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CONTENTS

PRESENTATION

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SUR issue number 15 is a very special one. For the first time, it encompasses three different sections. One comprises a thematic dossier on the national implementation of regional and international human rights systems. Additionally, this issue brings two non-thematic articles involving relevant contemporary human rights topics (business and human rights and women's rights in Islam), as well as an interview with Denise Dora, from the Ford Foundation (2000-2011).

Finally, celebrating the 10th anniversary of Conectas Human Rights, issue No. 15 is published with the same cover color as No. 1, and brings a dossier by Conectas's current and former staff members, who share their experience and lessons learned. This last section is presented in more detail in the letter to the readers, later in this issue.

Thematic dossier: Implementation at the National Level of the Decisions of the Regional and International Human Rights Systems

Since the adoption of the Universal Declaration of Human Rights in 1948, the international and regional human rights systems have been fundamental in the definition and protection of human rights, and have contributed substantially to the improvement of the Rule of Law in various different regions. These mechanisms, in many cases, have been the final remedy available to victims when local institutions failed or were unwilling to protect their rights. Accordingly, in addition to a protection mechanism, they represent a source of hope in adverse local political contexts.

Many human rights defenders and experts, however, claim that decisions and recommendations issued by these mechanisms are not currently being implemented satisfactorily at the national level. The lack of implementation is a serious threat to the very mechanisms themselves, which lose credibility in the eyes of the victims and the States, and fail to provide remedies to those who need them. ***Sur – International Human Rights Journal*** **issue number 15** brings a thematic dossier to tackle this problem, i.e. to promote a critical debate on the national implementation of decisions and recommendations derived from regional and international human rights systems. This section encompasses four articles, three on the Inter-American, and one on the European system.

The first article highlights the interplay between the European human rights system and Russia. ***Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges,*** by Maria Issaeva, Irina Sergeeva, and Maria Suchkova, examines the interaction between the Russian legal system and the Strasbourg Court, exposing the European human rights available mechanisms to enforce its decisions as well as criticizing the obstacles in Russia for the implementation of measures adopted by the European Court, particularly those of a general nature.

The dossier's second article, ***The Damião Ximenes Lopes Case: Changes and Challenges Following First Ruling Against Brazil in the Inter-American Court of Human Rights,*** written by Cássia Maria Rosato and Ludmila Cerqueira Correia, presents a general overview of the implementation of the recommendations expressed in the first ruling of the Inter-American Court against Brazil, in 2006, dealing with mental health institutions. The authors expose how, by developing international jurisprudence and strengthening the actions of Brazil's *Anti-Asylum Movement*, the Court had a positive impact on the country's public mental health policy and the rights of persons with mental disabilities, although further policy changes are still required.

Thirdly, SUR presents another article discussing implementation in the Inter-American system, this time exploring the Argentinean case. In ***The Implementation of Decisions from the Inter-American Court of Human Rights in Argentina: An Analysis of the Jurisprudential Swings of the Supreme Court***, Damián A. González-Salzberg reviews a series of legal cases involving Argentina before the Inter-American Human Rights system and analyzes the lack of compliance of the State regarding Inter-American Court decisions. Through his case-by-case analysis, the author shows how the Argentinean Supreme Court has been inconsistent

in its recognition of the binding nature of Inter-American Court decisions, despite international and national legal imperatives requiring the Supreme Court to fulfill its obligation to prosecute those responsible for human rights violations.

The final article of this dossier presents a theoretical discussion on how regional human rights systems can contribute to build a transnational public sphere. In ***Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions***, Marcia Nina Bernardes argues that the Inter-American system contributes to Brazilian democracy by providing a transnational litigation forum for discussing issues often underrepresented in the domestic public sphere. The author also states that Inter-American system loses its credibility particularly in cases where national authorities and the legal community fails to take into account international human rights norms at the national level. In this case, implementing regional decisions and recommendations is a key element, not only to strengthen the system itself, but also to improve Brazilian democracy.

Non-Thematic Articles: Violence against Muslim Women and Corporations and Human Rights

Apart from the thematic dossier, this issue brings two other articles that present a critical debate on pressing topics. The Journal's opening article, ***Criminalising Sexuality: Zina Laws as Violence Against Women in Muslim Contexts***, was written by Ziba Mir-Hosseini and discusses how political Islam has rehabilitated *zina laws* and its impact on women's rights. This normative body exists in many Muslim countries and forbids sexual relations outside marriage, sanctioning it with cruel punishments that violate international human rights. It criminalizes consensual sexual activity and authorises violence against women, involving, inter alia, death by stoning. The author argues that this issue should and can be solved within Islamic tradition. She also presents a critical analysis on how activists can be effective in challenging those practices by engaging their governments through "naming and shaming" strategies as well as a process of dialogue and debate.

Our second non-thematic article features a discussion on business and human rights. Leandro Martins Zanitelli's ***Corporations and Human Rights: The Debate between Voluntarists and Obligationists and the Undermining Effect of Sanctions*** discusses the contemporary debate on corporate behavior responsive to human rights. The author analyses two sets of competing arguments: the voluntarists and obligationists, the former pushing for voluntary commitments by States to promote corporate social responsibility, while the latter affirm the need of legal sanctions against corporations, as a necessary step to adapt their behavior to norms of social responsibility. The author defends a voluntarist approach, arguing that, despite the fact that the imposition of sanctions on companies can indeed lead to progress in the protection of human rights, it might pose an obstacle to the development of more genuine practices in social corporate responsibility.

Interview with Denise Dora

We have included an ***Interview with Denise Dora***, Human Rights Program Officer of the Ford Foundation in Brazil from 2000 to 2011. She analyzes the human rights organizations in Brazil, particularly focusing on the challenges faced by Brazilian society to build a strong civil society needed to guarantee human rights in the country and abroad, arguing that there still is room for capacity building in Southern organizations and for the reduction of global asymmetries.

This is the fourth issue released with the collaboration of the Carlos Chagas Foundation (FCC). We thank FCC for their support to the Sur Journal since 2010.

Finally, we would like to remind our readership that our next issue, edited in partnership with the *Latin American Regional Coalition on Citizen Security and Human Rights*, will discuss citizen security from a human rights perspective.

The editors.

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ABSTRACT

This article addresses the subjection of corporations to human rights norms, or the so-called "horizontal effect" of these rights. More specifically, it considers the controversy between voluntarists and obligationists on the best way to prevent human rights abuses arising out of corporate activity. Drawing on research on the undermining effect of sanctions, the article discusses the risk of such an effect should the method of promoting respect for human rights advocated by obligationists be applied, i.e. through regulation. It also examines the plausibility of a similar undermining effect on the motivations of actors – such as NGOs, consumers, workers and investors – whose actions impose limitations on modern corporations.

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KEYWORDS

Human rights – Corporations – Voluntarism - Global Compact – Regulation

CORPORATIONS AND HUMAN RIGHTS: THE DEBATE BETWEEN VOLUNTARISTS AND OBLIGATIONISTS AND THE UNDERMINING EFFECT OF SANCTIONS

Leandro Martins Zanitelli*

1 Introduction

This article addresses the subjection of corporations to human rights norms, which is known as the "horizontal effect" because it concerns relations between private actors rather than between private actors and the State. (KNOX, 2008, p. 1). More specifically, the article considers the controversy between voluntarists and obligationists, the former being proponents of proposals, like the one exemplified by the United Nations Global Compact, that attempt to prevent human rights violations through the adherence of companies and the spontaneous development (i.e. free from state coercion) of good business practices. Obligationists, meanwhile, tend to distinguish themselves by their mistrust of the aforementioned proposals and their subsequent insistence on the need for punitive measures, both on the national and international level, for any significant progress to be made on the prevention of human rights violations either by businesses or with their complicity.

After presenting a brief account of recent actions of the United Nations involving corporations and human rights (section I) and the voluntarist and obligationist arguments (sections II and III, respectively), the article examines a series of discoveries made in recent years concerning what is called the "undermining effect" of sanctions (section IV). The intention is to consider whether the evidence of an undesirable effect of sanctions on behavior supports the position advocated by voluntarists in the debate on the horizontal application of human rights. This is the question posed in section V, which concludes, in short, that the risk of an undermining effect on corporations should only be taken seriously if their respect for human rights – as well as the other actions nowadays encompassed by "corporate social responsibility" – is not related to the goal to maximize profits. If, on the one

*The author thanks UniRitter and Fundação de Amparo à Pesquisa do Estado do Rio Grande do Sul (FAPERGS) for the financial support and Sur Journal for the careful review of the paper.

hand, the imposition of sanctions on companies can indeed lead to progress in the protection of human rights, on the other hand it can pose an obstacle to the development of more genuine (in the sense of unselfish) practices in social corporate responsibility. Finally, the article examines the potential for sanctions to produce an undermining effect on the behavior of actors – such as activists, consumers and workers – thanks to whom businesses currently find themselves compelled to prevent abuses arising out of their activities. The evidence on this point indicates that an undermining effect should only be anticipated if the establishment of sanctions was to raise the confidence, among these actors, that corporations would observe human rights norms, albeit through force.

2 The horizontal effect of human rights in the United Nations

In a challenge to conventional thinking that only States are legally bound by international human rights norms, these limits have been considered, in recent years, to extend to at least some, if not all, of the duties emanating from these norms to non-State actors and, in particular, to corporations. Placing this obligation on private organizations is known as the horizontal effect of human rights (KNOX, 2008, p. 1), in contrast to vertical effects, which are the obligations that the same rights establish for States. In Brazilian constitutional doctrine, these expressions are used to designate the binding effects of fundamental rights norms on public and private actors, respectively (SARLET, 2000, p. 109).

Among the reasons why the debate on the horizontal effect of human rights has acquired such prominence is, to begin with, the dominance of some non-State actors, particularly multinational corporations, whose annual revenues can exceed the GDP of many countries (HESSBRUEGGE, 2005, p. 21). Along with this dominance is the fact that the cross-border activities of these companies often place them outside the jurisdiction of their host States (KINLEY; TADAKI, 2004, p. 938). Indeed, the policing of human rights violations based on the legislation of the host State can be compromised by the influence that corporations exert on local authorities, which is particularly predictable when corporate activity is vital to the development of poor regions (KINLEY; TADAKI, 2004, p. 938).

Within the scope of the United Nations, the recent history of discussions on human rights violations by non-State actors includes the creation, advocated in 1999 by the then Secretary-General Kofi Annan, of the Global Compact – a "learning forum" (RUGGIE, 2001) involving business leaders, governments, NGOs and international agencies intended to align corporate activities with universally accepted principles of human rights, labor, environment and anti-corruption (UNITED NATIONS GLOBAL COMPACT, 2011a).

Shortly afterwards, in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights, an advisory body to the Commission on Human Rights (later replaced by the Human Rights Council), approved the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (commonly referred to as "Norms") (UNITED NATIONS, 2003). These Norms recognized the horizontal effect of human rights

by declaring that, although the corresponding obligations fall primarily on the States, corporations, "within their spheres of activity and influence", also have the responsibility to "promote, secure the fulfillment of, respect and ensure respect of" human rights recognized in international law and national legislation, including the rights and interests of indigenous peoples and other vulnerable groups (UNITED NATIONS, 2003, para. 1). They also established that the activities of corporations shall be subject to monitoring by the United Nations and other national and international mechanisms "already in existence or yet to be created" for this purpose (UNITED NATIONS, 2003, para. 16), while compliance with the obligations and reparations for any violations are to be determined by national courts and international tribunals (UNITED NATIONS, 2003, para. 18). However, the proposed Norms encountered resistance from businesses and governments, prompting the Commission to abandon debate on the matter (FEENEY, 2009, p. 180).

In 2005, Kofi Annan appointed, at the behest of the Commission, Professor John Ruggie as Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations. With an initial mandate of two years, later extended for an additional year, the work of the SRSG was characterized, at first, by the rejection of the Norms, which were criticized in an initial report in 2006 for the lack of a principle defining the respective responsibilities of States and corporations on the subject of human rights (UNITED NATIONS, 2006, para. 66). The SRSG also claimed that the controversy engendered by the Norms "obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights" (UNITED NATIONS, 2006, para. 69). Later on, the SRSG suggested adopting a three-part regulatory framework ("Protect, Respect and Remedy") (UNITED NATIONS, 2008a) consisting of a State duty to protect against human rights abuses by businesses, a corporate responsibility to respect human rights and the need for remedies against potential violations both by States, that should develop ways to investigate, punish and compensate for wrongdoings, and by the corporations responsible for these wrongdoings. Corporations would provide the means for the injured parties to bring to their attention the violations that had occurred in order to obtain compensation.

This regulatory framework was generally well received (JERBI, 2009, p. 312) and was unanimously approved at the June 2008 session of the Human Rights Council, which, at the time, extended the SRSG's mandate for another three years, urging further development of the principles of "Protect, Respect and Remedy" and the provision of more specific recommendations concerning the duties of the State to protect human rights from abuses by corporations, including a clearer definition of the content and limits of the obligations of these corporations in relation to human rights and suggestions on how to enhance access to effective remedies at the national, regional and international level for victims of abuses (UNITED NATIONS, 2008b, section 8/7, para. 4).

Shortly before the end of his mandate, the SRSG presented, in 2011, a report containing "guiding principles" for implementing the three-part regulatory framework. These principles specify the duties of the State, which are defined as

duties to "prevent, investigate, punish and redress" human rights abuses occurring within their territory or jurisdiction (UNITED NATIONS, 2011, annex, I, para. 1), to which is added the recommendation that measures be adopted to prevent violations committed outside their territorial limits by corporations domiciled inside their jurisdiction (UNITED NATIONS, 2011, annex, para. 2). With respect to companies, the guiding principles establish, regardless of the size of the company (UNITED NATIONS, 2011, annex, II, para. 14), the duty to avoid human rights infringements either through their own activities or directly related to their business relationships (UNITED NATIONS, 2011, annex, para. 13). Moreover, companies are expected to respect all internationally recognized human rights, which include, at minimum, the rights expressed in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work (UNITED NATIONS, 2011, annex, para. 12). Finally, the guiding principles assign to the State the duty to ensure, through legislative, judicial or administrative means, access to effective remedy for the victims of violations (UNITED NATIONS, 2011, annex, para. 25), while also urging them to consider ways to facilitate access to non-State-based grievance mechanisms (UNITED NATIONS, 2011, annex, para. 28). They also recommend that corporations establish or participate in non-State-based grievance mechanisms intended to determine and remedy as early as possible abuses related to corporate activity (UNITED NATIONS, 2011, annex, para. 29).

3 The enforceability of horizontal human rights

Although the regulatory framework to "Protect, Respect and Remedy" and the recently proposed guiding principles for their application place a duty on corporations to respect human rights and, therefore, confer on these rights a horizontal effect, they do nothing to make these obligations legally enforceable against non-State actors on the international stage. In other words, although they assert the duty of companies to respect human rights beyond the mere observance of local laws (UNITED NATIONS, 2011, annex, para. 11), it is the State, within its territory or jurisdiction, that is responsible for investigating and punishing non-compliance by businesses with their human rights obligations (UNITED NATIONS, 2011, annex, para. 25). Concerning non-State-based grievance mechanisms, the guiding principles observe that regional and international human rights bodies have dealt "most often" with alleged violations by States of their duties to protect, and they encourage the States, themselves, to raise awareness about the existence of these other mechanisms and to facilitate access to them (UNITED NATIONS, 2011, annex, para. 28).

All this is consistent with the fact that the guiding principles are intended to elaborate on the implications of existing standards and practices for States and companies, not to create new legal obligations (UNITED NATIONS, 2011, para. 14). Currently, human rights observance is legally enforced internationally against States, not individuals (UNITED NATIONS, 2007, para. 33-44). In the Inter-American and European Courts of Human Rights, whose judgments are binding and may determine the payment of compensation, grievances can only be brought against

States (CONSELHO DA EUROPA, 1950, art. 33-34; ORGANIZAÇÃO DOS ESTADOS AMERICANOS, 1969, art. 48, 1, "a"). The same is true of the African Court (UNIÃO AFRICANA, 1981, art. 47), although the African Charter on Human and Peoples' Rights also places some duties on non-State actors (UNIÃO AFRICANA, 1981, art. 27-29). The exceptions to the principle of unsanctionability of individuals or non-State entities for human rights infringements under international law are confined to international criminal law (UNITED NATIONS, 2007, para. 19-32).

Immunity from the jurisdiction of international courts does not mean, obviously, that human rights violations caused by the activity of a corporation go unpunished but, instead, that the punishment depends on national legislations and also on the scope that national jurisdictions have to address abuses that occur beyond the territorial limits of each country. Examples of this are the cases filed in the U.S. based on the Alien Tort Claims Act, in which reparations have been claimed for human rights offenses committed outside U.S. territory by or in collusion with U.S. corporations or their subsidiaries (JOSEPH, 2004, p. 21-63).

There is a concern, however, that sanctions instituted by national legal systems will be insufficient to prevent violations. It should be noted that poorer countries, precisely those where the risk of abuses occurring is greater, are generally less likely to establish rules capable of curbing the activities of large companies in their territories (OSHIONEBO, 2007, p. 4). Moreover, there is a certain mistrust concerning the effectiveness of measures that are non-binding or unaccompanied by the means apply sanctions, such as the Global Compact, which has been accused of allowing some companies to obtain undue prestige by presenting themselves to the public, simply by signing the Compact, as defenders of human rights (NADER, 2000; DEVA, 2006, p. 147-148). As a result, both NGOs (INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, 2002; BUNN, 2004, p. 1301-1306) and the academic community (OSHIONEBO, 2007; BRATSPIES, 2005) have been calling for corporations to be internationally subject to sanctions for acts that disrespect human rights committed by them or their subsidiaries.

But is the imposition of sanctions on the international level in fact a good strategy for preventing human rights offenses by companies and, in particular, by multinational corporations? The following sections address this question considering not only the debate on the horizontal effect of human rights, but also the results of more comprehensive studies on obedience of legal norms and the behavioral effects of sanctions.

4 The desirability of sanctions (1): voluntarist arguments

On the topic of the protection of human rights, part of the debate on the appropriateness of imposing sanctions on offending companies has been fuelled by the UN Global Compact, a voluntary initiative to promote human rights and environmental preservation based on the debate between different actors, including corporations, and on the dissemination of information on the measures adopted by participating businesses. The Global Compact is, however, just one prominent example of the strategy to align the activities of corporations with collective

interests and, in particular, with human rights through soft law instruments or business codes of conduct that are non-binding or that carry no sanctions (KINLEY; TADAKI, 2004, p. 949-960).

Together with other similar proposals for enhancing respect for human rights by companies through the voluntary engagement of businesses, the Global Compact has sparked a debate that divides "voluntarists" and "obligationists" (ZERK, 2006, p. 32-36), the former characterized by their enthusiasm for projects to promote human rights voluntarily among corporations and the latter by their mistrust of these projects.

Before examining the arguments put forward by these two positions, it is important to point out that the debate is full of nuances and that the opinions held by each of the opposing groups are by no means homogeneous. Among the voluntarists, for example, there are those who are not opposed to the idea of subjecting corporations to sanctions, even internationally, for human rights violations (RASCHE, 2009, p. 526-528), but who nevertheless place a higher value on proposals such as the Global Compact and even suggest that they are a means to achieving binding norms. There are others, meanwhile, among those who might label themselves obligationists, who recognize the value of voluntary codes of conduct and other soft law instruments (DEVA, 2006, p. 143-144), while also declaring the insufficiency of these means and stressing the need for a system of legal sanctions (VOGEL, 2010).

One of the reasons to trust in voluntary solutions is the fact that respect for human rights is to some extent aligned with the corporate goal to maximize profits, as companies are likely to avoid violating these rights in their own interests or, in other words, in the selfish interests of their shareholders (KELL, 2005, p. 74; RUGGIE, 2001, p. 376). Much of the literature on human rights and, more broadly, all the activities performed by corporations for the good of society – usually identified by the expression "corporate social responsibility" – is intended to determine whether and to what extent social actions positively influence the performance of companies (MARGOLIS; ELFENBEIN; WALSH, 2007).

The relationship between social responsibility and commercial success suggests that the creation of punitive international norms for cases of human rights infringements by corporations may be less constructive than it would first appear. This relationship, however, does not lead to the conclusion that a regulation accompanied by sanctions should not be pursued or is even undesirable, just as voluntary proposals must be considered not only as part of the solution (to be complemented by the adoption of hard law measures for cases in which non-legally binding incentives prove to be insufficient), but also as a first-step solution or even as the only solution to consider for acts that violate human rights involving corporations. One preference for voluntarism in the sense alluded to here begins to emerge when, given the circumstances, it is recognized that efforts to subject companies to binding international norms would, given the resistance of these same companies and the enormous difficulty for an agreement between countries, be doomed to failure (KELL, 2005, p. 73; RUGGIE, 2001, p. 373). It has been claimed, therefore, that while initiatives such as the Global Compact, which are based on

dialogue and persuasion, may perhaps not be the best solution, they are, under the present circumstances, the only viable alternative for promoting human rights in the corporate world.

The viability argument also shows signs of treating voluntarism as a type of second-class solution, which, although not ideal, has proven under the current circumstances to be the only possible alternative. Are there, besides this, any other arguments to suggest that non-binding measures such as the Global Compact are superior to a system of sanctions? One such argument makes the claim that soft law measures intended to promote the gradual application of social responsibility principles are best suited, given the malleability of their provisions, to the incipient stage of the legal doctrine on the obligations attributed to corporations and to the fast pace at which the circumstances of production change, since these changes require frequent shifts in corporate behavior concerning respect for human rights (RUGGIE, 2001, p. 373-374). In addition to the lack of sanctions, it has been argued that the vagueness or "open-ended" nature of soft law norms like those exemplified in the principles of the Global Compact offers an advantage, given the circumstances, over a regulatory system for which it would be necessary to await more detail and precision.

5 The desirability of sanctions (2): obligationist arguments

Part of the criticism leveled at the Global Compact addresses certain characteristics not found in other non-binding codes of conduct, such as the involvement of the United Nations, which some consider undesirable not only because it allows corporations to improve their reputation by merely making a declaration to the cause of human rights (NADER, 2000; DEVA, 2006, p. 147-148), but also because it makes the UN more susceptible to the influence of these same corporations (UTTING, 2005, p. 384). This article, however, shall only consider the arguments that oppose the Global Compact for its non-obligatory nature and that, therefore, apply not only to this initiative but also to other soft law instruments in the field of corporate social responsibility.

Viewed as a voluntary proposal to encourage corporations to adopt the principles of social responsibility, the Global Compact is often criticized for its very nature, i.e. for the fact that it is non-binding. What this implies is that respect for human rights by corporations will not be achieved, beyond a certain degree, without enforceable legal actions, whether nationally or internationally. This, obviously, does not mean to suggest that the Global Compact and other self-regulating instruments are devoid of efficiency, or even that progress in corporate social responsibility cannot be achieved without these codes of conduct (particularly in cases when this responsibility and the goal to maximize profits coincide), but rather that the desirable degree of human rights observance cannot be achieved, or at least has not yet been achieved, with voluntary solutions. In the case of the Global Compact, this lack of success is attested not only by the low number of participating corporations (UTTING, 2008, p. 963; DEVA, 2006, p. 133-143), but also by the fact that observance of the Compact's principles by participants is allegedly poor (VOGEL,

2010, p. 79-80), applied through isolated measures or limited to areas in which respect for the aforementioned principles incurs the lowest cost (NASON, 2008, p. 421). Furthermore, the lack of mechanisms for verifying compliance with the provisions announced by companies in their reports does not even provide any assurance that they are indeed pursuing human rights (NASON, 2008, p. 421; OSHIONEBO, 2007, p. 23-24). Finally, even though membership of the Compact only requires submission of an annual communication reporting on the initiatives applied, a significant portion of the members currently have an "inactive" ("non-communicating") status, since they have not fulfilled this obligation: 1,550 (UNITED NATIONS GLOBAL COMPACT, 2011c) of a total of 6,195 business participants on May 31, 2011 (UNITED NATIONS GLOBAL COMPACT, 2011b). Another 2,434 corporations were expelled from the Compact, the majority for not submitting a communication for two consecutive years (UNITED NATIONS GLOBAL COMPACT, 2011c). This high percentage of "non-communicating" corporations is a sign that membership of the Global Compact does not always correspond to a serious commitment to the application of its principles (DEVA, 2006, p. 140).

Although they generally emphasize the inefficiency of the Global Compact, its opponents rarely specify the reasons why the Compact is, like other voluntary initiatives, doomed to failure. This mistrust could be caused by an assumption that is so banal that it barely even deserves a mention – namely, that the goal of corporate activity is to maximize profits and, therefore, that without regulation or some other informal incentive (such as the threat of a consumer boycott) through which the observance of human rights can serve to attain this objective, little or no respect for these rights by corporations is to be expected. Added to this is the fact that exposure to competition may lead businesses to violate human rights (for example, by exploiting workers) not only to maximize profits, but also as a means of survival.

6 The undermining effect of sanctions

This section will focus on the undermining effect of sanctions, while an analysis of its importance to the debate on respect for human rights by corporations and, more specifically, to the controversy between voluntarists and obligationists, will be left until the next section. One hypothesis for the effectiveness of sanctions, the dissuasion argument, is that the frequency of an offending behavior varies depending on the magnitude and the certainty of the punishment. Accordingly, the more severe the sanction and the more certain its application, the less chance there is that a violation will occur. This theory, which has already been proposed in the classic literature, has recently been tackled more rigorously in economic studies (BECKER, 1968). It is claimed, therefore, that an unlawful act can be predicted whenever its expected benefit (or "utility") is greater than the cost, which consists of the cost of the act itself to the actor plus the expected cost of the sanction. This expected cost, meanwhile, is determined by the severity of the sanction (i.e. its disutility for the actor) and by the probability (as perceived by the potential offender) that it will be imposed (BECKER, 1968, p. 176-177).

The undermining effect theory contrasts with the dissuasion argument. Whereas the dissuasion hypothesis claims that the threat of sanctions discourages the act against which the sanction is imposed, a discouragement that increases as the severity of the punishment and the certainty that it will be applied rises, the undermining effect to some extent states the opposite: instead of discouraging the violation, the punishment discourages obedience.

A more accurate description of the undermining effect explains it not necessarily as an effect that replaces dissuasion, but rather as one that can exist alongside it and, consequently, weaken it. As an illustration, imagine that actor *A* who, in the absence of a sanctioning norm regulating it, is likely to perform act *x*. After the introduction of a norm making the opposite conduct *–x* subject to punishment, the undermining effect corresponds to the reduction – or even elimination – of the previous likelihood of *A* to perform *x*. At the same time, it is possible that, given the fear of punishment, *A* nonetheless still performs *x*, which can be explained by the dissuasion effect. One way of defining the undermining effect, therefore, is by explaining it as a diminishment or suppression of the uncoerced likelihood (more precisely, uncoerced by the sanctioning_norm) to behave in a certain way. This effect may be offset by the dissuasion effect, to the extent that the actor ends up behaving in the desired way, but now motivated exclusively (or, at least, to a greater degree) by a reluctance to suffer the consequences of the sanction.

Explanations for the undermining effect vary. According to one of them (DECI, 1971), the undermining effect is an effect on the intrinsic motivation towards a behavior, also known as the over-justification effect (LEPPER; GREENE; NISBETT, 1973). It is claimed, with this assertion, that acts can be extrinsically and intrinsically motivated. When motivation is extrinsic, the act is performed with the expectation of a reward, while, in contrast, actors who are intrinsically motivated choose a certain behavior for the value this behavior holds for them (i.e. for its intrinsic value), not because of any benefit they will receive as a result. Intrinsic motivation for some activities is related to psychological needs of self-determination and competence (DECI; RYAN, 1985, p. 32). Therefore, when a behavior observed by intrinsic motivation begins to be rewarded (which occurs when either this behavior is rewarded or the opposite behavior is subjected to sanction), an alteration can occur in the "locus of control" (DECI, 1971, p. 108) in virtue of which the actor begins to perceive the behavior in question as no longer an exercise of their autonomy – that is, no longer as internal behavior, but instead externally controlled – losing, therefore, the intrinsic motivation to practice it.

Other theories explaining the impact of sanctions are based on evidence of conditional cooperation (also called "strong reciprocity") (GÄCHTER, 2007; GINTIS, 2000). At least under certain circumstances, it has been found that a significant portion of human beings behave as conditional cooperators, i.e., they are prepared to act for the common good provided that others do the same. This behavioral trait has led to a number of hypotheses on the effects of sanctions. It is claimed, for example, that if a sanction is perceived as being unfair, it can be interpreted as a signal of the perversity or lack of willingness to cooperate on the part of the authority that imposed it and, therefore, has a negative influence on the behavior

of people who are subject to it (FEHR; ROCKENBACH, 2003). Something similar occurs if the need for a sanction is perceived by the population as a signal that their peers are unwilling to cooperate (VAN DER WEELE, 2009). A conditional cooperator may judge that, if a sanctioning norm is necessary, it is because the other members of the community are only willing to cooperate due to an external incentive (in this case, the sanction). By assigning selfishness to others, the conditional cooperator who thinks like this ends up behaving selfishly too. The difference between these two hypotheses is that, in the first case, the undermining effect depends on the content of the sanction (more accurately, that the sanction is considered unfair), while in the second case, it is an effect of the sanction itself.

Conditional cooperation, however, also attributes to sanctions an effect that contrasts with the undermining effect, which is sometimes called the indirect effect (SHINADA; YAMAGHISHI, 2008, p. 116) or spill-over effect (EEK et al., 2002). This theory claims that the sanction induces part of the population to cooperate as it makes them believe that, under threat of punishment, other people, even egoists, will cooperate too. It is possible, therefore, to identify two motivational effects of sanctions, both of which promote obedience. On the one hand, there is the dissuasion (or direct) effect, whereby self-interested individuals behave in the desired way due to fear of punishment. On the other hand, there is the spill-over (or indirect) effect, whereby conditional cooperators obey because they believe others will too.

Both hypotheses – the undermining effect and the indirect effect of sanctions – have already been confirmed in experiments, although the evidence supporting the second (EEK et al., 2002; BOHNET; COOTER, 2003; SHINADA; YAMAGISHI, 2008) is more abundant than for the first (MULDER et al., 2006; GALBIATI; SCHLAG; VAN DER WEELE, 2009). The distinction that, at first glance, is apparent between them brings to light an ambiguity inherent in the idea of conditional cooperation, which can be understood either as cooperation conditioned on the cooperation of others in and of itself, or as cooperation conditioned on others being intrinsically motivated to cooperate. In the first case, what matters to the conditional cooperator is what others will do, not why they will do it, so the sanctioning norm can be seen as a signal, when it is observed, that others (even though motivated by a selfish impulse) will cooperate. This, then, is the indirect effect. In the second case, however, belief in the cooperation of others is not enough for the conditional cooperator when it is accompanied by a disillusion about the motives for cooperation, i.e., when it is believed that the cooperation of others will only be achieved through threat of punishment. For this "more demanding" conditional cooperator, the sanction may well be viewed as a signal of the lack of unselfish willingness of others to comply with a norm and, consequently, they may act selfishly themselves (undermining effect).

One way of conciliating the hypotheses of the undermining effect and the indirect effect consists of admitting that the motive of the cooperation of others is irrelevant for conditional cooperation and anticipating the undermining effect only in cases when the sanction, although in place, is unlikely to be applied. Sanctioning systems that are poorly enforced and, consequently, that rarely apply sanctions may

convey the idea that an intrinsic willingness to cooperate is absent (otherwise, the sanction would not be necessary) and, at the same time, given their inefficiency, prove inadequate in leading conditional cooperators to believe in the cooperation of others. This is the conclusion reached by Mulder *et al.* (2006), for whom sanctions can cause a reduction in cooperation when they are removed or when there are flaws in their application. Furthermore, the lack of trust in the intrinsic motivation of other citizens can lead the undermining effect to occur in areas not covered by the sanctioning norm (MULDER et al., 2006, p. 161). For example, if legislation severely punishes tax evasion, a conditional cooperator may be led to believe that his neighbors only pay taxes for a selfish reason, i.e. to avoid the sanction, and, therefore, that they will also act selfishly on other occasions when behavior is not (or is inadequately) sanctioned – for example, voting for a candidate who serves his or her own interest rather than the community's, consuming water in excess, etc.

Another explanation links the undermining effect not to the loss of intrinsic motivation or to the mistrust of the behavior of others that the sanction inspires but, instead, to the potential impact of legal norms on social norms (YAMAGISHI, 1986, 1988a, 1988b; KUBE; TRAXLER, 2010). For example, imagine that actor *B*, in the absence of a legal sanction, engages in behavior *y* in virtue of a social or informal norm. This means that *B* performs *y* because he/she judges it to be correct (i.e. through intrinsic motivation) or, at the very least, to avoid the application of an informal sanction. An "information sanction" can be any number of negative reactions to an offending behavior, from a simple disapproving look to ostracism, which have in common the fact that they are not applied by the State. Countless studies have revealed that, to a certain extent, social norms exist due to altruistic punishment, meaning that some individuals will sacrifice their own well-being to punish transgressors (FEHR; GÄCHTER, 2002; FEHR; FISCHBACHER, 2004). One hypothesis of the undermining effect, therefore, is that the establishment of a legal sanction in favor of a certain behavior weakens the social norm by which this same behavior is prescribed, since it discourages altruistic punishment. The idea, in short, is that actors are less likely to incur the cost of punishing their peers after the offending behavior becomes the target of a formal sanction.

7 Corporations, human rights and the undermining effect

One might object, therefore, to the idea of subjecting corporations to sanctions for disrespecting human rights, alleging the possible undermining effect of a national or international legislation created for this purpose. Using terms characteristic to the debate between voluntarists and obligationists, the former would say that the creation of sanctioning norms for the horizontal effect of human rights is not only, to an extent, unnecessary, considering the willingness of companies to adjust their activities to embrace the principles of social responsibility (including the observance of human rights), but also harmful, as the norms could curb this willingness. Furthermore, it should also be considered to what extent this undermining effect could occur as a result of the mere threat of creating a system of sanctions such as the one suggested by the Norms (UNITED NATIONS, 2003, para. 18).

In order to assess the cogency of a voluntarist argument predicated on the undermining effect, it is necessary to determine, based on either empirical data or on speculation, how likely it is for this effect to occur in corporations submitted to sanctions for human rights violations. Recall that the undermining effect was defined in the previous section as the reduction or elimination of the likelihood without the coercion exercised by the sanctioning norms to adopt a certain behavior. Therefore, for the undermining effect to occur, it is essential, first of all, to determine that such a likelihood exists, i.e., that corporations are inclined to respect human rights without the coercion of legal norms. Second, once this inclination has been confirmed, it is also appropriate to consider its magnitude, since the greater the likelihood of uncoerced observance of human rights, the more there would be to lose from the potential undermining effect of legal sanctions. Finally, the plausibility of the undermining effect also needs to assessed based on the reasons that lead a business to engage in corporate social responsibility and, particularly, in the defense of human rights. Many of the answers to these questions can be found in the literature on corporate social responsibility. The growing commitment of companies to socially worthwhile causes can be observed not only anecdotally – for example, by the number of Fortune 500 companies that mention social responsibility in their annual reports (LEE, 2008, p. 54) – but also empirically, in studies that employ a number of different gauges, such as charitable contributions, environmental performance and the application of administrative or legal sanctions (MARGOLIS; ELFENBEIN; WALSH, 2007, p. 11-13).

Much of the empirical research on corporate social responsibility has been dedicated to investigating the relationship between social responsibility and business success, or "corporate financial performance" (for a meta-analysis, see MARGOLIS; ELFENBEIN; WALSH, 2007). As this relationship has been substantiated, it is reasonable to speculate that the reason why a company is likely to defend human rights without the threat of a legal sanction is merely strategic, i.e., that respect for human rights, like other corporate social activities, is a means to maximize profits.

However, despite the prominence given to the alleged competitive advantage afforded by social responsibility, the pursuit of profit is not the only reason explaining why a company would make a commitment to promoting the common good. Indeed, it has been suggested that a company's managers to some extent observe their own personal ethics, often at the expense of the goal to maximize profit (LEE, 2008; p. 65; CAMPBELL, 2007, p. 958-959). One area in which a great deal of attention has been paid to the motives of business executives and managers is environmental responsibility. Kagan, Gunningham and Thornton (2003), for example, have shown that some of the differences in the environmental performance of paper manufacturers can be attributed to managerial attitudes. Similarly, the model of ecologically responsible corporate conduct proposed by Bansal and Roth (2000, p. 731) includes the "personal values" of the members of an organization.

These observations aside, it is important to add that the maximization of profit is still considered the primary motive for a corporation to behave in a socially responsible manner (AGUILERA et al., 2007, p. 847). Other branches of literature reach the same conclusion by observing that individuals subject to competition more

rarely behave in an altruistic manner (SCHOTTER; WEISS; ZAPATER, 1996), the same occurring in cases when the decision to be taken is perceived as an "economic" decision (PILLUTLA; CHEN, 1999; BATSON; MORAN, 1999).

Since respect for human rights constitutes a strategy for companies to maximize profit, it seems unlikely that an undermining effect will occur once sanctions are introduced for violating these rights. After all, the motivation to observe human rights is not intrinsic, nor is it related, like the models of conditional cooperation, to a willingness to act altruistically provided that others do the same.

Nevertheless, in cases when the socially-minded behavior of a corporation is not merely strategic, the hypothesis of an undermining effect is indeed worthy of consideration. Therefore, just as it has been accepted that companies make an unselfish commitment to human rights and to other socially worthwhile objectives, there are good reasons to establish a system of sanctions based on a dialogue between the parties, since the outcome of a participatory legislative process has less chance of being viewed as an affront to the autonomy of the parties and, therefore, of undermining the intrinsic motivation to act in the legally prescribed manner (FREY, 1997, p. 1046; TYLER, 1997, p. 232-233). It should be noted, meanwhile, that legislation that is considered unfair could also threaten the likelihood to cooperate (FEHR; ROCKENBACH, 2003).

However, even though there is the possibility of an undermining effect, its occurrence does not prevent the creation of a system of sanctions from benefiting the realization of human rights. In addition to the dissuasion effect of the sanction, the observance of these rights could also be promoted as a result of the aforementioned indirect or spill-over effect in companies that, thanks to the established sanction, would adjust their policies in defense of human rights not only out of self-interest but also out of a belief that others will do the same. One plausible assumption, although it has yet to be confirmed empirically, is that business executives who sympathize with the cause of human rights will start to behave like conditional cooperators when subjected to competition. In other words, as a system of sanctions causes one company to believe that its competitors will respect human rights, a higher level of observance can be achieved than one prompted by the dissuasion effect alone.

Finally, it remains to be considered what the possible consequences are of a system of sanctions for actors such as NGOs, employees, consumers and investors. Nowadays, these actors help combine the goals of social responsibility and profit maximization, for example, by assuring that human rights violations committed by corporations tarnish their reputation and, consequently, result in reduced sales, disinvestment or a decrease in worker performance. As previously mentioned, these actors frequently serve as altruistic punishers, who make a sacrifice – for example consumers who boycott the products of an offending company, purchasing similar, more expensive products elsewhere – in order to punish behavior they consider immoral. The question, as has already been observed, is whether the creation of legal sanctions can undermine the willingness of these actors. One such undermining effect could lead States and the international community to bear part of the cost that is today shouldered privately to punish

corporate violations, the appropriateness of which would have to be carefully examined. From the point of view of human rights, such a change would only be desirable if the dissuasion and indirect effects of the established sanctions were sufficient to offset the negative impact of reducing the social oversight to which companies are subject.

The occurrence of an undermining effect such as this depends firstly on the actual motivations of the actors involved. These motivations, even if they are predominantly intrinsic or altruistic, are not always entirely so (AGUILERA et al., 2007, p. 851-852), meaning that, by establishing a system of sanctions, the actions of groups that favor corporate social responsibility can only alter as fast as the changes in legislation force that these groups to review their strategies.

Now consider the hypothesis that activists, consumers and other actors do indeed behave as altruistic punishers and are likely to penalize companies that violate human rights even at a cost to themselves. This punishment corresponds to what is called a second-order social dilemma (YAMAGISHI, 1986), since, just like with common social dilemmas, cooperation (in this case, the punishment of misconduct) offers the individual a lower reward or payoff than the opposite conduct (defection), even though cooperation is, collectively speaking, the preferable alternative (DAWES, 1980, p. 169). To simplify: a society in which corporations respect human rights may be preferable to one in which this does not happen, but for many citizens the cost of punishing violations of these rights (for example, through protests or boycotts) is lower than the benefit that each citizen obtains, individually, from this same sanction.

If we accept the altruist punishment hypothesis, the question then lies in determining to what extent this punishment, as an example of the cooperation it represents, diminishes when formal sanctions are established. On this matter, there is evidence from an experiment conducted recently by Kube and Traxler (2010), in which levels of altruistic punishment are compared in cooperative games with and without the threat of formal sanction for free-riders (equivalent, in the experiment, to the sanction applied by an external agent). The results indicated a greater willingness of the participants to punish the lack of cooperation by their peers in the second case. Furthermore, a series of studies has been conducted by Yamagishi (1986, 1988a, 1988b) on cooperation in second-order social dilemmas. These studies revealed that behavior in second-order social dilemmas differed from what is observed in common social dilemmas (first-order dilemmas). While confidence in others raises the level of cooperation in first-order dilemmas – i.e., willingness to cooperate is enhanced by the belief that others will cooperate too – the relationship is inverted in second-order dilemmas, when, as we have already seen, cooperating means incurring a certain cost to punish defectors or free-riders. Therefore, a lack of confidence in others results in more, not less, cooperation when, like in the aforementioned experiments, there is a cost to maintaining a system of sanctions through which refusal to cooperate is punished.

This evidence leads to the conclusion that the hypothesis of an undermining effect involving actors other than corporations themselves or their managers cannot be dismissed. In the case of the experiments conducted by Yamagishi (1986,

1988a, 1988b), however, it is clear that this effect would be caused by an increase of confidence in others. This being the case, a system of sanctions for human rights violations committed by corporations or with their complicity would only reduce the willingness of activists and others to altruistically punish offending companies if the system raised their confidence that corporations, even though selfishly motivated, would respect these rights. It can be concluded, therefore, that sanctioning norms that are rarely applied – due to lack of enforcement or any other reason – have no undermining effect whatsoever on these actors, unless the very existence of these norms – even though they are not properly applied – is enough to elude potential punishers about the likelihood of cooperation by business leaders.

8 Conclusion

After a brief account of the recent measures of the United Nations on the horizontal effect of human rights and, more specifically, the observance of these rights by corporations, this article presented the differences between voluntarists and obligationists, the former more enthusiastic than the latter about the proposals – such as the Global Compact – to promote respect for human rights and, more generally, corporate social responsibility, without the use of regulatory mechanisms. Finally, it considered whether the studies conducted in recent years on the undermining effect of legal sanctions support the voluntarist position and to what extent they do or do not.

Before bringing things to a close, it is important to point out some of the limits of the conclusions that have been drawn here, starting with one that is all too evident: this article does not contribute in any way to the debate on the content of the horizontal effect of human rights, i.e., on the definition of the obligations to be observed by companies. If anything can be said about this based on the considerations presented here, it is that any future legislation on corporations and human rights should, preferably, in the absence of a consensus, be based on processes with the active participation of businesses. At least, as long as the legislation is intended to be created in concert with the development of social responsibility practices that are unrelated to the self-interest of companies, a development towards which a system of sanctions that is externally imposed and potentially viewed as unfair by businesses will have little to contribute.

Second, it is worth noting that the article makes no distinction between the countless ways in which respect for human rights by companies can be legally required. In addition to straightforward reparations for the victims of violations, human rights observance can be achieved coercively, for example, as a condition for obtaining aid from financing institutions such as the World Bank or by imposing trade restrictions (KINLEY; TADAKI, 2004, p. 999-1015). Although a conviction to make reparations for damages is comparable, monetarily speaking, to a denial of financing, the impact of either on the motivation of companies may differ. It is recommended, therefore, in the future, to consider the implications of research on the consequences of sanctions in relation to each of the various ways in which a horizontal effect of human rights can occur.

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RESUMO

O artigo trata da sujeição das corporações às normas de direitos humanos, a chamada "eficácia horizontal" desses direitos. Mais particularmente, tem em vista a controvérsia entre voluntaristas e obrigacionistas sobre a melhor maneira de prevenir abusos a direitos humanos relacionados à atividade empresarial. Baseando-se em trabalhos sobre o efeito solapador (*undermining effect*) de sanções, o texto discorre sobre o risco de verificar-se tal efeito caso se procure promover o respeito aos direitos humanos da maneira defendida pelos obrigacionistas, isto é, pela via regulatória. Considera, também, a plausibilidade de um análogo efeito solapador sobre as motivações de agentes – como ONGs, consumidores, trabalhadores e investidores – graças aos quais a atuação corporativa se vê forçada, hoje em dia, à observância de certos limites.

PALAVRAS-CHAVE

Direitos humanos – Corporações – Voluntarismo – Pacto Global – Regulação

RESUMEN

El presente artículo trata sobre la sujeción de las corporaciones a las normas de derechos humanos, lo que se denomina como "eficacia horizontal" de esos derechos. Principalmente, analiza la controversia entre voluntaristas y obligacionistas en torno a la mejor forma de prevenir abusos a los derechos humanos, relacionados con la actividad empresarial. Basándose en trabajos sobre el efecto de socavamiento (*undermining effect*) de las sanciones, el texto discurre sobre el riesgo de verificar dicho efecto, cuando se busca promover el respeto de los derechos humanos de la manera defendida por los obligacionistas, o sea, por la vía regulatoria. Considera, también, la plausibilidad de un efecto de socavamiento análogo, sobre las motivaciones de los agentes – como ONG, consumidores, trabajadores e inversores – gracias a los cuales el accionar corporativo se ve forzado, hoy en día, a la observancia de ciertos límites.

PALABRAS CLAVE

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