BUILDING INTERNATIONAL LAW FROM BELOW IN REALITY: the participation of civil society in the business and human rights agenda

CONSTRUINDO O DIREITO INTERNACIONAL A PARTIR DE BAIXO NA PRÁTICA: a participação da sociedade civil na agenda internacional de direitos humanos e empresas

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Abstract
The article seeks to show the need for international law to evolve with the emergence of new relevant actors, such as transnational companies, and the participation of organized civil society in the construction of processes previously reserved for states. Using the theoretical framework of the critical theory of human rights and international law from below, the paper answers the question "how important is it to build an international law from the below based on resistance, with active participation by grassroots movements, and is it possible to do so?". Using as methodology documentary analysis and participant observation, it concludes that in the process of the international treaty on business and human rights, civil society was essential for its establishment and progress, and that the classic theories of international law are no longer capable of explaining reality.
Keywords: International human rights law; international law from below; business and human rights; international treaty on business and human rights.

Resumo
O artigo busca mostrar a necessidade de evolução do Direito Internacional com o surgimento de novos atores relevantes, as empresas transnacionais, e a participação da sociedade civil organizada na construção de processos antes reservados aos Estados. Utilizando o marco teórico da teoria crítica de Direitos Humanos e do direito internacional construído desde abaixo, o trabalho responde à pergunta “qual a importância de se construir um direito internacional das bases, com participação ativa na sociedade civil, e é possível fazê-lo?”. Através de metodologia de análise documental e observação participante, conclui-se que no processo do tratado internacional de direitos humanos e empresas, a sociedade civil foi imprescindível para seu

estabelecimento e avanço e que as teorias clássicas do direito internacional não mais são capazes de explicar a realidade.
Palavras-chave: Direito Internacional dos Direitos Humanos; Direito Internacional a partir de baixo; Direitos Humanos e empresas; tratado internacional de direitos humanos e empresas.

1. Introduction

Given the crisis of multilateralism, it is necessary to reconstruct some of the hegemonic paradigms so that the global system can advance to mitigate the blanks that exist today in international human rights law. Therefore, it is very important to build an international law from below and to create a theory of resistance, since civil society has been fundamental in some recent advances, especially regarding business and human rights law.

When States try to backlash, civil society pushes initiatives further. This article will analyze the treaty on business and human rights specifically, and through this empirical analysis, will highlight the importance of social movements' participation and how previous frameworks, such as Guiding Principles, were doomed to fail. The main research question is: how was the participation of civil society in the negotiation process of the treaty on business and human rights?

The hypothesis is that the participation of civil society was key to the start and the development of the negotiation process, and showed how the former frameworks were insufficient to protect affected peoples' and communities' human rights. The methodology technique is the documental analysis of the sessions' reports using inductive inferences.

The text presents the first section about the theoretical framework of critical international law and human rights law. Then, it enters the main topic of the historical process of the human rights and business agenda, the treaty's negotiation process, and the participation of civil society. Finally, it presents the conclusion of the work.

2. Post-war international law and developmental ideology

The post-war climate after the middle of the 20th century produced fundamental changes in the structures of the known world until then. The Classic International Law, until then in force, entered into crisis. Diez de Velasco (1997) attributes three main factors to structural change in the system.

The first of them would be the Soviet Revolution, which culminated in the rise of the Union of Soviet Socialist Republics (USSR) and the socialist bloc and created a pole of power capable, at the time, of confronting Western Christian capitalism and economic liberalism. Therefore, the decolonization movement of the “third world” that followed the Second World War, called the colonial revolution by Diez de Velasco (1997, p. 60), generated the expansion of international society, with the increase of States and conflict of interests between the new nations, which aspired to reach the pattern of development of the industrialized countries, and the former colonizers.

The battle for the sovereignty of states, for their natural resources and for the balance of interests and relations of countries exporting raw materials and importing technology (in development) with developed countries was intensified by the demographic explosion, environmental degradation, and risk of depletion of sources of energy. The technical and scientific revolution, which is still in vogue, represents the last modifying factor of the classical international order (DIEZ DE VELASCO, 1997, p. 61).

Of course, the changes were not exclusively in the legal and political sphere, but in fact, they were motivated by changes in the economic and social system. Especially from the 70s onwards, under the phenomenon known as globalization, one of the main changes was in the forms of production, which began to seek greater expansion and in large companies that increasingly sought more inputs elsewhere (RAJAGOPAL, 2005, p .49-51).

However, the regulatory mechanisms of this business activity have not expanded in the same way (ARAGÃO E ROLAND, 2017, p. 134). Since the mid-twentieth century, the unrestrained exploitation of corporations has been felt by the countries of the "Third World", the name of developing countries, which began to demand control over the shares of companies in their territory at this time. After all, it was a moment of decolonization in Africa and parts of Latin America and the fear of a "recolonization" was very present (ARAGÃO, 2017, p. 52).

With the aforementioned globalization and the rise of the neoliberal production model from the 70s, reaching its peak in the 80s/90s, there was a consolidation of the expansion of these large corporations (ZUBIZARRETA and RAMIRO, 2016). The demands of developing countries had their impact mitigated, and the new actors had their place more and more firmly established in the international order.

What could be one of the explanations of why developing countries so accepted the often unsustainable expansion of the activities of foreign companies in their territory, being complicit in, or sometimes unable to face it, is precisely this: development. Or, at least, the development discourse constructed and regarded as universally accepted over the last century.

Professor Balakrishnan Rajagopal, from the Massachusetts Institute of Technology (MIT), since May 2020 UN Special Rapporteur on the right to adequate housing, has a very consistent work on the implications of development and the relations between States and International Law, analyzing the impact that discourses such as "development" and "globalization" have on the stratification of nations (GARAVITO, 2005).

The "development ideology", according to the author, had three main moments during its construction, which would be situated between the desire to move from the primitive to the civilized in a strictly cultural way, and the attempt to develop the backward to the modern in terms of material well-being, called by the developmental author (RAJAGOPAL, 2005, p.49).

The first moment was a more theological division, between "Christians and infidels". This would be the logic behind the evolution of the classical theory of sovereignty, which is based on the texts produced by Francisco de Vittoria, who is still considered today as the “founder” of International Law. Contemporary international law still presents the foundations of this thought, for example, when justifying certain humanitarian interventions (RAJAGOPAL, 2005, p.49).

The second phase was built on a more economic basis, in which there was a division between civilized and non-civilized peoples, which was still pre-modern but was already a classification attributed to commercial peoples and other peoples. This moment is important, as according to the author (RAJAGOPAL, 2005, p. 50), it represented the

establishment of a link between the status of civilization and capitalism, which, then, represented a veneer of morality for the exploitation of colonies.

The third moment would be the construction of a development concept to control the anti-colonial struggles that gained strength in the 40s and 50s of the last century. The post-war period also produced an exhaustion of the idea of colonization and, for this reason, movements and struggles for independence were successful, which could threaten the status quo. What can be seen, then, is the replacement of the colonizer logic - colony by the developed - underdeveloped logic, as a way of demarcating the hierarchy between these two types of countries. The terminology of the First, Second, and Third World makes this stratification very clear (RAJAGOPAL, 2005, p. 50).

The main thesis defended by the author is that the development discourse sells the idea that there is even a humanitarian intention of the rich countries to promote the improvement of "backward peoples" through techniques, mainly science, and technology, imported from the Western world, regardless of whether they were created in specific political contexts, or whether they represented a form of state that was selected by few to be a model of what should be achieved.

Here, an interesting parallel can be seen with Milton Santos (2004), a Brazilian geographer who for years studied the process of globalization and presents an understanding that is in agreement with the idea presented by Rajagopal when he says that there was a “globalization of techniques”. This designation, in fact, meant imposing the way to research, develop and produce based on what was done in rich countries, without letting other nations truly develop their own techniques or without taking into account the techniques they already used.

The author argues that globalization is sold to us as a great fable, based on fantasies that do not hold up in the real world, but which, after being repeated so much, become credible and even defended in society. This is because such discourse keeps the gears of the system working without major inconvenience (SANTOS, 2004, p. 08).

However, what is seen in practice is globalization as a perversity, because the more advances in technological and relational terms seem to happen, the less the lives of most

people seem to improve, especially in the Global South. Unemployment increases, average income tends to decrease, and there are no significant improvements in the reduction of infant mortality and chronic diseases, for example (SANTOS, 2004, p. 9).

Globalization, then, would present limited and inaccessible benefits to most communities across the globe, which find themselves hostage to the system without enjoying it. And worse, these benefits have significant costs, which those who just do not access the benefits bear. It can be concluded, then, that there was not a break with the colonial logic, but a co-option of that logic.

Rajagopal (2005, p. 51) mentions how this "triumph" of the development discourse did not leave International Law immune. In fact, as classical international law was weakened and discredited in its most central beliefs by the tragedy witnessed by the two great wars and the failure of the League of Nations, internationalists rallied around the emancipatory idea of modernity presented by development, especially those of the "first world", to face criticisms of excessive realism or utopia. The development offered a new "emphasis" on pragmatism, constitutionalism, and functionalism (RAJAGOPAL, 2005, p. 55). The "third world" jurists, on the other hand, also saw in the developmentalist idea and in the emergence of new institutions in International law an opportunity to consolidate the "national construction project" of the new States.

It is important to realize how internationalists from developing and developed countries, despite disagreements regarding the purpose of the State in the Economy or which group of human rights (civil and political or social, economic and cultural) should be prioritized present during the negotiations of The 1966 pacts and the work of New International Economic Order shared a central belief in international institutions, development, and human rights.

Along these lines, the Bretton Woods Institutions (BWI), namely the World Bank and the International Monetary Fund, were relevant in consolidating this discourse. Rajagopal (2005) argues that, in addition to neo-Marxist criticisms that these institutions represent a mechanism for exploiting rich countries, they are complex and have changed their course over the decades, as they interacted with social movements.

Despite starting with a purely developmental stance, after the movements of the 70s, they took a turn to observe the needs in the poorest regions of the globe. This change, however, gave rise to the institutionalization of poverty, and the construction of a “new” development discourse (RAJAGOPAL, 2005, p.140).

The author then emphasizes interconnection and interdependence. between International Law (set of doctrine, norms, institutions, and practices) and the development discourse, in which the first guaranteed the transmission, evolution, and consolidation of the practice of the second, while the second gave the first strength for its expansion and a new idea around which to “reinvent”, in quotes, as there has never been a real break with western ethnocentric power (RAJAGOPAL, 2005, p. 52).

This problematic dialectic, ignored by most internationalists, is the main point of Rajagopal's investigation, which concludes that the resistance of popular and collective movements against the violence of development that has reached millions of people, even those who have been successful, is completely made invisible by the academic work of International Law and Human Rights.

The Human Rights discourse emerges in this same context and has the Universal Declaration of Human Rights, in 1948, as a landmark of its internationalization. in which they ratified international normative instruments of respect for human rights, but violated many of these rights outside their territory. As a way of exemplifying the argument, Rajagopal (2005, p. 51) mentions the case of the United Kingdom, which signed the UN Charter providing for the right to self-determination of peoples, while strongly repressing the anticolonial struggle in Kenya.

It should be noted that, in this work, the perspective of the critical doctrine of Human Rights is used, which has as adherents, among others, the Portuguese sociologist from the University of Coimbra, Boaventura de Sousa Santos, the Greek jurist, professor at the University of London, Costas Douzinas, and the Spanish teacher Joaquín Herrera Flores.

These authors highlight how this set of rights, of the Western Christian matrix and constructed under this developmental perspective, served as a discourse for an expansion of

the production model that took place in the 20th century, the same worked by Rajagopal and Milton Santos.

It is interesting to note, when analyzing the work of all the authors, how an appropriation of the content occurred precisely from Human Rights within the development discourse and the two became almost complementary. Rajagopal (2005, p.53) warns of the danger of this relationship, taking into account that the Human Rights provided for in international diplomas today justify, together with development, many actions by powerful nations. Boaventura de Sousa Santos (1997, p. 17) understands that the process called globalization of production and its international division takes the form of “globalized localisms” (cultural characteristics of developed countries that are exported as global) and “localized globalisms” (being this is the impact of these characteristics assumed to be global in local societies in developing countries).

It can be said that the "classic" way of understanding Human Rights presents them as a positive role, laden with liberal ideology, but varnished with an abstract universalism, which would justify the expansion of the Western model of market and life , at least for the moment. The true content of human rights was emptied of its origin of struggle and resistance and their specifically selected roster became the only form of authorized resistance (RAJAGOPAL, 2003, p. 405).

Herrera Flores, in his renowned work, “The Reinvention of Human Rights” (2007), argues that we live in a new context in the 21st century, exacerbated mainly after the fall of the Berlin Wall in 1989. nations are gradually softened in the economic scenario by the expansion of neoliberalism, which reduced the State's participation in market activities (p. 24). According to Rajagopal (2005, p. 53), it was another mistake made by enthusiastic development jurists to believe that human rights would be the ideal field to discuss their disagreements regarding the role of the State in the Economy.

Gradually, the inversion of the roles in which control came to be exercised by market institutions such as the Bretton-Woods institutions and, in the 1990s, the World Trade Organization, was followed. There was then what the author claims to be a replacement of “obtained rights” by so-called “freedoms” (HERRERA FLORES, 2007, p. 25). The

consequences were high social costs, to the point that we witnessed the neoliberal model widening the abyss of injustices and inequalities between the top and the bottom of the pyramid.

Therefore, the need to present a new perspective in relation to human rights, capable of recovering emancipatory practices as a source of these rights, becomes latent. After all, the hegemonic perspective, which even today remains strong, is “simplistic” (as Herrera Flores would say) and even “ahistorical” (as Rajagopal defines it), which limits the content of human rights to “the right to have rights”. And worse, it arises from a narrative that presents itself as a jus-naturalist liberal and leads us to think that we have rights even before we can exercise them (HERRERA FLORES, 2007, p.27), but which, in fact, carries the consolidation of interests in a still imperialist logic (RAJAGOPAL, 2005, p.60).

Believing that the traditional narrative based on this doctrine can be sufficient to respond to and mitigate the vulnerabilities of peoples and communities is to completely distance themselves from the reality of the facts. The answer, then, would be to rescue the history of the masses, totally erased over the years, to understand what human rights are after all and how they can be protected, making them an effective means of popular claims.

The first step is to change the way events are narrated. In legal doctrine, it is systematically chosen to count historical transformations under the lens of legal institutions, in apparently isolated episodes, such as legal frameworks, contributions from courts, and the role of jurists and legal practitioners. This traditional approach in the West has two main problems, according to Rajagopal (2003, p. 402), namely, the source and the method.

At source, the limitation is in the juridical view of events, focused on texts originating from formal institutions, including decisions by international courts, such as the International Court of Justice, and the WTO dispute settlement mechanism. Therefore, no space is left for the texts of “resistance”, which would be acts of interpretation by groups or individuals, with the scope of confronting the institutional interpretation of Law.

The problem of method concerns aiming at the legal analysis in search of gaps or flaws in official texts, so that the Law feeds back and thus remains static. As much as the survey of flaws in legislation and decisions fulfills an important purpose, it is not enough if it is not related to the origin of the problem, which is in the political and social context. If this is not

taken into account, the solutions cannot be identified, only the flaws (RAJAGOPAL, 2003, p. 402).

When analyzing the research carried out in Law, we can see that most follow exactly this format and turn to their own texts in order to find the answers. The same happens in the practice of the courts, which immerse themselves in their own jurisprudence or in the negotiation of texts of treaties, which make little progress in relation to what has already been established in the legal doctrine. Of course, the judicial mechanisms must have more concrete limits, but if the academy itself refuses to move forward and dare in its investigations, it serves little or nothing to provide substrate for social changes, nor does it help to accelerate the fulfillment of demands for the struggles from the base.

Rajagopal (2003, p.405-407) emphasizes that DIP studies should be open both to address institutional and extra-institutional dynamics and to observe how the movement of the masses defines the failure or success of institutions. Despite the effort of some theorists to add non-state agents as actors of International Law, it is no longer enough, since much of what happens in the spaces of civil society mobilization is still lost, and elitist gaps continue to exist in the discourse of legal categories such as human rights (which aim to speak for those who suffer).

Nevertheless, it is challenging to break away from classical logic and try to build a theory based on resistance. The search for the theoretical framework of Rajagopal takes place in this sense since the author makes this topic his main study. The author's point of view coincides with that of Herrera Flores, in understanding that there was a change in the character of social movements after the 1970s, based on new forms of exploitation and domination, and also the disappointment with the violence arising from the search for development.

It is an arduous task to characterize these movements, due to their plurality, the complexity of training, the different level of success, the varied motivations for organizations to adhere to the agenda, and the disagreeing understanding among researchers about the notion of conflict (RAJAGOPAL, 2003, pp. 408-411). This difficulty led both liberal and Marxist theory to be insufficient to study new forms of resistance.

In the case of liberal theory, the first problem lies in a very sharp division between the public and private spheres, generally delegating legal protection to the public sphere. There is a gap, then, when analyzing the power dynamics related to private relations through this theory. The second limitation of liberalism is the belief that politics should only be carried out in institutional and "legitimate" arenas, such as political parties. This tendency to unify political space excludes politics carried out in other arenas and promotes a corrupted version of statism (RAJAGOPAL, 2003, p. 411-412).

In addition to trying to unify the political space, liberalism tries to unify social actors by creating spaces in which they are supposed to be represented. The problem lies in the proven heterogeneity and plurality of the practice of mass mobilization, which this model cannot accommodate. Finally, based on the Weberian perspective that the State would neutrally resolve the contradictions that arose from civil society institutions, such as the family and the market, the liberal theory starts from a favorable and harmonious point of view in relation to economic growth, which proved flawed when the State, in fact, colonized all spaces of civil society (RAJAGOPAL, 2003, p. 411-412), including captured by market interests.

Marxist theory, in turn, provided the tools for the analysis of social movements for a long time but ran into the mobilizations that emerged as a response to its failure as a liberation discourse (RAJAGOPAL, 2003, p. 413-415). The first factor in this failure was the rigid classification of the identity of social agents into structures that privilege one group over others (for example, the proletariats in the vanguard of the peasantry). Struggles that lacked a well-defined class basis were then excluded within Marxism (such as the oppression of women, for example).

The second factor would be the non-consideration of cultural aspects in the mobilizations, which in the "Third World" followed the economic aspects to a strong degree. Another point would be the idea shared with liberalism of a unified political space and the State as the main agent of economic and social transformation. Finally, Marxist theory has not been able to provide the theoretical tools to understand and respond to new aspects of the globalized economy. Movements like those of indigenous peoples, fishermen, peasants, and anti-globalization, would be the result of the failure of Marxism as a fully coherent left doctrine.

Social movements approach and depart from different points of both theories and their derivatives, as they seek to preserve the autonomy implicit in positivism, but abandon the notion of the State as the collectivity capable of guaranteeing it. They also share suspicion with naturalists about leviathan but believe in the multiplicity of arenas and collectivity as political actors rather than just individuals. Rajagopal (2003, p. 415 - 418), then, understands that popular mobilizations have their own form of politics that he would call "cultural policy".

The purpose of this definition is not, however, to fall into the false dichotomy that was used to separate old movements (focused on struggles for resources) from new ones (focused on identity guidelines), a separation with which he does not agree. The idea is to understand that social movements from the end of the 20th century and which continue into the 21st century have a strong identity content within the struggle for survival.

Based on the idea of collectivity as an agent of change, the law carried out outside formal institutions, and the importance of moving the bases for the construction of social and legal transformations, the work will focus on the perspective constructed by civil society for the negotiation of the International Treaty.

The theory developed here understands that Human Rights, much more than those integrated with international diplomas, is the set of struggles coming from marginalized and oppressed groups in the search for access to material and immaterial goods that guarantee life with dignity, which, may or may not be provided for in a system of guarantees, they must be (HERRERA FLORES, 2007, p. 32 -34).

3. Human Rights and Business International Agenda

Between the 1960s and 1970s, stimulated by anti-colonial sentiments, developing nations organized themselves into the so-called New International Economic Order (DIEZ DE VELASCO, 1997, p. 61) and already demanded attention from the international community on the activity of transnational corporations in their territories. Over a period of time, the demand produced some results and two main organizations were created at the UN with mandates notably directed to the matter of development, namely, the UNCTAD (United Nations Conference on Trade and Development Agreements), created in 1964, and the UNDP (United Nations Development Program) (ARAGÃO; ROLAND, 2017, p. 137).

In 1972, the president of Chile, Salvador Allende, addressed the United Nations General Assembly with a speech that clearly denounced the actions of transnational corporations in Chile and how they had become true actors in power in international relations, corroborating the scenario described in the previous section. It is precisely the year in which this speech was delivered that is considered by Deva and Bilchitz (2013, p. 4-10) as the starting point of the first phase of the global or international agenda of Human Rights and business at the United Nations.

This phase takes place between 1972 and 1990 (DEVA; BILCHITZ, 2013, p. 4-10), during which the context allowed for the creation of a Commission on Transnational Corporations (by the then UN Economic and Social Council (ECOSOC), whose work culminated in the elaboration of the Code of Conduct for Transnational Companies.

The United Nations Center for Transnational Corporations (UNCTC), which functioned as the secretariat of the Commission on Transnational Corporations, began operating in 1975, following resolution 1908 passed by ECOSOC in 1974.

The two NOEI resolutions passed at the General Assembly that same year made explicit reference to the regulation of TNCs, and it was necessary for the international organization to establish a front to deal with the growing power of these actors (SAUVANT, 2015, p. 15). At that time, in a way, developed countries also supported the Commission as they had a parallel interest in legitimizing transnational corporations through legal and legal means, in view of the criticism they had been suffering around the world (SAUVANT, 2015, p. 17-18).

The initiative followed two main paths, that of specific agreements and that of an instrument that was more comprehensive and multilateral. Some specific agreements were issued within the scope of the ILO and UNCTAD, for example, but the main project of the umbrella agreement, which would be the Code of Conduct, whose negotiation collided with the conflict of economic interests between nations and the rise of the neoliberal doctrine of the 1980s, did not take hold (SAUVANT, 2015, p.19-52).

After the aforementioned advances, there was a significant paralysis of this issue at the United Nations, with the peak of the neoliberal model in the 1990s. The emergence of international organizations such as the World Trade Organization (WTO), and the strengthening of the Bretton-Woods, World Bank, and IMF institutions, which promoted global capitalism by

encouraging free trade and investment agreements, whose actions were driven by the total weakening of the socialist world, with the fall of the Soviet Union (ARAGÃO; ROLAND, 2017, p. 136). This context had a great influence on the selection of topics for discussion at the UN.

However, organized civil society, through social movements and non-governmental organizations, engaged in the struggle to resume discussions (ARAGÃO, 2017, p. 137). The second phase starts in 1997 and runs until 2005. The UN Human Rights Commission had already been created and a Working Group was founded with the objective of presenting a summary of the activities and performance patterns of the TNCs. As a result of the Group's activities, a project on the Responsibility Norms for Transnational Corporations and Other Businesses on Human Rights was launched in 2003 and presented to the Commission (DEVA; BILCHITZ, 2013).

Nonetheless, a few years earlier, in 2000, the UN Secretary-General at the time, Kofi Annan, launched the Global Compact, a document that is still widely recognized and referenced, but which presents an approach to the actions of companies with an opposite structure than the Norms, as it sets forth voluntary guidelines in a more lenient way, while the Norms are closer to the approach sought by civil society, with counter-hegemonic strategies and binding mechanisms (ARAGÃO; ROLAND, 2017, p. 138). For this reason, the Working Group's Norms were rejected by the Commission on Human Rights, and the Global Compact was accepted as a standard at that time.

It was possible to notice that there were two different approaches to the Agenda within the United Nations: the first was looking for a more binding framework and effective, with a focus on accountability, as advocated by social movements, and another that followed the path of voluntary guidelines and self-monitoring.

The second, which was being reinforced by other voluntary frameworks such as the OECD guidelines, also offered only guidance to companies and states, as a primary focus on economic development. International seals, called ISOS, were also created, which somehow conferred an award on the company that behaved properly. In other words, not only did they not legally demand behaviors that were in accordance with human rights, they also rewarded those

who presented them. The idea remains preponderant, today also under the evolved form of good practices and corporate social responsibility (ZUBIZARRETA, 2008, p 17-49).

The logic of Corporate Social Responsibility emerged very strongly, and it also reinforces the company's positive image through actions that are often not related to its final activity and actually represent distractions from the agenda of the necessary change in the performance pattern of these companies (ROLAND et. al, 2018, p. 17-18).

These structures, for the most part, also share a very important characteristic, which is the production of reports through materials and data offered by the company itself, which undoubtedly determines the logic of self-regulation questioned by civil society and which has proven to be nothing. effective and safe (ZUBIZARRETA; RAMIRO, 2016).

During all these years of developing the agenda, there has been a significant effort by States and international organizations to present only soft law structures, and the UN has favored the voluntary approach, appointing in 2005 Harvard University researcher John Ruggie to the post of "Special Representative of the Secretary-General on Human Rights, Transnational Corporations and Other Business enterprises". Ruggie's term lasted between 2005 and 2011, the period of the third phase of the agenda (DEVA; BILCHITZ, 2013).

In 2008, Ruggie introduced the "Protect, Respect, and Remedy" pillars to the already established Human Rights Council. Based on this structure, the representative delivers its apex work in 2011, the well-known Guiding Principles or Guiding Principles (UNGP). In this document, there is no provision for binding obligations, only guidelines on the responsibility of corporations to respect human rights (UN, 2011).

The UNGP has 31 principles, of which 10 belong to the Protect pilar (the State's duty to protect human rights), 12 belong to the Respect pilar (the responsibility of companies to respect human rights), and 7 belong to the Remedy pilar (access to Reparation). The document was unanimously approved and, within the logic of consensus, it gained great relevance, until today being the research area within Human Rights and Business that receives the greatest attention, funding, and credibility.

However, despite being widespread, the UNGP has not come close to solving the problem of regulatory gaps, nor do they meet the needs and demands of civil society.

Throughout the text, there is a total prevalence of the word "should" in almost all principles, which has the meaning of suggesting the best thing to do, and not imposing an obligation, like must or shall. Such lexicon definitively confers the character of a guideline and/or suggestion to the document.

The lack of enforcement of its provisions has, of course, great weight for its weak implementation, this failure having been recognized even by several speakers at the event organized by the UN to commemorate the 10 years of the Guiding Principles, which took place virtually on 07/07 /2020. It should be noted that the voluntary approach was not used to build the international human rights system, which was based on prioritizing binding documents (ARAGÃO; ROLAND, 2017, p. 139).

Other problems are added to voluntarism, such as: not addressing extraterritorial obligations, a central issue in the discussion of the regulation of transnational companies; not mentioning responsibility along value chains; and, above all, not breaking with the logic that companies are the central actors of global economic policy (ARAGÃO; ROLAND, 2017, p. 139). Ruggie's term of office was considered a period when “companies were in the driver's seat” (DEVA; BILCHITZ, 2013, p.8).

Despite the gaps, the framework of the Guiding Principles is still considered one of the most important on the United Nations agenda. Of course, its importance is recognized as a step to start the solid bases of discussion on the regulation of transnational companies, in addition to suggesting some important concepts, such as Human Rights Due Diligence. It is not about discarding the entire work, but rather it is important to recognize its limitations to advance on the agenda in a concrete way.

However, this movement is not observed by States, companies, and even academia, which use the UNGP as a kind of safe conduct not to endorse or minimize the initiative of the treaty, which will be better described below.

Starting in 2007, the global economic crisis brought to light several cases of companies that committed extremely negligent and even criminal actions; discussions on a legally binding international instrument were resumed (BERRÓN, 2015). After the publication of the Ruggie Principles, a working group was created for their implementation and everything

indicated that the UN would continue to direct its forces towards consolidating the framework of “good practices” and “corporate social responsibility” (FARIA JÚNIOR, 2015, p. 74), but civil society had other plans.

As of 2011, several movements began to articulate themselves and staged strong demonstrations at world conferences on human rights, putting pressure on States to develop specific actions so that binding norms could be adopted (FARIA JÚNIOR, 2015, p. 75). Although there is no unanimity or single thought within the universe of diversity that the so-called "civil society" presents, the point of the union was the dissatisfaction with the existing regulatory frameworks for the regulation of transnational corporations, which involved the UNGPs (ARAGÃO; ROLAND, 2017, p. 143)

The strategies involved the articulation of movements in large groups such as the Treaty Alliance and the Global Campaign to Dismantle Corporate Power and Stop Impunity, which today has more than 250 members around the world (GLOBAL CAMPAIGN, 2020), including Homa – UFJF Human Rights and Business Center. There was also an approximation and dialogue with the vulnerable and affected communities, as well as the collective construction of the Peoples' Treaty (ARAGÃO; ROLAND, 2017, p. 144), inspired by the idea of bottom-up globalization (SANTOS, 2005) and international law from below (RAJAGOPAL, 2005).

In 2013, after years of pressure and movement, the first fruits appeared. At the 24th session of the UN Human Rights Council, in September of that year, a strong joint declaration by countries from the African and Arab groups, plus Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru, and Ecuador, threw open the willingness of these nations to move forward in the discussion of a legally binding instrument (UNHRC, 2013). It was the first major blow to the much-vaunted “consensus” of the Ruggie Principles.

On June 26, 2014, during the 26th session of the Human Rights Council, resolution 26/9, proposed by Ecuador and South Africa, supported by Cuba, Bolivia, and Venezuela, created the Open-Ended Intergovernmental Working Group (OEIGWG), or Intergovernmental Working Group on Transnational Corporations and Other Businesses, with

a mandate to develop a legally binding instrument to regulate activities of transnational corporations (UNHRC, 2014).

The approval of the resolution was a great victory for organized civil society, with specialists such as De Schutter (2015, p. 41) considering the coalition of organizations around the agenda to be impressive.

Despite the approval, the margin was small and the resolution was not well accepted within the HRC, and of the 47 member countries at the time, it obtained 20 votes in favor, 14 votes against (including the votes of the US and the Union group of countries). European) and 13 abstentions (including Brazil) (UNHRC, 2014). The following day, and by consensus, the HRC approved resolution 26/22 which continued the process initiated by the Guiding Principles (UNHRC, 2014). This scenario already demonstrated the difficult battle that would be fought ahead in negotiating the treaty.

4. International Treaty Negotiations

The creation of the Intergovernmental Open Membership Working Group on Transnational Corporations and Other Businesses (OEIGWG) with respect to human rights, led by Ecuador, marked the beginning of what we might call the fourth phase of the international agenda, although Deva and Bilchitz have not adopted that classification.

The Working Group then began to hold annual sessions at the headquarters of the Human Rights Council in Geneva, to exercise the mandate and build the legally binding instrument. Reports from the special sessions are presented at one of the three main sessions of the Human Rights Council in the following year. It was decided by the HRC that the first two sessions of the OEIGWG would be discussions on what the future document should look like.

The first session took place between the 6th and 10th of July 2015 and the debates were organized into eight roundtables, each with a different theme that would help to establish the initial principles and elements of the instrument (UNHRC, 2016). The president-rapporteur elected was María Fernanda Espinosa, Permanent Representative of Ecuador at the time, and post President of the UN General Assembly.

The eight roundtables addressed issues such as the principles of the binding instrument, its scope, the human rights that should be provided for, the obligation of States to ensure respect for human rights, including the aspect of extraterritoriality, the legal responsibility of companies and the creation of national and international jurisdictional mechanisms.

Some gaps in the Guiding Principles were made explicit by the delegations that mentioned the need to provide maximum protection of human rights, redress mechanisms, and also some complementary instrument that would improve the application of protection in the domestic sphere (UNHRC, 2016, p. 7).

However, the initiative has already faced obstacles from the beginning. Some delegations, mainly the United States and the European Union, which act as a bloc in these sessions, when arguing for the non-necessity of the instrument, clung to the need to first apply the Guiding Principles. The use of such an argument must be faced precisely because of several gaps in the framework of the Principles, and the parallel discussion of a binding instrument does not prejudice its application; on the contrary, it strengthens the issue and may exert some pressure on countries to adopt the international framework more effectively (ROLAND; SOARES, 2019).

There was also, from the first session, a great participation of organized civil society, through non-governmental organizations, which raised the need for an extraterritorial approach to the instrument, based on the universality and indivisibility of human rights. Likewise, the importance of providing for direct responsibility and obligations to companies was observed by members of society, and a mechanism was created that allows the victims to take legal action against violators, which is not possible today, often due to investment treaties that provide for clauses of dispute resolution in arbitral tribunals (UNHRC, 2016).

The second session of discussions on the work of the Intergovernmental Working Group took place between the 24th and 28th of October 2016 and included six roundtables, in which the issues discussed in the previous period were discussed in depth (UNHRC, 2017).

Once again, it was necessary for several delegations and members of organized civil society to reaffirm the essentiality of the binding international instrument against the

panorama of impunity. It is also interesting to note that a number of delegations, particularly those behind the treaty, such as Ecuador and South Africa, have taken a stand in favor of placing victims at the center of the entire process, from the discussion on the instrument to "access to remedies and reparations "(UNHRC, 2017). This position brings us to the centrality of the victim's suffering, a thesis so well constructed and incorporated into the IAHRS jurisprudence.

Antônio Augusto Cançado Trindade is the main name that helped to establish the idea, through his role as judge of the Inter-American Court of Human Rights, when he developed this discussion in his votes.

The principle was reinforced by the very important interpretation according to which the individual is in fact a subject of international law with full capacity and should be at the center of discussions, especially when dealing with human rights (CANÇADO TRINDADE, 2008, p.495- 532), a topic that will be better worked on in subsequent chapters.

The NGOs also called attention, in the 2nd session, to the need to foresee an international court in order to guarantee the maximum effectiveness of the treaty. As a recommendation of the President-Rapporteur and conclusions of this period of debate, it was decided that for the next session, a new work program would be presented, following informal consultations to be organized with governments and civil society organizations (UNHRC, 2017)

At the third session, held from October 23 to 27, 2017, the first concrete product of the negotiation process was presented, the "Document of Elements for the project of the legally binding international instrument on transnational corporations and other businesses with respect to Human Rights", which brought in its content the issues discussed in the first two sessions and marked the beginning of the most substantial discussions of the instrument's text (UNHRC, 2018).

Again, it is possible to observe the effort to boycott the treaty initiative undertaken by some delegations, mainly by those already mentioned, with emphasis on the United States, which formally withdrew from the discussions (UNHRC, 2018).

It is interesting, but not surprising, to note that attempts to dismantle the process, sometimes direct, sometimes under an argumentative veneer based on the initiative of the Guiding Principles, National Action Plans, or national Due Diligence laws, come from States

that are domiciles for headquarters of the transnational companies and the most economically benefited from its activity, although it is not uncommon for developing countries to follow this orientation, as a result of their capture by economic power and dependence on foreign capital.

Returning to the third session, at the end of the discussions on the Elements, in addition to a fourth session being scheduled for the following year, States and other interested parties were invited to provide comments and observations on the elements of the project for the first version of the LBI could be presented. In July 2018, Draft Zero was released.

Draft Zero was considered a disappointment by much of the academic community and organized civil society that followed the discussion process. Despite the barriers that were already being faced, there was hope of success, once consummated and released into the draft. (ROLAND; SOARES, 2019). But the text presented, in general, was very vague, broad, without clear predictions, and much lower than expected, even lower than what was already established in the Elements (GUAMÁN, 2018). This was interpreted as a real blow to the treaty and there was a lot of uncertainty regarding the session that would take place from 15 to 18 October 2018.

Many delegations, in the fourth session, defended the draft text and approved the fact that only direct obligations and responsibilities were foreseen for the States themselves. However, other delegations and several NGOs questioned whether there would be real effectiveness when there is no express provision of responsibility for companies, arguing the absence of impediment to companies being directly held responsible at the international level (UNHRC, 2019).

This possibility had been strongly justified by Surya Deva, in her participation as an expert in the second negotiation session, and corroborated by Olivier de Schutter. In the third session, when he mentions that, despite the existence of the term "primary responsibility" of the State in relation to human rights in the document of the Elements, this could not give rise to a justification for not providing for the attribution of direct responsibilities to companies (DE SCHUTTER, 2017).

But even so, with all the accumulation of discussions from previous sessions, the same delegations had to question this point and others, such as the lack of provision for

extraterritorial jurisdiction, a supposed unnecessary duplication of provisions of the Guiding Principles and the lack of prediction of supremacy of the human rights instrument in relation to trade and investment agreements, with the justification that this would mean the superiority of one branch of international law over the other, although this primacy has been defended from the beginning by civil society, mainly by the idea of the centrality of the victim's suffering (UN, 2019).

In the end, the draft did not seem to please either party, not civil society, who had hoped for a stronger text, or the states that had always opposed the treaty. It is worth emphasizing that, at that time, Ambassador Luís Gallegos was in charge of the Working Group and Ecuador was going through a significant internal political change.

Despite the frustration, civil society did not lose its heart and remained mobilized, as it already knew that there would be countless challenges along the way. At the VI International Seminar on Human Rights and Business, organized by Homa and held in 2018 in the city of Juiz de Fora, Ambassador Luis Gallegos was accused of movements about the vague and insufficient text presented (HOMA, 2018).

On July 17, 2019, the Revised Draft or Draft One was published by the chairmanship of the OEIGWG and, despite correcting certain well-criticized points of the previous one, mainly with regard to the formal structure, the text did not focus on systemic regulatory gaps of transnational corporations, remained vacant and did not seem to present any possibility of enforcement (ROLAND et.al, 2019). Again, it fell short of what was foreseen in the document of the Elements and of the demands of the affected and affected movements.

The fifth negotiation session, held between October 14 and 18, 2019, made it clearer how difficult the process was. There was a political shift in the spectrum of international relations, the US left the Human Rights Council for good and neoliberal governments were consolidating again in Latin America.

In general, the dispute remained between countries that considered the provisions of the new Draft as still too vague and insufficient to guarantee the effectiveness of the instrument, including Cuba, Azerbaijan, Egypt, and Palestine, which join civil society, against those who they insisted on a more directed approach to the States and that the document

presented nothing more than a standardization of the Guiding Principles (UNHRC, 2020). This group is the majority and joins the companies, in the session represented by the International Organization of Employers (IOE) not necessarily to curb the treaty's initiative, but to ensure that the document does not advance too much in accountability for companies.

The participation of Brazil is noteworthy, which, on the last day of discussions on the draft text, wanted to present an amendment to the final report so that in the following year, 2020, civil society could not have access to some parts of the discussions between States, that is, that some of them took place behind closed doors and with no chance of manifestation of the movements. This proposal would have been formulated by Brazil and China and was vehemently rejected by several other nations, including the European Union Bloc. Finally, an observation was added that the negotiation is guided by States, but that in the sixth negotiation session, civil society, and different stakeholders would continue to actively participate in the process (UNHRC, 2020).

In 2020, amid the COVID-19 pandemic in the world, civil society feared that the discussion would be discontinued, that a new version of the instrument would not be launched, or that the sixth session would be held behind closed doors. There was also fear of an entirely virtual session, which could weaken mobilization strategies in Geneva and in the Human Rights Council. But the negotiations were back on track for the past two years.

Despite the recurrent contestation of the project, the attempts to veto it and, more recently, the weakening of the text, what is observed is the continuation of discussions substantially and with the participation of a significant number of States, which can be considered advantageous, as it guarantees the solidity of the process. At the seventh session, held in October 2021, many countries engaged in the concrete negotiation of the text, and even brought suggestions from civil society, although new boycott attempts were presented, such as a possible framework convention, defended by the States States, which would take the force of the binding document.

Undoubtedly, challenges are increasingly present in relation to this instrument, but the struggle of international civil society remains strong for the document produced in this unpleasant scenario to have the best text and receive the most favorable treatment possible.

Regarding Brazil, in 2019 we witnessed a much tougher and more reticent stance in accepting major advances in the text and more contrary to popular participation than what we witnessed in previous years. The suggestions sent by Itamaraty to the Working Group have been closely aligned with neoliberal policies (BRASIL, 2020) systematically implemented by the government.

Despite this, efforts have been made internally to ensure allies in the LBI negotiation. In August 2020, the 1st National Consultation on the Treaty on Human Rights and Companies was held, organized by the National Council for Human Rights (CNDH) in partnership with Homa, Amigos da Terra Brasil, Justiça Global, FES/Brasil, and the Affected People's Movement by Dam (MAB).

The event was attended by various actors from civil society and institutions for the protection of human rights, such as the Public Defender of the Union (DPU) and the Federal Attorney for Citizens' Rights (PFDC). It also had a panel of Parliamentarians for the Treaty initiative, which seeks support from the National Congress to promote discussions on the instrument at the international level. Deputies Fernanda Melchionna (PSOL) and Helder Salomão (PT) attended. At the end of the event, a civil society position letter was written, signed by 50 organizations, to be sent to the Ministry of Foreign Affairs.

Undoubtedly, many challenges are increasingly present in relation to this instrument, but the struggle of international civil society remains strong so that the document produced is the best text and receives the most favorable treatment possible in this uninspiring scenario.

5. Conclusion

It is possible to infer that civil society was a key agent in establishing the treaty's negotiation process. It began against all odds and with very little support from countries which supposed to be the main actors of international law, facing the resistance of the rich nations that invoked the UNGP as the way to pursue.

If it were not for social movements articulated around the sessions and the advocacy with the representatives of countries' so-called “guardians of the treaty”, this document would not have thrived.

Of course, that is a long way to go and the importance of having States interested in advance is essential, but this case is anecdotal to represent how popular participation in international law is invisible when it is crucial in many cases.

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