A Regional, Multi-Level and Human-Centered Approach to Business and Human Rights Issues

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Title: Un approccio regionale, multi-livello e incentrato sull'uomo in relazione alle problematiche relative all'impresa e ai diritti umani

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1. – The Inter-American Commission on Human Rights (hereinafter, also 'the IACHR', 'the Commission', or 'the Inter-American Commission') somewhat recently adopted a timely thematic report on business and human rights (hereinafter, also 'the report'). In a moment in which nine years have passed since the adoption in 2011 of the Guiding Principles on Business and Human Rights (hereinafter, also 'the Guiding Principles' or 'the UNGPs'); in which a process on the elaboration of an instrument on the field at the United Nations still has an uncertain future in terms of its outcome and the content, if any, it will have; and in which some consider that the initiatives in the field must be mostly carried out at the domestic level, the publication is a welcome one that can provide guidelines to different actors, including but not limited to States and businesses themselves, in addition to human rights defenders and others.

The report, only available in Spanish at the moment -reason why I quote some excerpts below in said language-, is certainly adopted from a regional perspective, in light of problems experienced in, and developments that have taken place in the Americas (§ 28) -including not only those found in the practice of the main bodies of the Inter-American system (namely, the IACHR and the Inter-American Court of Human Rights), but also in States such as Argentina (§ 7-8, 207), Colombia (§ 49), Brasil (§ 118), and other jurisdictions, that for instance have adopted or plan to adopt National Action Plans or other measures and frameworks in order to deal with particular corporate problems from a human rights perspective (§ 106).

In that context, the report demonstrates the importance of having not only judicial but also other bodies with functions as that of promoting human rights, which the IACHR has (article 1.1 of the Statute of the IACHR, approved in 1979). This is because, indeed, in the exercise of their contentious jurisdiction, judicial bodies must wait for cases to be submitted before them, and are constrained to exploring those issues related to the respective application. While they may -and often do- mention *obiter dicta* considerations, they do not have the same possibility of proactively and *motu proprio* setting forth guidelines and recommendations on multiple dimensions and aspects of a problematic sector or field. Conversely, bodies as the Commission

can. By doing so, they may also contribute in a preventive fashion, avoiding the need to come up before the Inter-American Court if States heed its recommendations, and anticipating looming problems, in addition to condemning abuses that have not reached international -or even domestic- bodies yet in terms of contentious disputes.

In connection with this, the relevance of the possibility of having an independent and expert collegial body with promotion functions that empowers it to set forth recommendations and express interpretations that seek to overcome apparent gaps stands out, particularly when looking at the impasses and stagnation of State negotiations motivated, perhaps sometimes, by (behind the curtain?) political and economic considerations -as is starkly pointed out in relation to the recognition of corporate violations and of the applicability of the business and human rights considerations to all corporations, with some non-exclusionary and specialized focus paid to some corporations and dynamics, as explored below in this note. A universal instrument on the field is not yet a reality, and its content is still fiercely debated. But the Commission managed to issue much needed recommendations and conclusions.

This being said, while the report is certainly a *regional* one -in terms of the identification of local standards, problems, demands, and experiences-, this does not mean that its relevance is limited to actors in the American region. Far from it: many of the problems and issues are also found elsewhere; and some of the norms and legal considerations identified in it are applicable abroad as well, considering the coincidence in normative content of some of the sources taken into account by the IACHR.

Given its ambitious and (quite) comprehensive scope, detailing all aspects of the different sections of the report in a note as this one would be exceedingly descriptive and long for the purposes of a review such as this one. Accordingly, I will focus on some of its underlying and overarching themes, pointing out some of the many relevant remarks found in the report.

2. – In my opinion, the report does well to acknowledge the relevance of the Guiding Principles as a starting point. It indicates that they serve as a "dynamic and evolutionary conceptual basis" of the discussions in the field (§ 11, 197). Accordingly, the IACHR recognizes that they operate as some sort of common language on business and human rights (something I have explored before: Nicolás Carrillo Santarelli and Carlos Arévalo Narváez, *The Discursive Use and Development of the Guiding Principles on Business and Human Rights in Latin America*, *International Law: Revista Colombiana de Derecho Internacional*, No. 30, 2017), while at the same time pointing out that they have not foreclosed further developments and interpretations beyond them (§ 11).

An example supporting this affirmation is found in the express mention of the necessity of making sure that foreign investment treaties and regulations do not make the protection of human rights from negative impacts of corporate conduct more difficult (§ 17). Certainly, while the Guiding Principles did identify possible conflicts between such agreements and State obligations (§ 9 of the UNGPs), the verb used in them is softer (they simply say that States 'should' maintain policy spaces, instead of using the stronger verb 'shall'), and they do not enter into as much detail on the legal duties of States in that context. The Commission instead is more detailed, indicating that States must not only avoid becoming parties to treaties that may conflict with their -*de facto* or normative- capacity to observe their human rights commitments, but expressly mentions requirements such as the need to be careful when negotiating or interpreting other agreements (§ 17), and the importance of referring to vulnerable persons and communities or corporate duties in the agreements themselves. While these elements may be inferred from the UNGPs by some interpreters, others may

fail to do so -and the practice of States and other actors, which have ignored demands as those ones, unfortunately, confirms the importance of expressly identifying demands such as these.

Accordingly, one of the underlying and overarching themes of the report deals with the need to ensure compatibility between the various standards, frameworks, and regulations that States are both bound by and suggested to consider. They include both international and domestic (§ 108), and also public policies -for instance, in terms of National Action Plans (§ 109)-, practices, and laws. This harmonization not only helps to counter *fragmentation* tendencies in legal practice, and attempts to bring about normative *coherence* in terms of the protection of human dignity -which must have priority over financial and other concerns (see, for example, Concurring Opinion of Judge A.A. Cançado Trindade to Advisory Opinion OC-17/03 of the Inter-American Court of Human Rights, § 13, 19).

Additionally, in relation to that overarching objective, the report is brave enough to make it clear that voluntary approaches are insufficient in order to meet the demands of international human rights law; that public policies do not remove the need of having binding norms on business and human rights issues, and that ensuring the access of victims to judicial remedies is mandatory, regardless of whether there are non-judicial grievance mechanisms -State or otherwise.

As to 'voluntary' initiatives, the report reminds that contributions of businesses, and corporate social responsibility initiatives, while they can have positive impacts -in terms of the shaping of practices, attitudes and benefits to individuals and communities- (§ 26), are not to be confused with compliance with *human rights* demands. Such demands are different and not automatically satisfied by acting in accordance with the former, that is to say with social responsibility or in accordance to codes of conduct or other voluntary standards adopted or accepted by businesses themselves (*ibidem*). The report is on point when it notes, in this regard, that voluntary initiatives cannot be deemed to satisfy or replace the necessity of binding ones and of legal accountability. According to it, States are called to:

Asegurar el cumplimiento del respeto a los derechos humanos por parte de las empresas de manera efectiva y vinculante. Las iniciativas voluntarias, mecanismos o estándares sobre responsabilidad social, si bien pueden ser útiles e influenciar ciertos comportamientos empresariales, *no reemplazan las normas exigibles sobre responsabilidad jurídica de las empresas en este ámbito, y su existencia o uso no puede esgrimirse como argumento sobre una pretendida carencia de necesidad de normas vinculantes sobre la conducta empresarial, incluyendo su alcance transnacional*" (emphasis added, recommendation No. 9 addressed to States, page 216).

In relation to hard law standards and judicial mechanisms, and the necessity of their availability, the IACHR explores the State obligation to ensure this when the report indicates that having public policies is not enough to satisfy the obligation to adjust the legal system to international human rights standards. This is so because regulations must be set in place (§ 109), being it hence required both that States legally require businesses to meet due diligence standards when operating (recommendation No. 3 addressed to States, which refers to adopting binding legislation on corporate due diligence duties), and that victims have access to judicial remedies even when they have the possibility of resorting to non-judicial grievance mechanisms, because the latter neither replace nor foreclose the former (§ 142), in light of the stronger guarantees of protection they provide.

In relation to these considerations, three additional things can be added: firstly, that while there are certainly benefits of having the possibility of resorting to alternative dispute resolution and non-state grievance mechanisms (UNGPs, Principles 25, 27 through 31), they fail to have the same features as judicial ones, and thus their existence or use cannot eliminate access to the latter. Secondly, that the

IACHR is not the only body to have made pronouncements in that regard (§ 39 of: Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24, 10 August 2017). And thirdly, that in order to be effective in the business and human rights context, in relation to judicial mechanisms States must consider ensuring the equality of the parties by means of tools as the possibility of having a dynamic burden of proof, restrictions to *forum non conveniens* doctrines, legal assistance, and the removal of factual and normative obstacles to an effective protection of victims of corporate conduct (§ 133 and 137 in the report; or § 44 in the aforementioned General Comment No. 24 of the Committee on Economic, Social and Cultural Rights), among other strategies.

3. – Another important consideration found throughout the article, that to my mind is extremely important and often ignored in studies or pronouncements on related issues, is who or what entities must be considered covered in the scope of the business and human rights field. The report very well points out, in this regard, two things: firstly, that its *ratione personae* universe should not be limited to *corporate* entities as such, but must rather encompass different *economic actors*. I will explore these elements in greater detail now. And secondly, the Commission considers that while special attention must be paid to transnational corporations or those with the capacity to operating transnationally, other business entities are likewise capable of posing problems from a human rights perspective, and that their relevant conduct must thus be addressed as well.

Almost from the very outset of the report, and throughout its length (§17, 23, 52, 57, 65, 138, 177, 187, 201-203, 207, 209, 213, 214, 295, 329), the Commission draws a distinction between economic actors and businesses. I am not entirely sure that my interpretation is one that the Commission had in mind when doing this, but I consider that it is a distinction that enormous potential and is much needed given what it reminds States about. The Commission points out multiple times that States have obligations to prevent and respond -by means of investigating, holding accountable, and ensuring reparations- to violations and abuses attributable to both categories (§ 58), i.e. businesses and other economic actors. This is important insofar as it is recognized that human rights demands are not limited to cases in which actors with a given corporate structure or type under private law are involved. This is a most fortunate recognition, not only because it recognizes that businesspersons, and not only businesses, have responsibilities (§ 208), but also for the following reason, already recognized in the Inter-American system.

In the Americas, and in other regions, there are groups that do not constitute legal persons, and individuals, who engage in illicit activities seeking profit and engaging in operations with an undeniable serious and detrimental impact on human rights and the environment, including armed groups that blow up pipelines, those engaging in illegal mining or timbering -worse, sometimes with State acquiescence!- in the Amazon and other areas, those who cause or bring about deforestation, and drug trafficking groups who blackmail, threaten and attack individuals and communities, among others. In spite of their lack of establishing a new legal subject enjoying a corporate type or structure, their violations and abuses are undeniable, often carried out pursuing for-profit ambitions. And while the case law of the Inter-American system of human rights is clear in terms of the demands on States in relation to them, it is important that the report reminds and highlights that State obligations are not limited towards preventing or addressing the abuses of businesses, but also ask the State to deal with actions owed in relation to the prevention of, and response to, the conduct of multiple economic actors.

Furthermore, the report does recognize a problem experienced in the Americas in terms of persecutions against individuals and organizations who have denounced abuses of economic actors, highlighting the need to ensure their rights, the importance of the actions of human rights and environmental defenders for communities, and the responsibilities of those involved in attacks or harassments against them, with such harassments not being limited to physical threats (§ 207, 329) but also to legally-backed deterrents, such as threats of (illegitimate) legal action (§ 321, 324), or attacks against them in social media or in the form of cyber-espionage (§ 269, 279). In fact, the Commission stresses the dramatic fact that almost 50% of the attacks on human rights defenders related to business activities has taken place in the Americas (§ 316). That States must protect defenders from both businesses *and* other economic actors who may attack or threaten them is another important implication recalled by the inclusive subjective scope it adopted. Especially so if one considers that entities falling under both sets or categories have regretfully acted against human rights defenders and many others.

Secondly, in my understanding the report does manage to strike a perfect balance in terms of which corporations are the ones whose conduct -from a human rights perspective, in this case- international bodies and State authorities must pay attention to. Indeed, in the process on elaboration of an international instrument on business and human rights, there are still hotly disputed debates on whether it is only transnational corporations which should be addressed by international standards; or if conversely all businesses, local ones included, should be covered too (Nadia Bernaz, *Clearer, Stronger, Better? - Unpacking the 2019 Draft Business and Human Rights Treaty, RightsasUsual, 19 July 2019*). Adherents to the opposite sides in this discussion often point out either that transnational corporations have greater capacity of inflicting harm and evading State control, reason why they are the ones that must be internationally addressed, or that all businesses have the factual capacity to negatively impact on the enjoyment of human rights and liberties, reason why it is counterproductive and unreasonable to limit protection exclusively from some of them.

The Inter-American Commission on Human Rights achieves the identification of protection requirements from and in relation to all sets of businesses, taking into consideration particular needs and demands, thus achieving the objective of promoting the observance of human rights in a comprehensive way -i.e. in relation to all businesses, which is consistent with the fact that all of them can violate human rights and thus persons must be protected from them-, while at the same time drawing attention to specific obligations based on the specific threats that some businesses may pose. In this way, for instance, the Commission reminds States that they must hold *all* corporations accountable, while at the same time paying special attention to the specific due diligence and other considerations to be taken into account in relation to businesses with subsidiaries and transnational operations, by saying that:

> "[E]l contenido de los derechos humanos internacionalmente reconocidos y la aplicación efectiva de las obligaciones de respeto y garantía de los Estados, *involucran la responsabilidad jurídica de las empresas* en términos de evitar provocar o contribuir a provocar mediante sus actividades vulneraciones a los derechos humanos, ejercer la debida diligencia en este ámbito, rendir cuentas y asumir las consecuencias que correspondan, ya sean, por ejemplo, en el ámbito penal, civil o administrativo. *En relación con actividades y operaciones transnacionales, esta responsabilidad significará*, por ejemplo, la necesidad de ejercer la debida diligencia sobre las actividades de subsidiarias, grupos empresariales en los que participa, relaciones comerciales, cadenas de valor o suministro, así como de no incurrir en abusos directos contra los

> derechos humanos de forma extraterritorial. Su involucramiento directo, la ausencia total de tal debida diligencia, o una realización materialmente deficiente de ella, conllevaría la responsabilidad jurídica de la empresa a nivel interno y a la consecuente reparación de los y las afectadas" (emphasis added, § 196).

This dual and comprehensive approach is actually enshrined in the very Guiding Principles on Business and Human Rights, which in Principle 14 says that "all enterprises *regardless* of their size, sector, operational context, ownership and structure" (emphasis added) have a responsibility to respect human rights, while acknowledging that specific demands "may vary according to [...] factors" such as the impact of their conduct, and other factors, including its size (commentary to Principle 14). Moreover, the report of the IACHR likewise mentions that "all businesses, without exception, have the responsibility to respect human rights", that States must consider variables when designing the business and human rights framework applicable under their jurisdiction, including factors such as case by case impact analysis, the identification of vulnerable populations, the size of corporations, economic sectors and activities in which operations take place, the type of corporations, and others (§ 3).

On the other hand, when examining the subjects and actors the conduct of which justifies examinations as that of the report examined in this note, the Commission does well to point out that specificities related to some private law and other rules applicable to corporations, pertaining to their legal personality and corporate structure or other aspects, may sometimes pose problems from a human rights perspective that merit a specialized response. This may be the consequence of corporate veil interpretations, jurisdiction 'jumps' -a concern identified in the before an intergovernmental working group of the United Nations exploring the field itself (Human Rights Council, *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, A/HRC/31/50, 5 February 2016*, § 50), mergers, and other figures permitted by or enshrined under private law, in addition to some procedural or other doctrines (e.g. *forum non conveniens*), that may end up leading to impunity and the lack of the full protection and reparation of victims (§ 134).

In relation to this, the report hits the nail, in my opinion, when posing the right question: what is the social function of those and other private law and applicable doctrines and standards (§ *ibidem*), and accordingly what is their justification? When they are frustrated in ways that challenge the respect and protection of human dignity, calls for a review of when they merit being implemented, reformed (recommendation No. 8 addressed to States in the report, at page 216), applied -e.g. in order to avoid the disappearance of responsible corporations, § 215-, or interpreted in a manner consistent with a systemic approach (§ 135), are in order, to bring about compatibility with humanitarian demands, which should not be trumped by technicalities (§ 134). Hence, the conformity of the rules applicable to businesses with human rights considerations is something that law-makers and practitioners must struggle to achieve. In this regard, the doctrine of the Inter-American Court of Human Rights of the control of conventionality, asking State bodies and agents to consider applicable standards and interpretations when discharging their functions, may be pertinent and useful (Inter-American Court of Human Rights, *Control de convencionalidad, Cuadernillo de jurisprudencia*, No. 7).

4. – At the outset of the analysis of the next factors of the report I will explore, I must openly confess that I am overly pleased with what the Commission does in terms of

drawing the conclusions of what a system truly based on human dignity demands and sets forth. In fact, the report coincides with what I expressed before in some studies. One first indication in the report that stands out is that by means of which the Commission indicates that since human rights law and the standards it promotes and supervises are based on human dignity, it is necessary to examine the *ratione personae* implications of such a basis. This is of course a logical analysis, the omission of which in other studies is somewhat baffling. If the foundation of human rights law is human dignity, it is the starting point from which inferences determining what this regime requires must be drawn.

In this regard, the report mentions that the basis of State obligations to protect from corporate and other private abuses is precisely the recognition of the capacity of non-state actors to negatively affect the enjoyment of human rights ("el reconocimiento de la capacidad no estatal de afectar negativamente el goce y ejercicio de los derechos humanos es el fundamento de la exigencia de actuaciones a los Estados para prevenir o responder a tales violaciones con miras a proteger la dignidad humana de las víctimas", § 65). This is precisely a point I made before in prior writings (Nicolás Carrillo Santarelli, *Direct International Human Rights Obligations of Non-state Actors: A Legal and Ethical Necessity*, Wolf Legal Publishers, 2017). It flows from the fact that the centrality of the human rights universe is human dignity, which is not dependent on factors different from human identity: hence, protection cannot be made dependent on *who* is threatening human dignity. In the words of the Commission found in the report:

> "La CIDH parte del reconocimiento de la dignidad humana como fundamento de los derechos humanos internacionalmente reconocidos. *Esta dignidad es incondicional y, en consecuencia, su protección y respeto no pueden depender de factores extrínsecos, incluida la identidad del agresor*" (emphasis added, § 183).

Accordingly, human beings are owed the respect and protection of their inherent worth regardless of who attempts to disrespect them. This helps to overcome a State-centered mentality, and recognizes that non-state actors may actually violate human rights, and that something must be done in that regard out of legal demands. However, in diplomatic and legal circles some have come up with a -to my mind- euphemistic expression saying that corporations can 'abuse' human rights, falling short of recognizing that they do 'violate' them in practice. This has a negative expressive signaling effect for victims and legally says nothing -but may perniciously lead to hindering judicial or other actions due to an artificial distinction drawn by the two terms (Nicolás Carrillo Santarelli, *Direct International Human Rights Obligations of Non-state Actors*, op. cit.).

The report, fortunately, recognizes that the case law of the Inter-American Court of Human Rights in the exercise of its contentious jurisdiction recognized non-state violations and the State obligations required by virtue of that recognition from its very beginning (§ 210); sometimes interchangeably refers to violations and abuses (§ 327, recommendation No. 8 addressed to States, at page 216), even when addressing recommendations to businesses themselves (e.g. recommendation No. 4 addressed to businesses, asking them to "[f]acilitar la rendición de cuentas y reparar a las víctimas de violaciones y abusos a los derechos humanos en las que estén involucradas" (emphasis added, at page 223); and sometimes even uses solely the expression violations (e.g. § 5, 9-10, 58); while at other times the expression chosen by the IACHR is that of 'abuses' but unequivocally acknowledges and refers to the fact that non-state actors have the "capacity to negatively affect the enjoyment of human rights" (§ 65), thus recognizing the central element that imposes demands -and does not deny that nothing impedes international legal sources from being resorted to in order to impose duties on those that violate said rights, be them corporations, international organizations, or others.

Furthermore, and as is implicitly indicated in the preceding paragraph, the Inter-American Commission on Human Rights expressly acknowledged, as I also argued before (Nicolás Carrillo Santarelli, *Direct International Human Rights Obligations of Non-state Actors*, op. cit.), that in the exercise of its function to *promote* the observance and defense of human rights it is not constrained by the *ratione personae* limitations -contingent and prone to future modifications- applicable in the current formulation of its contentious jurisdiction. Accordingly, it addresses recommendations towards businesses, raises awareness about and pinpoints their abuses independently of those of States, and says that it is empowered to issue to corporations guidelines and recommended courses of conduct, by saying that:

> "[D]esde la función de promoción de los derechos humanos de los órganos encargados de cautelar su vigencia *es permisible que se den pronunciamientos directos sobre la conducta no estatal, precisamente para promover prácticas que conlleven a una mayor efectividad en el disfrute de los derechos y libertades fundamentales*. A su vez, la REDESCA de la CIDH observa que, de manera consistente, sostenida y cada vez más notoria, comités y diversos relatores especiales de Naciones Unidas *se han pronunciado directamente sobre comportamientos empresariales que afectan directamente el disfrute de los derechos humanos aludiendo no sólo a las obligaciones de los Estados sino a aquellas que se proyectan sobre tales empresas*" (emphasis added, § 188).

This express recognition may be deemed as a landmark, especially in a world in which States are not the sole nor always the biggest threats to the enjoyment of human rights, and in which it is thus imperative to enter into a dialogue with non-state actors to persuade them to align with human rights standards and demands, especially when reliance on State protection is not always possible due to the potential or actual evading of their control, due to lack of sufficient relational power or other factors.

Needless to say, the Commission does not only raise awareness about potential corporate misdeeds in ways that call for State protection and checks and balances carried out by other non-state actors and activists (§ 2, 410); but also recognizes the positive role that businesses can play when they help those affected by natural disasters, employ former detainees (§ 368) or (I might add) former combatants in post-bellum scenarios, or otherwise contribute to the promotion of human rights, as when they adopt or foster inclusion policies (§ 383), denounce abuses, or refuse to enter into relationships with States or others with a questionable human rights performance record (§ 410).

Finally, it is also important to draw attention to the monumental recognition within the report that while much of human rights law enters into contact with businesses indirectly, by virtue of demands placed on States by international legal standards and obligations that require them to adjust legislation and practices in ways that specifically or generally ask them to prohibit non-state conduct or hold actors accountable domestically, as has been studied by John H. Knox (John H. Knox, *Horizontal Human Rights Law*, *American Journal of International Law*, Vol. 102, 2008), businesses may also have direct duties under international law.

In relation to this, it is convenient to mention that while some businesses already enjoy rights and actions under international economic law, which are defended by home States and others, there is much -probably strategic- reluctance to admit that they must have obligations. Some also question whether businesses can be subjects of international law in this regard, which is illogic when considering how readily their rights are -greedily?- accepted. These duties may be express or implied, as has been explored in doctrine (Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, *Vanderbilt Journal of Transnational Law*, Vol. 35, 2002).

Accordingly, in addition to duties that can be created expressly identifying them as duty-bearers by resorting to the sources of international law, sometimes it is possible to identify implied obligations imposed on them by peremptory law. Their recognition can flow from the acknowledgment of the implied capacities of non-state actors to act against it, and the correlative implied and necessary prohibition imposed on all that can violate *jus cogens* to do so. This is based on the absolute character of its norms (as I explore in: Nicolás Carrillo Santarelli, *Direct International Human Rights Obligations of Non-state Actors*, op. cit.). Such a logic of recognition is found in the report, which does mention that:

> "*Si bien las obligaciones en materia de derechos humanos son primordialmente estatales, la evolución del derecho internacional de los derechos humanos ha demostrado que otros actores pueden tener obligaciones en tal régimen*, como sucede, por ejemplo, con ciertas disposiciones de la Convención sobre los Derechos de las Personas con Discapacidad, que incluye la posibilidad de que ciertas organizaciones internacionales firmen y se adhieran a dicho tratado. El análisis y uso de normas consuetudinarias, principios generales del derecho u otras fuentes del derecho internacional, incluyendo aquellas con carácter de jus cogens, *también pueden ser útiles para observar la existencia de obligaciones que vinculen a las empresas y otros actores económicos* respecto de la vigencia de los derechos humanos" (emphasis added, § 177).

5. – Some scholars have described a succession of stages in terms of the protection of human rightsm as moving from their political declarations, later constitutionalization, recognition in international standards, and then specialization (Francisco Javier Ansuátegui Roig, *La historia de los derechos humanos*, *Diccionario crítico de los derechos humanos I*, Universidad Internacional de Andalucía, 2000). This last process can be understood in two complementary ways: the normative and practical taking into account of both the special needs of vulnerable individuals and groups in order to satisfy their needs of protection, on the one hand, and the identification of particular worrisome threats, in terms of specific conduct, contexts, or powerful actors, with the aim of coming up with regulations that tackle them by taking into account their concrete features and challenges, on the other.

The report of the IACHR on Business and Human Rights achieves these two complementary approaches to human rights specialization, as seen especially but not exclusively in Chapters 6 and 7 on specific contexts and differential impacts, respectively. This is particularly important because this approach ensures that the report is not overtly theoretical, vague or satisfied with setting forth important but only general conditions. Instead, the Commission actually identifies concrete problematics worthy of special attention and draws attention to specific demands in relation to them. The IACHR notes how it had already addressed concrete problems in relation to the extractive industry sector (§ 18, 113, 119, 138, 153, 199), and that it encourages the exploration of others in future activities (§ 198), and then examines in detail some areas of concern. In relation to them, it is noteworthy that the Commission identified particular problems thanks to the consultation process it engaged with different stakeholders during the elaboration of its report -as will be described below, in section 7-. In this sense, for example, when discussing the rights of children vis-à-vis businesses, the IACHR looks at the food industry and its impact on obesity (§ 358), pointing for instance to publicity and commercial practices that may incentivize the consumption of unhealthy food (§ 359) -which is an important thing to do, considering how others have critically analyzed certain publicity and merchandising strategies (George Monbiot, *Advertising and academia are controlling our thoughts. Didn't you know?*, *The Guardian*, 31 December 2018).

Among the areas of special concern, the report addresses environmental matters in great detail, as they deserve; transitional justice scenarios, public services, the impact of corruption on the enjoyment of human rights and the role businesses may play in relation to it, taxation matters, information and technology sectors, and others, including foreign investment regimes and the financing of projects (Chapter 6 of the report and elsewhere in it).

In relation to these specific contexts and issues identified by the Inter-American Commission on Human Rights in its report, concerning transitional justice, the IACHR notes how it is often the case that not sufficient attention is paid to the role of economic actors in abuses during dictatorship or armed conflict contexts, and that failing to address them in post-conflict and transitional scenarios is problematic *not only* in terms of the failure to live up to the commitments of States to respond to abuses by investigating them, sanctioning those responsible and bringing about reparations; but also in terms of the social impact of such a failure, insofar as it prevents society from knowing all the different narratives and having access to the whole truth about what happened, impedes reconciliation and the demand of changes, and may forestall attempts to successfully 'turn the page'. This is a most welcome approach. Indeed, human rights perspectives should not be constrained to positivist analyses if they attempt to be meaningful. The social implications of standards, policies and requirements, or the failure to observe them, is something that is sometimes missing in certain studies but is absolutely necessary. In order to illustrate these points, it is useful to look at what the Inter-American Commission actually said in this regard. According to it:

> "Esto implicará evaluar necesariamente si la estructura estatal está diseñada y equipada para atender en igualdad de condiciones a las víctimas de graves violaciones de los derechos humanos cometidas en estos contextos; para la REDESCA, estas acciones, además, permitirán dar una dimensión más real y cercana a los procesos de justicia transicional, *en el que se transcienda el análisis tradicional y dominante del comportamiento de las autoridades estatales*, en particular militares y fuerzas de seguridad, *que sin perjuicio de la gravedad de su responsabilidad en los hechos, pueden no abarcar todos los escenarios y dinámicas de represión y graves violaciones de derechos humanos en las épocas de dictaduras o conflictos armados.* Para ello, la identificación, investigación y, en su caso, sanción de los actores empresariales *permitirá no sólo abonar a la verdad sino a entender particularmente las relaciones y lazos cívico militares que se presentan así como sus causas y consecuencias con objeto de tomar medidas para evitar situaciones similares* en el futuro" (emphasis added, § 216).

In addition to looking at other issues in relation to which corporate and economic conduct can have a detrimental human rights impact, including but not limited to corruption, tax evasion, pharmaceutical practices in relation to generic drugs and inflated prices that are detrimental to dimensions of access to health services (§ 223-224,), and the human rights demands in relation to the funding of projects by financial entities, in relation to which States must seek to require human rights compatibility (§ 297-301); the report also takes notice of demands in relation to specific types of businesses, such as those publicly-funded. In this regard, the IACHR reaches the conclusion that public corporations are presumed to have very close relations with their States, reason why the obligations of the latter will be intensified in relation to their conduct (§ 69-70, 102, 311). At the same time, the IACHR says that these State obligations may be positive or negative, depending on the circumstances and applicable duties and attribution rules. Thus, the report does not contradict what the International Law Commission said in relation to the separate legal personality of all corporations, private or otherwise, from States, and direct attribution when they are used as mere

instruments or exercise public powers (International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, § 6 of the commentary to article 8).

On the other hand, the Commission indicates that there is respect owed by corporations, and protection by the State -unless corporate conduct is directly attributable to it, in which case its respect is also required-, in the context of not only contractual relationships (businesses are recommended to include human rights clauses in their contracts, as indicated in recommendation No. 2 addressed to them at the end of the report, page 222); but also beyond them. It is mentioned that human rights considerations are necessary in all business and commercial relationships (§ 4, 46, 132, 249), labor or insurance relations between private parties (§ 179, 186, 335, 367), extra-contractual relations, e.g. tort (§ 192) or otherwise, as when businesses have security or prison functions (§ 47, 366). Furthermore, the Inter-American Commission indicates that special attention must be paid to vulnerabilities and gaps of protection generated or reinforced by asymmetrical (power) relations between individuals and communities with businesses (§ 5).

Additionally, the Commission refers to the rights and needs of particularly vulnerable individuals and communities who may be particularly exposed to, or harmed by, corporate conduct. They include, but are not limited to, persons with disabilities, children, human rights defenders, women, indigenous and afro-descendant communities, LGBTI persons, the elderly, imprisoned individuals, or migrants, among others (§ Chapter 7 of the report). The Inter-American Commission does well, in this regard, to mention intersectionality, that is to say, the confluence of factors that may intensity exposure to risks and threats or their impact -in relation to business operations and activities, among others-, and the necessity of providing a specialized or reinforced protection in relation to those so exposed (§ 44, 313, 330, 389, 397). According to the IACHR, in this regard:

> "[E]l sistema interamericano no sólo ha recogido una noción formal de igualdad, sino que avanza hacia un concepto de igualdad material o estructural que parte del reconocimiento de que ciertos sectores de la población requieren la adopción de medidas afirmativas de equiparación. Por ello, *se debe incorporar un enfoque interseccional y diferencial*, incluyendo la perspectiva de género, *que tome en consideración la posible agravación y frecuencia de violaciones a los derechos humanos en razón de condiciones de vulnerabilidad o discriminación histórica de las personas y colectivos* como el origen étnico, edad, sexo, orientación sexual, identidad de género o posición económica, entre otras condiciones, *en el marco de las actividades y operaciones empresariales*" (emphasis added, § 44).

6. – Altogether, the report achieves something noteworthy: apart from pointing out both general and sector- or actor-specific demands, it draws attention to the fact that many of the problems in the business and human rights field can be traced back to underlying structural or systemic social elements, such as the fact that greater importance has been attached to profit over human concerns in structures and practices -something poignantly evident during the differentiated and intersectional impact on vulnerable individuals during the COVID-19 pandemic. In this way, for example, the report exposes the fact that some shareholders have been the almost sole beneficiaries of profit and revenues, instead of having re-invested them in the bettering of public and social services in the context of which they operate, leading to increased prices and the constant need of public investment (§ 228), which is at odds with the benefits they reap from services that communities should benefit more from. This brings to mind calls for a change in the mindset of the (to me, outdated and inadequate) shareholder primacy paradigm (see: Eric

Posner, *Milton Friedman was Wrong*, *The Atlantic*, 22 August 2019; David Gelles and David Yaffe-Bellany, *Shareholder Value is No Longer Everything, Top C.E.O.s Say*, *The New York Times*, 19 August 2019).

Additionally, in relation to these concerns the Commission draws attention to the negative effects of the so-called 'economic diplomacy', by means of which some States advance the economic interests tied to the corporations related to them, without much regard for the potential or past negative impact of their activities (§ 305); or the undue and excessive influence that businesses may have in the shaping of State norms and domestic attitudes by virtue of their economic pressure -i.e. the so-called 'corporate capture', which may be unfortunately translated into corruption or other dynamics that weaken the guarantee of the enjoyment of human rights (§ 53, 130, 260, 403).

The pertinence of such comments is undeniable, considering the dramatic and negative impact that those practices and attitudes often have on the exercise of human rights (*ibidem*). That being said, and as shown in some of the remarks mentioned in this note, the report of the Commission never fails to be technically sound and be rooted in solid legal considerations. Important legal analyses are presented when the report identifies the different circumstances in which the responsibility of States can be engaged due to the breach of their abstention and action duties -e.g. in cases of complicity, attribution, failure to protect with due diligence, a prolonged and constant breach of protection duties that may be understood as aquiescence -which thus turns the applicable duty that was breached into one of respect (§ 77-78)-; and the circumstances in which non-state conduct may be attributable to the State, as is explored in detail in Chapter 3 of the report. Additionally, the report explores the thorny issue of extraterritorial obligations in a solid manner (Chapter 4); and also points out important concrete legal considerations, such as the fact that the privatization of public services does not eliminate State supervision obligations, but rather intensifies them by demanding that States pay attention to risks of abuses in contexts as those of public procurement or the supply of services (§ 309). In doctrine, authors have likewise mentioned that the supervision obligations of States, tied to the duty to ensure/protect, continue to exist even after delegation or privatization processes have taken place (August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *Non-State Actors and Human Rights*, Oxford University Press, 2005).

7. – Another aspect worth commenting on in relation to the report under examination has to do not so much with its content, but also regarding the process of its elaboration. In relation to it, it is useful to bring to mind the duality between the substantive and procedural legitimacy of international processes and decisions drawn by Thomas M. Franck (Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford University Press, 1998). While much of this note on the report has dwelt on the former, it is fair to indicate that the Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights of the IACHR carried out a long consultation process with civil society, academics and many others, the studies of whom were considered, in order to count with elements that allowed it to identify specific problems and to better form its opinion (§ 33, 37-38, 203). The IACHR even made an appeal for the different stakeholders to continue providing it with information and opinions after the adoption of the presently-examined report, in order to be in a better position to carry out its functions in the future, monitor the observance of the recommendations provided for in the report, and help with its dissemination (§ 419) -with dissemination of information on the law being an important strategy for furthering compliance (Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, *ICRC*, 2001) and sensitization, which can bring

about expressive effects and internalization (Harold H. Koh, *Internalization through Socialization*, *Duke Law Journal*, Vol. 54, 2005).

By acting so, in an open process, with transparency and openness, among other 'publicness' features (Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, *European Journal of International Law*, Vol. 20, 2009), the Inter-American Commission on Human Rights has acted in ways that can reinforce the perception that it operated with *procedural* legitimacy, which can in turn increase the support of the report by virtue of the perception of the way in which it acted.

Additionally, the report reveals that the IACHR recognizes that the proper implementation of a framework conducive to the protection of individuals, communities, and the environment from negative corporate impacts requires a multi-level, multi-actor - in which civil society and other actors demand businesses to behave responsibly and help monitor compliance with the IACHR recommendations (§ 26, 49, 418)-, harmonic, consistent, and integrated interaction of participants, entities, regimes, and legal systems (§ 1, 4, 6, 411), if any efforts are to bear fruit in lasting and meaningful ways. This is why the dialogue entered into and invited by the report and the process of its elaboration is so important. Likewise, this approach is consistent with the call for a 'smart mix' of national, international, and other measures in order to "foster respect for human rights", enshrined in Principle 3 of the UNGPs.

Finally, it is also noteworthy that the Inter-American Commission on Human Rights reminded businesses that they must take into account the recommendations it addresses to them and that they cannot argue that they have no responsibility when they limit themselves to doing what States ask them to do, considering that State regulations and orders may be insufficient or otherwise fail to be in conformity with international legal demands.

In this sense, for example, the report notes how businesses must repair victims of human rights abuses in which they are involved, "even when the State has not required such reparations" (§ 415, recommendation No. 4 addressed to businesses) - while also noting that, in any case, such a failure may engage the responsibility of the State itself, which is consistent with the Inter-American Court's affirmation that sometimes both States and non-state actors may have their respective responsibilities engaged in relation to a given abuse (Inter-American Court of Human Rights, Advisory Opinion OC-14/94, § 56).

This rationale is consistent with what others have said as to the necessity of businesses looking not only at, but also beyond domestic law, in order to make sure that they behave responsibly in human rights terms. In this sense, and as the commentary to Principle 11 of the Guiding Principles indicates, "[t]he responsibility [of business enterprises] to respect human rights […] exists over and above compliance with national laws and regulations protecting human rights". The inclusion of recommendations addressed to them and to other economic actors is a great contribution in this regard, and is beneficial not only for communities and individuals, but actually also for businesses themselves, considering that they may be eager to know with clarity what is required and expected of them in order to adjust their practices and operations (Jonathan Bonnitcha and Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, *European Journal of International Law*, Vol. 28, 2017).

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