some actions that the world community may do in this regard: negotia-

⁵⁶ STOPPING killer robots country positions on banning fully autonomous weapons and retaining human control. New York: Human Rights Watch, 2020. Available at: https://www.hrw.org/sites/default/files/media_2021/04/arms0820_web_1.pdf. Access on: 15 Mar. 2024.

ting a new convention that forbids deadly autonomous weapons systems or completely autonomous weaponry. putting out distinct national stances and achieving consensus on the need to enact a negotiating mandate. including national bans as essential components of a global prohibition. reflecting and putting into practice the moral and legal justifications provided by Marten's Clause to strengthen the current public consciousness. opposing the use of force and the elimination of real human control from weaponry systems. establishing declarations of principles, codes of behaviour, and other regulations to make sure the private sector does not forward the creation, manufacturing, or unfettered use of entirely autonomous weapons.

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