

**Multinational Corporations:
Human Rights beyond States'
Responsibility**

MA in Understanding and Securing Human Rights
Institute of Commonwealth Studies, School of Advanced Study,
University of London

Student No. 1040731

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Abstract

Globalisation has affected the world in many ways. New commercial relationships have arisen, but also new social and political ones, as well as new forms of communication that have made the world a smaller place. Besides all of these new changes, new actors and roles for existing actors within the international sphere have been created by the new global order. Amongst these actors we find multinational corporations, which have been capable of defining national economies and shaping the world's financial and economic order. Multinational corporations are one of the principal actors of today's life intended to bring economic development to construct a more equal world. However, these corporations have created relevant impacts on the life of societies, communities and individuals around the world, frequently affecting human rights in a direct and negative manner. The immediate problem then lies in defining their role in the global world, finding a way to make them accountable, and determining how to prevent them from committing human rights violations. Through the analysis of a case study on Colombia and the different binding and soft-law international human rights instruments, this research will determine that even if applying a broader and more modern interpretation of their current provisions, there is still an imminent need to regulate corporate activity internationally. Moreover, the research aims to establish the importance of specifying multinational corporations' obligations towards the respect and protection of individual and group human rights.

Chapter I

Introduction

Multinational corporations¹ have existed in the history of international commerce for centuries. The first widely known multinational corporation was the Dutch East India Company, established in 1602 to carry out colonial activities in Asia (UNESCO, 2011). It was possibly the world's first megacorporation, possessing quasi-governmental powers, including the ability to wage war, imprison and execute convicts, negotiate treaties, coin money, and establish colonies (Cultural Heritage Connections, 2011). Although these powers and activities seem distant to the power and influence these corporations have in present times, today multinational corporations have strong influence in political, economic and financial decision making in national and international policies that responds to a new global order and structure characterized by globalisation². This enormous influence has generated conflicting opinions amongst legal scholars, politicians and economists, and in civil society - and society in general.

Multinational corporations are large industrial organizations having a wide network of branches and subsidiaries spread over a number of countries (H. Lalnunmawia, 2010). The two main characteristics of MNCs are their large size and the fact that they have a parent company centrally controlling their worldwide activities (Ibid). Thus, MNCs role in international capital flows has increased substantially in the last few years through foreign direct investment (FDI), generally to developing countries because the latter has been recognized to be an important source of development (M. A. Hussein, 2009). Most MNCs' parent companies are to be found in almost all the industrialised countries, such as the United States of America, the United Kingdom, Canada, France and Germany, among several others. As mentioned, their operations extend beyond their own countries, and cover not only the countries on the global North but also and mostly the least developed ones (LDCs), of the global South³.

The great impact MNCs have on the development process of underdeveloped countries has produced several arguments for and against their operation. The arguments promoting foreign direct investment of MNCs are usually based in the positive role they play in economic development, such as contributing to increase the possibilities of economic growth; reducing or removing the deficit in the balance of payment; filling the gap between targeted governmental tax revenues and locally

¹ For the purposes of this research, the terms: multinational corporations, transnational corporations, MNCs, TNCs and multinational enterprises, will be used alternatively.

² "The term globalisation is generally used to describe an increasing internationalisation of markets for goods and services, the means of production, financial systems, competition, corporations, technology and industries." (OECD (b), 2011)

³ The expressions global North and global South are used to indicate developed and developing countries, also known as First world or Third world countries respectively.

raised taxes, by taxing MNCs' profits, and providing resources with training programs and learning processes of management experience, entrepreneurial abilities, and technological skills (H. Lalnunmawia, 2010). Moreover, MNCs are also considered to be engines of prosperity and enhancement of local living conditions by generating employment, income, and wealth, as well as by introducing and dispensing advanced technology through the process known as 'technology transfer' (M. Monshipouri, C. Welch, Jr. and E. Kennedy, 2003).

However, there are also many arguments against the intervention of corporations in the economies and societies of underdeveloped countries. Although MNCs provide capital, they may lower domestic savings and investment rates by eliminating competition through exclusive production agreements with the host governments (H. Lalnunmawia, 2010). Commonly, MNCs often fail to reinvest much of their profits and they may inhibit the expansion of local firms (Ibid). The management, entrepreneurial skills, technology, and overseas contacts provided by the MNCs may have little impact on developing local skills and resources (Ibid). On the contrary, the development of these local skills may be inhibited by MNCs suppressing the growth of indigenous entrepreneurship as a result of their dominance of local markets, superior knowledge, worldwide contacts, and advertising skills (Ibid). Consequently, MNC's could drive out local competitors and prevent the emergence of small-scale enterprises (Ibid). Furthermore, MNCs often use their economic power to influence governments to adopt policies unfavourable to development, such as providing them with special economic and political concessions in the form of excessive protection, lower tax, subsidized inputs and cheap provision of factory sites, among others (Ibid).

The list of possible economic and social negative impacts continues; however, MNCs human rights and environmental violations are considered to be the worse form of negative impact. Multinational corporations are regularly accused of violating human rights directly or indirectly, by "colluding in various ways with repressive states" (C. Wells, p. 2). Although infringements also occur in developed nations, typically in respect of the environment, rights to privacy, consumer rights to health and information, as well as freedom of association, the most notorious MNCs' abuses occur in the developing world (D. Kinley and S. Joseph, p. 7, 2002 and E. Engle, 2004). MNCs' violations include for example complicity in the brutality of host States police and military, the use of forced, slaved and child labour, poor working conditions, suppression of rights to freedom of association and speech, violations of rights to cultural and religious practice, infringement of rights to property (including intellectual property), and gross infringements of environmental rights (Ibid).

In conclusion, MNCs operations and growing economic and political influence have triggered extensive debates about the issues of efficiency and social justice in a world where the simultaneous rush in economic growth and inequality has led to serious implications for economic rights in developing countries (M. Monshipouri,

C. Welch, Jr. and E. Kennedy, 2003). Economic rights, which are an important determinant of social and cultural rights, were neglected for a long time due to the political interests of the Western world's leading powers. However, the lately growing importance of these so called second generation rights has raised a lot of questions regarding the role MNCs play in development and human rights violations and concerning the need to regulate their operations and accountability.

There is no doubt that, despite any possible changes in the world economic order, multinational corporations will continue to have a relevant and fundamental role in national and international economies, finances and politics. Moreover, it is not doubtful that they contribute to the fulfilment of economic development and thus, the indirect realisation of social and cultural rights. In consequence, it is necessary to determine and establish a way to control these companies by creating preventive measures in order to avoid undesirable behaviours and constructing mechanisms to make them accountable for violating human rights.

In the following chapters I will show through a case study how multinational corporations, through wrongful corporate behaviour, violate human rights in developing countries. I also analyse the existent international normative regarding MNCs' human rights obligations and the different positions taken by scholars in the field. The purpose will be identifying what the international community must do to prevent MNCs abusive behaviour, and oblige them to respect human rights and provide remedy in case of a violation.

Chapter II

Case study: Colombia's human rights under international threat

The purpose of the case study presented in this chapter is to demonstrate the impact multinational corporations can have on the human rights of those living in underdeveloped countries, and to determine what legal protection current international human rights law has to offer for abuse prevention and remedy. The Colombian situation regarding human rights violations by multinational corporations is a very good example to help us understand what was explained in the previous Chapter: the influence of corporate actions on the economic, social and governmental policies of a country, and their concomitant effects.

For almost fifty years, Colombia has been immersed in an internal armed conflict between guerrilla groups, paramilitaries and official armed forces (ABColombia, 2011). This conflict, combined with several other factors, has impeded the Country's consistent, continuous and peaceful development in all of its areas. As a direct consequence of the internal conflict, Colombia has become the country with the largest number of internal forced displaced persons in the world⁴, one of the major producers and exporters of illegal drugs, and made the list of the eight most unequal countries in the world (Ibid). A high level of violence can be experienced daily in many regions, accompanied by extreme poverty, joblessness and lack of equal access to education and health, among many other problems.

Faced with this internal armed conflict and, overall, a general complex internal situation, Colombia's democratic governments have had different ways of managing and carrying out national and international policy with the aim of overcoming the ever present difficulties. It was mainly during Uribe's administration, especially in his second term, where economic policy was primarily based on attracting foreign capital (also known as foreign direct investment) (CAJAR, 2010). Thus, the government began to implement strategies to attract foreign investments mostly directed to the mining and energy sectors, in response to the vast natural wealth of the country, general international conjuncture and internal needs (Ibid). In addition to existing projects, the government of President Uribe accelerated and facilitated the granting of mining concessions to multinational enterprises, which resulted in the request of 40% of the entire Colombian territory for exploration and mining (Creadess, 2011). The current government of President Juan Manuel Santos Calderon aims to continue attracting foreign capital, also mostly in mining and

⁴ For more information regarding internal forced displacement in Colombia, see: ABColombia's "Returning Land to Colombia's Victims", available at http://www.abcolombia.org.uk/downloads/8ZC_ReturningLandReportforweb.pdf

energy sectors, as proposed in the 2010-2014 Colombia's National Development Plan⁵.

The chaotic situation of Colombia and its government, characterized by major corruption scandals -as the *parapolítica* case, closely linked to multinationals- has facilitated the granting of concessions in clear violation of national laws. One of the most illustrative cases of political corruption is the well-known case of the mining application for the exploration and possible exploitation of the protected area of the *Páramo de Santurbán*⁶ by the multinational Greystar.

The question that arises in these cases is obviously the following: Why are concessions or mining permits given for the exploration of places where mining is prohibited? The answer is much more complex than expected. Colombian mining legislation is broad and is endowed with certain history⁷. However, as has emerged in recent times, diverse interpretations of its provisions, some legal gaps and conflicts of corrupted political and economic interests, have led to the granting of 391 mining titles in the Colombian wilderness (CODHES, 2010). In addition to specific mining legislation, Colombia's Political Constitution establishes the protection of the environment, the obligation to ensure sustainable development and the right to a healthy environment in Articles 79 and 80 (1991). Furthermore, Law 99 of 1993 gives special protection to the environment in relation to economic development projects within the framework of the 1992 Rio Declaration on Environment and Development, which also created the Ministry of Environment.

However, the environmental violations⁸ are not the only allegations made against multinational corporations; they just constitute a clear example of the illegal practices carried out by the Colombian government in collusion with corporations. The latter have also been accused of committing serious human rights violations such as provoking forced displacement, violating several trade unions rights, usurping land, violating the rights of indigenous peoples and afro-Colombian

⁵ The National Development Plan is available at <http://www.dnp.gov.co/PND.aspx>

⁶ The *Páramos* (wetlands) are areas of natural reserve protected by new Article 34 introduced by the reforms of Colombia's Mining Code, which, although found unconstitutional, the reformed code will still be applicable for the following 2 years, when the Congress should pass a new one. For more information, see: <http://www.elespectador.com/noticias/judicial/articulo-269205-corte-tumba-reforma-codigo-de-minas>

⁷ For more information on Colombian mining legal framework, go to: <http://www.imcportal.com/contenido.php?option=showpagecat&scat=48>

⁸ Many human rights scholars consider environmental violations as human rights violations because they could directly or indirectly affect human rights, such as the right to water in many mining cases (J. Barry and K. Woods, 2010). Others, instead, give nature subjectivity and, thus, have an environmental approach instead of a human rights one (Ibid). For more information on the right to water and the human rights approach to environmental issues, see: J. Barry and K. Woods, 2010, 'The Environment', in Goodhart, *Human Rights: Politics and Practice*, Oxford: Oxford University Press, and The Rights to Water and Sanitation, available at <http://www.righttowater.info/>

communities, all rights protected by international law, incorporated into national laws, including the Political Constitution.

One of the most important cases of the last couple of years has been the Muriel Mining Corporation one, accompany with a joint venture with the mining giant Rio Tinto⁹ (Colombia Solidarity Campaign, 2009). In 2001 Muriel Mining Corporation bought from The Phelps Dodge Company the concession for the exploitation of the *Cerro Cara de Perro* (Dog Face Hill), located north of the town of Murindó, in the Department of Antioquia (Colombia Solidarity Campaign, 2009). In 2005 nine mining concession were given for exploration and exploitation of copper, gold, molybdenum and other exploitable minerals; forming therefore, the Mandé Norte Mining Project, which covers an area of 160 km² between the Murindó Municipality, Antioquia and the Carmen del Darien Municipality, Chocó (Comisión Intereclesial de Justicia y Paz, 2009). Explorations began in 2009, against the wishes of local people and lack of proper consultation, creating a number of negative impacts on their lives and the environment (Ibid). Moreover, the commencement of mining activities in the Dog Face Hill by the Muriel Mining Corporation, in the territory of the Urada Jiguamiandó Indigenous Reservation, was accompanied by a contingent of the Colombian National Army; which, according to the indigenous communities, prevented them from the right to proper circulation and enjoyment of their own land (Ibid). This area was declared a Forest Reserve by the Colombian Government in 1959, recognized as indigenous land in 1970 to various indigenous communities, and, moreover, some Afro-Colombian communities had rights recognized over the land in the year 2000 (Colombia Solidarity Campaign, 2009).

In the complaints filed to the Inter-American Commission of Human Rights (the Commission) and to the Colombian justice system, indigenous peoples and Afro-Colombians claimed the violation of the right “to life, personal safety, consultation, existence to a social and cultural integrity, cultural identity, autonomy of the cultural communities, protection of the wealth of the nation and to due process” (Colombia’s Constitutional Court, Seventh Chamber of Revision, 2009). Although the Commission granted precautionary measures to the indigenous families affected by the project in order to cease the operations, the Colombian courts of first instance and appeal levels denied the requests made by the communities (Ibid and CIDH, 2010). Nevertheless, after a detailed analysis, the Seventh Chamber of Colombia’s Constitutional Court, decided in favour of the communities, recognizing the rights of due process, right to previous consultation, and right to existence, autonomy, integrity, and social and cultural identity of the communities involved in this case (2009). Therefore, it revoked the decision of the *Sala de Casación Civil* (Civil Cassation Chamber) and it ordered governmental authorities to suspend all exploration or exploitation activities in the area in relation with the Mandé Norte Project (Ibid). It ordered the Ministry of Interior and Justice to carry out a proper

⁹ Rio Tinto is one of the world leaders’ mining multinational corporations with headquarters in the United Kingdom and Australia, see: <http://www.riotinto.com/>

previous consultation to all communities affected by the Mandé Norte Project (Ibid). It also ordered the Ministry of Environment, Housing and Territorial Development to culminate the environmental impact study (Ibid). It also ordered the Ministry of Defence to analyse the situation of the military in the indigenous (Ibid). Finally, it ordered INGEOMINAS (the administrative authority in charge of extending the exploration and exploitation permits) to stop granting permits until both the environmental impact study and previous consultation are carried out entirely (Ibid).

The issue raised in this case study is simple. It is clear that the Colombian situation, both *de facto* and legal, favours multinational companies to violate human rights or harbour those committed by the Colombian State. Looking for their own economic benefit, and with clear knowledge of the situation in the country, multinational companies are taking advantage of existing legal voids, the armed conflict, widespread corruption and the needs of the Colombian people. The ignorance of the situation in Colombia or the pretext that the company operating in Colombia is a legally independent subsidiary of the parent corporation, are not by any means justifications allowing the commitment of human rights and environmental violations. In conclusion, human rights violations occur in developing countries due to the combination of all the aforementioned factors.

As seen in the Muriel Mining Corporation case study, victims of human rights violations committed by MNCs have currently two options to obtain justice and remedy: suing the host State at the national courts and/or at an international body, or attempting to make a civil suit against the multinational company in the courts of its country of origin and/or at the most and if applicable, presenting criminal actions against the company's directors. However, these options leave unpunished other direct or indirect participants in the violations: the multinational corporations and their home State. Moreover, not all states offer the possibility to aliens of suing their MNCs for human rights related issues. In addition, many of the host States where these human rights violations occur are corrupt States with laws only favourable to businesses, and with corrupted judicial powers lacking independence. In such cases, it is impossible that the justice system of a State that has violated human rights or been complicit in the violation, decides in favour of the victims of abuse.

Even though the case of Muriel Mining Corporation has not yet been resolved and we cannot predict its outcome, as it is still under appeal in the Colombian Constitutional Court's plenary session, this example demonstrates a couple of issues needing consideration. First, serious human rights violations are more likely to occur in underdeveloped countries either as a consequence of issues related to corruption, internal conflict and/or ambiguity and lack of laws. And, second, in the current international legal order the tools to remedy or prevent those violations are little to almost none, because there is no legal requirement for businesses or the home States to where the corporation belongs.

The previous statements will be analysed throughout this research work, which focuses on determining what current tools international law provides and what should be the changes made to prevent such violations or remedy them in case they have already occurred. Therefore, it is important to have in mind, while pursuing the reading of this work, the case briefly discussed here, since, as mentioned above, it illustrates the severity of abuses committed by companies and the lack of protection for individuals, communities and victims.

Chapter III

States' responsibility under human rights law

Violations of human rights by multinational corporations like the ones described in the previous Chapter, with State knowledge and sometimes direct support, are not new. “In the book “The Constant Gardener” John le Carré describes vividly the role of a government knowingly allowing its corporations to violate human rights in another state because the government’s main concern is to assist its corporations to make money”¹⁰ (R. McCorquodale and P. Simons, 2007, p. 598). In this particular case, fiction does not seem as distant to reality as one could hope. Economic interests tend to be a common engine for human rights violations in underdeveloped countries¹¹. Yet, it is the growth of transnational corporations operating across more than one State that has raised questions about how international law will deal with these entities (Ibid). “This is partly because the distribution of power and control of TNCs are arranged in ways that defy territorial boundaries, with a ‘parent’ corporation being a national in one State and its various subsidiaries being ‘nationals’ in those States where they operate” (Ibid, p. 599). In order to create a solution for and prevent or remedy the negative social effects caused by multinational corporations, it is necessary to analyse what the current legal international framework offers for the protection of human rights.

International Human Rights Law belongs to the field of law called International Public Law, also known as *Jus Gentium*, which operates on the basis of the international society of which States are its main actors. Traditionally, international public law regulated the relationships among political entities organized over a defined territory and independent from any superior authority; thus, reflecting the classic theory of the State as the only actor of international relations (M. Diez de Velasco, 2005). However, after a series of events that marked the history of the twentieth century, particularly the creation of the United Nations Organisation, international public law suffered a process of ‘humanization’ (Ibid). This process was mainly led by the incorporation of the prohibition of the use of force among States in order to solve international disputes, and the creation of several norms with the aim to protect the individual person (Ibid). Therefore, not only a new category of law developed since then into what is known as International Human Rights Law but also new subjects started to be part of international relations.

¹⁰ John le Carré, a member of the British Foreign Service from 1959 to 1964, notes at the end of the above mentioned book that reality is actually worse than described therein (R. McCorquodale and P. Simons, 2007).

¹¹ The following are examples of this affirmation: arms’ trade, forced and child labour used for the production of goods and violations of environmental and human rights committed by extractive companies, among others.

International Human Rights Law evolved from institutions created in the nineteenth century to promote and protect human rights from odious practices, such as slavery, human trafficking or torturing, to a more complex system based in a legal order with the purpose of protecting the individual and its dignity as an autonomous value in the international society (M. Diez de Velasco, 2005). Thus, the guarantee to protect the full enjoyment of human rights is the only and immediate objective of this particular system and its existing mechanisms. It is this fundamental and essential value of the international society that modified and continues to modify the structure of the international legal order, as well as continuing to be reaffirmed as the most important object of protection. The protection of human rights is not only a goal by itself with an end in itself; it is also the indirect purpose of many international norms.

All of these affirmations are reflected amongst many international instruments, besides the fundamental one that is The Universal Declaration of Human Rights. The 1945 Charter of the United Nations (UN Charter), in its Preamble, states that the peoples of the United Nations (UN) are determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...”; Article 1 mentions “to achieve international co-operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms...” as one of its core purposes, and Article 55, included in Chapter IX of International Economic and Social Co-operation, establishes the necessity to promote “universal respect for, and observance of, human rights and fundamental freedoms for all...” . The Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in June 1993, reaffirmed the commitment to fulfil the relevant principles stipulated in the UN Charter and in The Universal Declaration of Human Rights, emphasizing the unquestionable universal nature¹² of these rights and freedoms.

Regional organisations also recognize the duty and need to protect human rights as one of their fundamental commitments and objectives. The Charter of the Organisation of American States (OAS), through its Preamble and Articles 1, 2 and 3, reaffirms the purposes and principles established in the UN Charter and recognises the importance of fundamental rights, freedoms, democracy and development in its holistic interpretation¹³. Likewise, the European Union and the African Union set human rights promotion and protection within its core principles and purposes. Moreover, besides the main charters leading the functioning of these international and regional organisations, there are many international and regional instruments

¹² Universality is the conception that every individual has legitimate claims upon society for defined freedoms and benefits, of which the Universal Declaration of Human Rights would be an authoritative source since it has been accepted by virtually all States, incorporated into national laws and translated into binding obligations (L. Henkin, 1989).

¹³ The right to a holistic development is a concept established within the ICESCR provisions encompassing all economic, cultural and social aspects of the human person (1966).

exclusively recognising, promoting and protecting human rights, of which the International Bill of Rights is the core one¹⁴.

In conclusion, as has been stated by the Spanish jurist Manuel Diez de Velasco Vallejo, international human rights law is essentially the result of a dialectic evolutionary process between the State's powers derived from sovereignty, on the one side, and the interest of the international society in defining one of its core new values understood as the basic protection of the human being, on the other side (2005). When analysing the role of MNCs and their human rights obligations scholars must have in mind that if the goal of international human rights law is the protection of the individual and its human dignity, its evolution must correspondingly aim to protect the individual from the MNCs' wrongful behaviour.

Human rights protection has always been conceived as primarily a responsibility of the State, which has been and continues to be the main actor of the international society. However, changes in the world structure, globalisation and a new economic global system have created new international actors. New actors, such as international organisations like the United Nations¹⁵, or multinational corporations, have the influence to change economic, financial and social policies around the world, especially in less developed countries. The immediate question arising from this affirmation is: In a world of multiple international actors, who has human rights obligations and to what extent?

States are the creators of the norms, the designers and members of the supranational institutions created internationally or regionally, the participants in diverse international processes and, consequently, the primary duty bearers under international human rights law (H. Steiner, P. Alston and R. Goodman, 2007). Because States have the most complete, or highest degree of international legal personality (in the sense that it has full rights and obligations within the international sphere), they create the international system and they are the only international entities with sovereignty, they stand as the main duty bearers under international law (Ibid).

Many international human rights instruments reflect this position. For instance, Chapter II of the Charter of the United Nations establishes that the membership of the organisation is formed by States which are willing to accept and carry out the obligations set in the Charter (1945). In this same position, the Charter of the Organisation of American States establishes the same principles for the States within the American region (1948). Furthermore, human rights instruments specifically

¹⁴ The International Bill of Rights is constituted by the 1948 Universal Declaration of Human Rights and the two 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

¹⁵ For more information of the legal capacity of the United Nations, see the International Court of Justice 1949 Opinion on Reparations for Injuries Suffered in the Service of the United Nations.

institute the responsibility of the States to promote universal respect for and observance of the human rights established within their texts (ICCPR, 1966). Article 2 of the 1966 International Covenant on Civil and Political Rights (ICCPR) is one of the clearest examples of the holistic responsibility of the State towards human rights, establishing the three main aspects or phases of that responsibility. Part one of Article 2 states: “Each State Party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...” thus, establishing the positive obligations of the State parties to promote, respect and ensure the enjoyments of the rights recognized by the Covenant (Ibid). The second part of the article sets the States’ obligation to internally or nationally “... adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant” (Ibid). Finally, the third part of this Article establishes the right of all persons to an effective remedy in case of a human rights violation and the obligation of the State to provide and enforce such remedies (Ibid). In this same path, Article 3 of the ICCPR sets: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant” (1966). In the same wording of the latter, the 1966 International Covenant for Economic, Social and Cultural Rights (ICESCR), sets in its Article 3 that “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

In conclusion, there is no disagreement to the affirmation that States have the obligation to protect, promote and respect human rights, to provide remedy for their violations, and to fulfil these obligations within their jurisdiction. However, in today’s globalized world, where border boundaries seem to have blurred in several respects, including the economic, financial and political ones¹⁶, the State’s responsibility of ensuring and promoting human rights and of providing remedies, appears to be a very complex issue, specifically regarding corporate behaviour. In a field where social and environmental responsibility has become an everyday topic, issues of State responsibility, extraterritorial State responsibility and even corporate responsibility for human rights violations, have taken an important place in the international legal discussions. As seen in the Colombian Case Study presented before, the role of the host State, where corporate operations are carried out, is not enough to protect individuals; and more so, when there is an internal conflict, a deep economic crisis or a dramatic social situation, such as in Colombia. Should, then, home States where the corporation comes from, such as the United Kingdom or Australia in the analysed case study, be extraterritorially responsible for the actions of their corporate nationals? This question will be answered within this and the following Chapter.

¹⁶ International political influence and the disappearance of political boundaries are reflected, for example, in the settlement of extraterritorial US military bases.

It is clear from different international instruments that States are bound by human rights obligations; however, what is not always easy to determine in the light of their current wording is whether or not States must also ensure human rights protection outside their territory. States must ensure that corporations operating within its own territory do not violate human rights. Nevertheless, the question arises when a corporation violates human rights in a territory other than its home State, such as in the Muriel Mining Corporation/Rio Tinto Case. In order to understand to whom human rights obligations are applicable and to what extent, it is necessary to pursue the analysis of the nature of such obligations, which are repeatedly established as universal.

If we consider that human rights law has been created to protect individuals from the oppressive and abusive actions of States, and thus it poses the obligation to protect human rights in the hands of the State within its jurisdiction, and we understand jurisdiction as territory, then what happens in the case of a country being unable or unwilling to control the activities of a multinational corporation due to its strong economic power or the obligations arising from a treaty such as an investment agreement? (R. McCorquodale and P. Simons, 2007). The immediate outcome of such a situation would be the lack of protection or remedy for those people whose rights have been violated, because corporations are not yet held accountable and the host State where the operations are being carried out is clearly in breach of its human rights obligations (Ibid). Consequently, the theory of the States' extraterritorial responsibility has taken an important part in the human rights doctrine and jurisprudence for the last few years.

Despite the imminent necessity of determining whether or not the obligations to protect, respect and fulfil human rights are also applied extraterritorially, there is not yet consensus or clarification around the many doubts that emerge from this subject when related to corporations' human rights violations. As mentioned, jurisprudence, of which the Inter-American Court and Commission of Human Rights is very progressive, and doctrine have made enormous efforts in order to create legal standards for the application of the extraterritorial responsibility theory. Thus, even though most of these legal literature, jurisprudence and documents would contain the analysis of situations not involving corporations, it is important to study them with the aim of determining what is the common finding around the issue of the State's extraterritorial responsibility. Once determined, those legal interpretations could be analogically applied to situations of human rights violations by MNCs.

The immediately arising question is then: when is a State extraterritorially responsible for the human rights violations committed by a multinational corporation? At first glance, the answer should be that a State incurs extraterritorial responsibility when, either through actions or omissions, it facilitates or contributes to situations in which human rights violations by a company occur (R. McCorquodale and P. Simons, 2007). Nevertheless, the issue is much more complex

and thus, it is essential to analyse the different *de facto* possibilities that could befall and the jurisprudence that has been created.

States' responsibility towards the protection of human rights is to be found in the international human rights treaties, as explained previously. These international human rights treaties establish the extent of application of the human rights obligations contained therein. It also arises from this normative that human rights obligations are not exclusively territorial but also jurisdictional, which means that a State has human rights obligations both towards individuals within its territory and to individuals under its jurisdiction¹⁷ (R. McCorquodale and P. Simons, 2007). Yet, to understand the extent of those obligations, we must determine the meaning and scope of the term 'jurisdiction' through the analysis of international bodies' decisions as it has not been established in any treaty. In the Report 38/99 of the case *Saldaño v Argentina*, the Inter-American Commission on Human Rights (IACHR) determined that under Article 1 (1) of the American Convention on Human Rights "States Parties have undertaken to respect and ensure the substantive guarantees enshrined in the Convention in favour of persons "subject to their jurisdiction"." And, the IACHR further explained that the term 'jurisdiction' in the sense of Article 1(1) is not limited to the national territory; "[r]ather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory" (Ibid). Moreover, the IACHR clarified that this understanding of jurisdiction has also been confirmed by the European Court and Commission when analysing the scope of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the case *Cyprus v Turkey* (Ibid). Thus, the fact that in the human rights international order the term 'jurisdiction' is interpreted in its broader meaning, not purely confined to the territory, increases the possibility of finding States extraterritorially responsible for human rights violations.

Since 2001 the State responsibility has been codified under the International Law Commissions (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles). Although these articles are not binding law and play the role of guiding principles, several can be considered customary international law because they reflect on existing principles of international law and have been adopted by international tribunals as reflective of customary law (R. McCorquodale and P. Simons, 2007). Articles 1, 2 and 4 of ILC Draft Articles on State Responsibility, define the concept of wrongful act and the extent of a State's obligations under international law as a conduct or omission attributable to an organ of the State, whether legislative, executive, judicial or any other function, which constitutes a breach of an international obligation and, therefore, entails the responsibility of that State (2001).

¹⁷ See, for example, Article 1 of both the American Convention on Human Rights and the European Convention on Human Rights.

Both the international bodies' decisions and opinions, and the Draft Articles, give us different requirements that must be met in order to engage in extraterritorial responsibility. The first requirement is the need for the State's effective control over the organ committing a violation outside its territory or over a specific area of control; thus, in order to determine whether there is extraterritorial responsibility one must analyse the State's relationship with the party committing the human rights abuse (R. McCorquodale and P. Simons, 2007 and M. Hamiki, 2010). A duty-holding State will incur extraterritorial responsibility when it does not take reasonable measures to prevent and restrain the abuser, when that abuser is subject to the authority or control of the State (Ibid). According to the Human Rights Committee (HRC) in General Comment 31, when interpreting the extent of the obligations under the ICCPR: "A State party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State Party, even if not situated within the territory of that State Party...regardless of the circumstances in which such power or effective control was obtained" (2004)¹⁸. The IACHR has stated that individuals are under the jurisdiction of a State when they are subject to the authority and control of that State, whether or not there is effective control of the territory in question (R. McCorquodale and P. Simons, 2007). This position was reflected in the decision the IACHR made in the case *Alejandro v Cuba*, where it ruled that "when agents of a State, whether military or civilian, exercise power and authority over persons outside the country, continues its obligation to respect human rights" (IACHR, 1999). Similarly, the European Court of Human Rights (ECHR) has taken the same approach reflected in the case *Loizidou v Turkey*, where it found Turkey responsible for human rights obligations under the European Convention as a consequence of Turkey's exercise of effective control over the unrecognized Turkish Republic of Northern Cyprus, the territory where the violations occurred (ECHR, 1996). The ECHR understood that the facts in question fell under "Turkish jurisdiction" within the meaning of Article 1 of the Convention..." (Ibid). Despite the fact that the European Court appears to have a stricter standard for the interpretation of the term jurisdiction because of the need for 'effective control' and not just the exercise of some type of power or authority, the international trend is to move towards a broader conception of the applicability of extraterritorial obligations in cases of human rights violations. Furthermore, this trend has been reaffirmed by the International Court of Justice (ICJ) in the *Advisory Opinion on The Wall* regarding Israel's responsibility in the occupied Palestinian territories and in the case *Democratic Republic of Congo v Uganda* (R. McCorquodale and P. Simons, 2007). In both cases, the ICJ understood there was extraterritorial responsibility of the States in the light of the ICCPR, ICESCR and the Convention on the Rights of the Child (CRC) (Ibid). Moreover, the ICJ established that all States have extraterritorial human rights obligations under all international

¹⁸ For more information on the interpretation of the obligations under Art 2(1) of the ICCPR, see General Comment No. 31(80) Nature of the Legal Obligations Imposed on State Parties to the Covenant.

human rights instruments and customary international law, whether or not the territory where the violation occurred was occupied by that State (Ibid). In conclusion, ICJ's jurisprudence and opinion go beyond the need for effective control over a territory, consequently truly interpreting the purpose of human rights law which is defined as the protection of the individual and its dignity from abuse.

Moreover, there is legal doctrine that goes even beyond the theory of a State's extraterritorial responsibility. Todd Howland constructs the idea that multiple States have responsibility to protect the human rights of the same individual, as criminal law has created co-defendants and co-conspirators and civil law created joint enterprises and joint enterprise liability (2007). His theory is justified in the universal nature of human rights law (T. Howland, 2007). Although Howland does an analysis of the international intervention in the considered failed State of Haiti for arriving at the conclusion that the applicability of human rights law has a very strict and narrow interpretation, his theory can be used analogically for different situations where States intervene directly or indirectly in other countries (Ibid). Quoting the words of Martin Josef Schermaier: "At some point in the development of every legal system, the original strict and formal application of rules is supplemented by a freer approach which aims to go beyond the positivist strictures", Howland advocates for an interpretation of international human rights law which will introduce logic and principles of general domestic law, such as the *duty to act* derived from general principles of tort, contract and criminal law, and the *legal obligations of agents or sub-contractor* under contract, agency or tort law (2008). The analogical use of these principles, present in most legal systems, would derive in the application of the principles of extraterritorial responsibility and proportional¹⁹ responsibility for human rights violations.

Howland's theory becomes more appealing when he points out specific international instruments supporting the multiple-State responsibility and obligations towards human rights (2007). The Preamble of the American Declaration of the Rights and Duties of Man proclaims: "the essential rights of man are not derived from him being a national of a particular state, but are based upon attributes of his human personality" (1948). Therefore, as mentioned before, it is the nature of human rights that gives them universality, validity and applicability around the world and what generates also a universal obligation, i.e. imposed on all States. The preamble of the American Declaration emphasises the importance of the individual, regardless of his nationality; thus, it is the obligation of all States, and not only the State from where an individual is a national, to respect and fulfil the human rights of all human beings even of those outside the State's jurisdiction (Ibid). Moreover, during the World Conference on Human Rights held in Vienna in 1993 States declared: "Human rights and fundamental freedoms are the birth-right of all human beings; their protection and promotion is the first responsibility of Governments." Once again, the idea that

¹⁹ Proportional responsibility should be measured by the extent and type of intervention a State or entity had in the situation where one or several human rights were violated.

human rights are universal, indivisible, interdependent and interrelated is reaffirmed by the States, yet the international community has not achieved full acceptance of human rights as they create a constant limitation of power (T. Howland, 2007).

Interestingly, Howland brings up the ICESCR and its emphasis in the need for international cooperation for the achievement of economic and social rights (2007). Article 2 of the ICESCR declares:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation [...] with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures...”(1966).

Moreover, the United Nations Committee on Economic and Social Rights (CESCR) clarifies on the meaning of the former provision in its 1990 General Comment 3, when it stated:

“... that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.”

In the light of the words of the ICESCR and the clarifications done by the CESCR regarding its application, it must be concluded that the extraterritorial application of the State Parties obligations under the Covenant is much clearer than that under other international human rights instruments, such as the ICCPR, the European Convention or the Inter-American Convention on Human Rights. And, as will be pointed out in further discussions, this Covenant is particularly relevant in the subject matter of multinational corporations, since their biggest impacts are related to economic development and, thus, the enjoyment of economic, social and cultural rights.

In conclusion, despite some progress, human rights law and accountability for violations still have not evolved to hold multiple actors liable (T. Howland, 2007). Legal interpretation is still in the one state-citizen stage in terms of the application of human rights law “despite the fact that the reality on the ground is complex, multidimensional and involves many actors” (Ibid, p. 409). The international community, today composed by actors other than States, must create pressure in order to achieve multi-State responsibility; making each State proportionally responsible according to the role and type of involvement they had in the human rights violations.

Despite the fact that there is still a long way to go in the field of the State responsibility in relation to human rights, it is clearly stated by human rights bodies throughout the world and in the light of different human rights instruments, that States have extraterritorial responsibility for violations committed outside their territory when they meet certain requirements. Amongst these requirements are: acting on behalf of the State in an official capacity, under the State's power or authority, or the State's effective control over the people and territory. Therefore, it has been clarified that the term 'jurisdiction' is no longer limited to the national territory of the State party to an international human rights instrument; States can be held accountable for actions committed outside their own territory.

The question that follows this line of thought is one regarding the extraterritorial responsibility of the State when a violation is committed by a corporation of that State, financed by that State or registered in that State. With the aim of determining this kind of responsibility one must analyse when and how the requirements of extraterritorial responsibility would apply in a relationship between a corporation, the State where it belongs (home State) and the State where the human rights violation was committed (host State).

Chapter IV

State's extraterritorial responsibility for the human rights violations of corporate nationals

Although there have been many efforts invested in creating a homogenous theory on the State extraterritorial responsibility, few specific things have been said in the international legal arena about the State's extraterritorial responsibility for the violation of human rights by multinational corporations. Most of the developments in this particular field have been carried out by the international juridical doctrinaires. Consequently, in order to construct a unified theory and determine if this type of responsibility could be found in current international human rights instruments, an analysis of these doctrines, in the light of some leading human rights instruments²⁰ and the aforementioned ILC Articles on State Responsibility, must be done.

Article 5 of the ILC Articles runs:

“the conduct of a person or entity which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance” (2001).

The commentaries of the ILC Articles provide that the word ‘entity’ refers to a public, semi-public and even a private company (Ibid). Therefore, in the light of this article and the interpretations made by the ILC, if a multinational corporation is exercising public or governmental functions, its violations can be attributed to the State in whose name is exercising those functions (R. McCorquodale and P. Simons, 2007).

Furthermore, Article 8 of the ILC Articles creates another hypothesis in which a State can be made extraterritorially responsible for an international wrongful act, which includes any human right violation covered by international law, whether by a treaty or by customary law (2001). Article 8 states “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct” (Ibid). Again, if a State provides instructions or exercises some type of direction or control over a private company, the actions of that company can be attributed to the State. Further interpretation of

²⁰ It is important to mention that many of the provisions within relevant human rights instruments signed by most States in the world, have become customary international law, and are thus binding on every State, even those which have not signed the corresponding treaties.

the meaning of the terms ‘instructions’, ‘control’ and/or ‘direction’ and the existence of a real link between the private entity and the State would have to be carried out in each particular case; however, the wrongful conduct can be attributed even when only one of these three requirements exists (Ibid). Two important and leading cases in this particular field have stated two different positions regarding the meaning of control and the link between the State and the private entity or individual. These cases are *Nicaragua v The United States of America* and the *Prosecutor v. Duško Tadic*. In the first one, the International Court of Justice set a higher standard for the interpretation of the terms ‘control’ and ‘planning, direction and support’; while in the second case the Appeals Chamber of the International Tribunal for the Former Yugoslavia stressed that “the degree of control may... vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control” (ICJ, 1984 and ICTY, 2001)²¹. Accordingly, due to the lack of international consensus on the interpretation of these terms, each particular case will determine the scope of its meaning. Thus, an interpretation that allows for a greater application of this Article and the fact that the company’s conduct would not have to fall under any type of governmental activity, would allow that a larger number of behaviours performed by private companies be attributed to the State, hence generating better protection against human rights violations.

Another relevant article is number 16, which sets that a State can be found responsible for aiding or assisting another State in the commission of an internationally wrongful act (UN-ILC, 2008). The ILC requires the State to “knowingly providing an essential facility or financing the activity in question...with a view to facilitating the commission of the wrongful act” (Ibid, p. 66). Therefore, international extraterritorial responsibility only arises when the State is aware that its help or contribution will facilitate the breach of an international legal obligation and only to the extent of that intervention (Ibid). Although this article only establishes the case of State intervention or complicity, several jurists have succeeded in establishing the applicability of this article for cases involving private corporations. The key element lays in the connection or relationship between the corporation involved in the human rights violation and the home State of that corporation. Robert McCoquodale and Penelope Simons bring up the example of the Export Credit Agencies (ECAs), which play an important role in the finances and economics of industrialized countries and in the interrelationships among them, their multinational corporations and the developing world (2007). ECAs, but also many other public financial institutions and State banks, usually provide a diverse range of services for those national companies to develop the latter competitiveness in today’s global or national markets (Ibid). These services, which can be attributed to States in most

²¹ For further reading on this ruling, see: *Nicaragua v The United States of America*, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nus&case=70&k=66> and the *Tadic Case*: The Judgement of the Appeals Chamber, available at <http://www.icty.org/sid/7749>

cases due to the link between State and the public entity, go from developing contacts in other States to actually participating in governmental trade missions abroad (Ibid). Hence, when a corporation commits a human rights violation, the services provided by the State's financial entities can be seen as facilitating, assisting or financing the commission of those wrongful acts and, thus, the State could be found liable for breaching its human rights obligations under international law (Ibid).

In conclusion, when a home State aids or assists a corporation, for example, by displacing communities like in the Colombian case or by financing a corporate behaviour resulting in a human rights violation that constitutes an international crime, then the State can be considered responsible under international human rights law (R. McCorquodale and P. Simons, 2007). However, it has been agreed by the international legal doctrine that in order for the State to be held responsible, it must be proven that the State knew its assistance or financing would aid in the commission of an international wrongful act (Ibid). If we apply this reasoning to the case study about Colombia, it is easy to affirm that there should be a presumption of the knowledge of the internal conflict and social and political situation in Colombia, since it is often shown in the world news and it has been the longest lasting conflict in the Latin American region.

Therefore, if by any circumstances the home country is not aware of the particular social and political situation of the prospective host country, it should first acquire knowledge of these matters and then deeply analyse the human rights and environmental effects of corporate operations. The international community as a whole should pressure industrialized States to create and adopt national and international efficient norms to control investment and its social and environmental impacts, in order to always have the obligation of pursuing a proper investigation prior to undertake any type of venture.

Furthermore, in the matter of extraterritorial responsibility for multinational corporations' human rights violations, the legal doctrine, mainly led by leading European international lawyers, has established that there is a States' 'general obligation' to protect, the term 'general' being the keyword of this expression (R. McCorquodale, 2011). This concept implies that a State cannot evade responsibility for serious human rights violations committed by multinational companies registered in its territory. However, despite the strong desire for consensus, it has not been established which human rights are those that fall into the concept of the 'general obligation to protect'. Consequently, it is understood that by giving a different value or importance to every human right, not all would fall under the general obligation to protect. In a conference held at the Law Society of England and Wales in the city of London, England, on July 2011, Robert McCorquodale further explained his understanding of the concept of the State's general duty to protect.

McCorquodale clarified that a general duty to protect individuals from violations of human rights is based on two formal and inalienable principles (2011). The first

principle establishes that the duty to protect is a vital element of the human rights obligations posed in regional and international treaties and treaty bodies' decisions; while the second principle or basic component is given by the extension of the applicability of this concept, which means that the duty to protect extends to all international customary obligations (Ibid). This general duty to protect would authorize the application of extraterritorial responsibility, which is also justified in the fact that States sometimes exercise territorial jurisdiction and developing nations are in a weaker position when negotiating with the industrialized countries (Ibid). Moreover, McCorquodale also specifies operational situations where States should likely be considered responsible for human rights violations: in conflict zones, cases where financial agencies support business credit enterprises, and in circumstances where there is a lack of action by the State (Ibid).

Following this same position, Monica Hakimi explains that the concept of 'Responsibility to protect' advances two specific propositions of which the first is the State's obligation to protect its population from war crimes and mass atrocities and the second is the international community's obligation, as a whole, of taking responsibility to protect a country's population if the State fails to do so (2010). Nonetheless, obligations to protect are not new to international law or exclusive to human rights law (Ibid). Even before the development of modern human rights law, the law on the protection of aliens required States to protect foreign nationals from physical injury caused by private actors, and although these provisions were not understood in terms of aliens' rights, the obligation required States to protect aliens from third-party harm (Ibid). Today, with the evolution of the international legal order, several human rights and criminal law treaties oblige States to protect persons from abuses committed by private actors; in addition, States acknowledge that they have such obligations and treaty bodies apply and enforce them (Ibid). Furthermore, the obligation of *non-refoulement* is also a well-established one, by which a State must restrict itself from returning someone to his home country if he could suffer abuse in his country (Ibid). Finally, the ICJ in its already mentioned 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and following the new world trend of general responsibility, established that States must protect against acts of genocide committed by or in another State.

Currently, lawyers, international organisations, international courts, non-governmental organisations, human rights defenders and States, discuss much more about the concept, scope and extension of this general responsibility, since priorities and the conception of various human rights have changed and evolved over the years. These are the main reasons why we currently approve and advocate the applications of these types of obligations in different contexts and situations. As I have mentioned before, multinational corporations have taken an incredibly important role in the economics and finances of the world and, consequently, in influencing and even determining the political and social outcomes of many

countries, especially of those underdeveloped or in the process of developing. The international community has realized these facts and has been forced by international and public complaints to scrutinize the behaviour of corporations. This is also due to the pressure established by international organisations, NGOs, civil society and human rights and environmental defenders.

Many scholars have analysed the obligation or responsibility to protect from private or third-party harm in different international human rights treaties, such as the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, among many others (M. Hakimi, 2010). Yet, these are all treaties that cover the protection and recognition of specific rights; thus, in order to obtain a wider application of the obligation to protect and achieve its recognition as customary law, it is necessary to show that its existence is established in the widest human rights instruments that constitute the International Bill of Rights²².

Although up to now economic, social and cultural rights have been marginalized and most discussions of the extraterritorial application of human rights law has been related to civil and political rights (T. Howland, 2007), for the particular case under consideration in this essay the most relevant international instrument is the ICESCR. As explained previously, the ICESCR is much clearer when it comes to the acceptance of the general obligation or duty to protect also extraterritorially than the ICCPR is, the latter being also one of the most important international human rights conventions. Although I have already clarified the wording of this document regarding extraterritorial responsibility, it is important to mention a few comments made by the United Nations Commission on Economic, Social and Cultural Rights in issues of development in underdeveloped countries, commentaries that can be analogically applied to situations involving multinational corporations' operations.

The CESCR states:

“Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation” (1990).

Additionally, it is stated that it is important to bear in mind the following:

²² The International Bill of Human Rights is formed by the Universal Declaration of Human Rights and the two 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Although the Universal Declaration of Human Rights is not a binding instrument itself, many of its provisions have become customary law.

“development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of “development” have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.”

Consequently, it is not possible to justify in the name of development investments that could result in human rights violations. Today’s world is driven and based primarily on economic productivity and financial speculation, and therefore, it would be unusual and contradictory to set aside the international treaty that more broadly protects the rights of individuals from any violations that may occur under the banner of development, i.e. the ICESCR.

Another situation, worth mentioning, that commonly occurs in the area of corporate foreign direct investment and generates issues of responsibility, is the creation of local enterprises, subsidiaries of the international corporation. Because corporations generally conduct extraterritorial operations through a subsidiary incorporated in a State other than the home State, Mc Corquodale and Simons question whether or not a home State should be found to be internationally responsible for the human rights violations pursued by a subsidiary of a corporate national (2007).

Responsibility may arise if it is determined that the home State has an obligation to also control the activity of the subsidiary and its social and environmental impact on the host State. However, in these cases there are two fundamental and inter-related problems. The first is that the subsidiaries are a separate legal entity, i.e. subsidiaries’ corporate responsibility is independent from the responsibility of the home State’s corporation. The second problem, directly related to the previous one, is that the companies could use this type of legal forms or structures to avoid any liability that may arise from the exercise of their business offshore and often also to avoid strict state regulations and high taxes.

Thus, when creating a local subsidiary independent from the parent company, MNCs transfer human rights responsibility only to the host State. Nevertheless, as a general principle of national and international law, acts must be conducted in good faith. Therefore, if the MNC’s firm intention is to evade taxes, breach laws, and avoid human rights responsibilities, their actions could be considered fraudulent, because the law cannot be used as a tool to bring fraud nor as a means to cause the violation of rights, especially those aimed at protecting the dignity of the human being.

The European Court of Justice (ECJ) has ruled that it is necessary “to investigate the parameters of the [corporate] group structure and the reality of the interrelationships within the group” (R. McCorquodale and P. Simons, 2007, p. 616). Likewise, worldwide jurisprudence and doctrines have emerged to apply new juridical constructions such as the ‘piercing the corporate veil’ theory, to determine inter-group responsibilities and relationships, and the ‘alter-ego’ theory, to define the connection between a subsidiary and a local company (Ibid). Therefore, in order to make the home State extraterritorially responsible for the human rights violations of a corporate subsidiary, the connection between that State and the subsidiary must be proven. And a State willing to avoid this kind of responsibility must make sure to more actively engage in the projects and actions of their corporate nationals abroad, particularly when performed in underdeveloped countries and/or countries with internal conflicts. “It cannot reasonably be argued today that states do not know that their corporate nationals (or the latter's foreign subsidiaries) may engage in human rights violating activity in their extraterritorial operations” (R. McCorquodale and P. Simons, 2007, p. 619).

In conclusion, the international community, through the ILC Draft Articles on State Responsibility, vast interpretations of different human rights instruments, international customary law, and the constantly developing juridical doctrine, has established the State’s general responsibility to protect human rights extraterritorially in a set of circumstances. States also have the obligation to ensure an in-depth and extensive analysis of the social and environmental impacts of the projects carried out by their corporate nationals in different countries, especially in the least developed ones, in order to minimize the possibilities of incurring human rights violations.

Therefore, going back to the Muriel Mining Corporation case presented in Chapter II, if we follow the abovementioned line of thought, the United Kingdom (UK) and Australia (home States of Rio Tinto) have a general responsibility to protect human rights abroad from the wrongful behaviour of corporate nationals and, consequently, should respond for them. Moreover, for example, if a link is proven between the mining project in Colombia and the UK’s and Australia’s ECAs, the requirement presented by international soft-law, jurisprudence and doctrine would be fulfilled to make both countries accountable for the human rights violations of the corporate national (Rio Tinto). However, is this somehow weak theory of the State’s extraterritorial responsibility enough to protect individuals from corporate human rights violations or should the international community also make corporations accountable in this field? This is a question aimed to be answer within the following Chapter.

Chapter V

Business and human rights, direct duties imposed on corporations

It is well known that the protection of human rights has traditionally been considered a responsibility of States and not of corporations (D. Kinley and S. Joseph, 2002). However, it is also well known that the role of MNCs has dramatically changed since the 1990s, where they have started to take a fundamental role in the everyday more globalized economic system. Critics of the foreign direct investment dependant system “argue that the benefits of multinational production come with substantial costs for governments and their citizens”, specially of those underdeveloped countries in need to adjust themselves in a competitive globalized system which defines power through economic and financial means, (N. Jensen, 2003, p. 587). The need to attract FDI pressures governments to provide a climate more hospitable to foreign corporations, which could potentially alter domestic economic policy, and could force the State into modifying its internal laws to make them more favourable for multinational enterprises, and in some cases even challenge the *de facto* sovereignty of the nation-state and the capacity for democratic governance (Ibid). Then, the domestic laws of many states could fail to impose adequate human rights duties on corporations, while the international legal system does not provide any direct duties, thus leaving individuals unprotected against corporate harmful behaviour (D. Kinley and S. Joseph, 2002, p. 8). The latest allegations were confirmed by the brief reference to Colombia’s economic and financial measures, introduced in the case study presented in Chapter II of this paper.

Due to the role MNCs have come to play in the last couple of decades, it is necessary to understand that they should be accountable for the human rights violations they have committed; the States’ exclusive responsibility is not enough in a world where national borders have become blurred and the role of the State has decreased considerably. There is no doubt, that many problems will arise when creating such accountability for MNCs, for example determining the extent of responsibility both corporations and States should have when MNCs have incurred in human rights violations abroad and both the home and host States have failed in preventing those violations or have been accomplices in them.

In the last decade, the international community has become aware of the importance of the causal relationship between corporations and social responsibility, and there have been some efforts to create regulations and to help limit their negative social and environmental impact, and to determine their responsibility when committing human rights violations. In order to determine what should be done to create a comprehensive legal order, it is necessary to examine the steps taken so far by the international community. Yet, before carrying out an analysis of the international instruments that directly relate human rights with MNCs and could possibly generate

duties on the latter, for the purposes established above it is necessary to mention trends in favour of recognizing corporate duties within the existing international legal system.

First, it is important to briefly highlight that the international law corpus creates obligations for actors other than States: under current international criminal law individuals are judged for gross human rights violations (S. Ratner, 2001). Moreover, the wording of the International Bill of Human Rights itself addresses “every individual and every organ of society” as responsible for the observance and fulfilment of the rights established therein and also stipulates:

“[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant” (UDHR, 1948, Preamble, and ICCPR and ICESCR, 1966, Art. 5.1).

The Universal Declaration along with the two Covenants, contain normative demonstrating that there are international actors obliged by human rights laws other than the States. Therefore, we need now to examine what has been determined to be the role, rights and duties of multinational corporations as non-State actors of the international community.

Precedent shows the willingness of key legal actors to contemplate corporate responsibility at the international level as in the cases of *United States v. Flick*, *United States v. Krauch* and *United States v. Krupp* where the leaders of German industries were prosecuted for crimes against peace, war crimes, and crimes against humanity in the second Nuremberg trials under the Allied forces’ Control Council Law No. 10.131 (S. Ratner, 2001). Although individuals were tried, the courts persistently referred to corporate obligations and responsibility (Ibid). Additionally, international environmental law and polluters’ responsibility have made corporations liable for a series of damages that could also constitute human rights violations; yet, the terminology regularly used by governments and commentators refers to ‘civil liability’, instead of responsibility²³, derived from the principle ‘polluter pays’ and the fact that complaints are presented by private lawsuits, thus, mistaking then the formal process with the nature of the right (Ibid). This misunderstanding of the nature of the right with the formality of the mechanism to enforce that right has generated the biggest discussions regarding corporate human rights responsibility. Many scholars see that there needs to be an international business court or some other international enforceable mechanism for corporations to become subjects of international law. Nevertheless, this position does not represent the opinion of the majority of the doctrine.

²³ The interpretation of the concept ‘responsibility’ is generally associated with the State and not with a private entity.

Another set of laws establishing duties on corporations are the ILO Conventions. Even though, further analysis will be done “both the purpose of the conventions and their wording make clear that they do recognize duties on enterprises regarding their employees” (S. Ratner, 2001, p. 478). Furthermore, while some provisions do seem to impose duties only on States, the latter have recognized that the true meaning enforces duties on private enterprises (Ibid). Additionally, States have developed international law creating binding obligations on corporations with respect to economic activities, such as the Organisation for Economic Co-Operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions with the aim of penalising and reducing corrupted activities (Ibid).

These examples cited above are here to illustrate the indirect duties imposed on corporations and/or the recognition that corporations essentially have some kind of personality under international law, a personality that gives them certain rights but also duties to respect and comply with some international law provisions. Besides, there is a series of developments in the international legal arena that directly oblige enterprises to comply with human rights standards.

Although, as stated, it was not until the last decade that more significant efforts were made, in the mid-1970s, the UN Commission on Transnational Corporations, created by the UN Economic and Social Council through its Group of Eminent Persons, held meetings with the aim of discussing the necessity to create Codes of Conduct for corporations (M. Monshipouri, C. Welch, Jr. and E. Kennedy, 2003). Three broad objectives set by the UN General Assembly guided the work of this Commission (UN Centre on Transnational Corporations, 2003). Their focus was to understand the political, economic, social, and legal effects of MNC activity -especially in developing countries-, to promote the positive contributions of MNCs to national development goals and world economic growth while decreasing and eliminating their negative effects, and to strengthen the negotiating capacity of host countries and MNCs, in particular of developing countries (Ibid). In spite of considering relevant topics such as the need for and the nature of codes of conduct and the role MNCs played in the international economic and political arena, the Commission did not accomplish great achievements and the topic of human rights and MNCs was not in its main agenda (M. Monshipouri, C. Welch, Jr. and E. Kennedy, 2003).

However, with the increased international attention and concerns about corporate human rights abuses in the 1990s, the international community, led by the United Nations, addressed the issue again by creating the Global Compact, officially launched in July 2000 (M. Monshipouri, C. Welch, Jr. and E. Kennedy, 2003). The Global Compact “is a strategic policy initiative for businesses that are committed to aligning their operations and strategies” and consists of Ten Principles in the areas of human rights, labour, the environment and anti-corruption inspired and guided by the Universal Declaration of Human Rights, The International Labour Organization's Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on

Environment and Development and The United Nations Convention Against Corruption (UN Global Compact, 2011).

Although the Global Compact sets out its guidelines for corporate practices in ten principles that encompass the most important aspects of social and environmental corporate impact, the principles are yet too general in terms of content and objectives. Also, they are not binding on the participants and stakeholders, leaving any kind of commitment up to their will and according to their particular interests. However, we must not detract from its potential impact on corporate behaviour and persuasion for compliance²⁴. Instead, we must raise their global importance and build from them a stronger order of rules.

During 1976, around the same time as the UN Commission on Transnational Corporations was created, the Organisation for Economic Co-operation and Development created The Guidelines for Multinational Enterprises (Guidelines) which “constitute a set of voluntary recommendations to multinational enterprises in [...] areas of business ethics [...], human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation” (OECD (b), 2011). From their initial adoption the OECD Guidelines have been updated four times, the last one being in 2011, in order to fulfil the needs of the changing world order (Ibid). The 42 adhering governments²⁵ of The Guidelines are committed to promoting its principles and observance among multinational enterprises operating in or from their territories (Ibid). The Guidelines are very complete in content and for a long time they were believed to be the most prominent multilateral document on various aspects of corporate responsibility and the role of international investment (J. Letnar Černič, 2008). Also, they used to be the only corporate responsibility instrument formally adopted by state governments (Ibid).

Despite the fact that the OECD Guidelines consider that States have the primary responsibility for improving the legal and institutional regulatory framework, they still directly impose duties on corporations in accordance with “principles and standards of good practice consistent with applicable laws and internationally recognized standards” (OECD Guidelines, 2011, I.1.). While these principles are legally defined as mere recommendations, the language used in the text and the existence of monitoring mechanisms to follow up States’ compliance creates a notion of obligation. Yet, the Guidelines actually go no further in the human rights field than the statement asserting that corporations should “[r]espect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” (OECD Guidelines, 2011, I.1. and S. Ratner, 2001). At the same time, the Guidelines and the

²⁴ There are over 8.000 members in 135 countries, for more information go to <http://www.unglobalcompact.org/>

²⁵ 34 countries are OECD members, while 8 are just signatories to the principles (OECD (b), 2011).

commentaries do not give sense of which human rights are included within the previous statement and use an ambiguous language that makes it difficult to understand the scope and extent of the obligations established therein (S. Ratner, 2001). Nonetheless, it is relevant to acknowledge that the Guidelines have been adopted by all of OECD members and eight non-members and, therefore, reach most of the largest corporations in the world because they generally belong to developed countries in the global north, such as the United States, France, Germany, Japan and the United Kingdom -all OECD members- (J. Letnar Čerňič, 2008).

The list of soft-law developed around human rights and corporate responsibility continues. In 1977 the International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, later amended in November 2000 (S. Ratner, 2001 and A. Clapham, 2006). The Declaration contains principles of relevance to both multinational and national enterprises and recommends their observation to governments, employers and workers' organisations on a voluntary basis (A. Clapham, 2006). In addition, the Declaration reflects binding obligations and thus, some provisions have normative value, such as the one specifically referencing human rights through the obligation to respect the International Bill of Rights (Ibid). Along with this instrument, all of the ILO Conventions and recommendations -even if not-binding in their entirety or if they only impose obligations on States- are relevant because they are adopted through a tripartite system where all interested groups are represented in the ILO's governing body: governments, industry and labour (S. Ratner, 2001). The ILO is the only international organisation where all equally interested groups have equal voice and vote, consequently bringing balance and representation to the debates and signing of the conventions. For the reasons explained before, the ILO's conventions related to labour issues and human rights such as child labour, human trafficking, forced labour, discrimination in employment and occupation, and equality of migrant workers, are relevant to the field of corporate responsibility. If corporations were able to discuss, express their opinions and vote for the adoption of an instrument, that particular instrument should be also binding on them.

The latest soft-law principles recently adopted by the international community, once again led by the UN, are the long and widely awaited Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, written and presented by the UN Secretary-General's Special Representative on Business and Human Rights, Professor John Ruggie, and endorsed by the UN Human Rights Council on 16 June 2011. Professor Ruggie started his work in 2005 and put forward a draft of the framework in 2008, which was unanimously accepted by the UN Human Rights Council and adopted by public and private actors (ETI, 2011). The Guidelines consist of 31 guiding principles divided into three sections, each one based on one of the three core principles: (1) protect, which involves the "State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and

adjudication”; (2) respect, which establishes “the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others” and to address the adverse impacts they could cause; and (3) remedy, which generates the States’ and businesses’ obligation to provide to victims with greater access to effective remedy, both judicial and non-judicial (UN Human Rights Council, 2011 17/31, p. 4). Despite being the first international instrument directly specifying business’s obligations towards human rights, Ruggie’s Guidelines have received extensive international criticism, especially from human rights advocates. Although a detailed analysis of the Guidelines and their faults will require an entire different research study, it is important to highlight the main existing errors in order to establish where we stand in the legal evolution regarding human rights and multinational corporations. More importantly, identifying these errors will help determining where each actor of the international community stands, as they respond to very different political and economic interests.

The European Centre for Constitutional and Human Rights pointed out in its position paper relevant concerns regarding the content and approach of the Guidelines which, overall and in the words of ECCH representatives, undermine “all efforts to strengthen corporate responsibility by proposing a re-statement of rules which is under-inclusive, weak and—in essential parts—of doubtful utility” (ECCH, 2011, p. 2). Mainly, the Guidelines fail to properly address the issue of extraterritorial responsibility of States (ECCH, 2011). First, they fail to create the possibility for future extraterritorial responsibility norms (Ibid). Secondly, they hardly encourage home States to regulate business enterprises’ respect for human rights abroad and they do not recognise the home States’ responsibility to provide access to remedy (Ibid). In short, the situation of the home States seems to remain exactly as it was before the creation of these Guidelines. Furthermore, the Guidelines also fail to specify the criminal and civil law duties of corporate directors, which constitute a key element to fostering business respect for human rights (Ibid). Most importantly, the Guidelines do not introduce any form of control or compliance mechanisms in order to enforce the principles therein, a problem which, as mentioned, has generated considerable disagreement among scholars regarding the nature of the responsibility of multinational corporations. In conclusion, the Guidelines contain weaker human rights standards than those already existing in the international legal framework; their broad rejection of corporate duties under international law is not a re-statement of current international law, but a contradiction of existing opinions as to the unresolvedness of the issue, and they do not strongly contribute to promote the ‘protect, respect, and remedy framework’ (Ibid and Human Rights Watch, 2011).

Although it is true that these principles are only guidelines of international law and have no binding authority, if followed and incorporated by the majority of States they could become customary law and, thus, become binding on the international community members. Nonetheless, beyond this discussion, the criticisms mentioned

reflect major flaws within these guidelines; flaws that need to be removed to create a legal system consistent with the goal of protecting individuals from human rights violations committed by MNCs.

However, we should not downplay each of the soft-law instruments cited *ut-supra*. The international community has been slowly coming to recognize and assume the direct human rights obligations of multinational corporations. The trends in behaviour, opinions, and in some actions show that even “the orthodoxy now accepts that non-State entities may enjoy forms of international personality” and thus have human rights responsibilities (S. Ratner, 2001, 475). In 2001, Steven Ratner wrote that “[i]n reviewing recent trends, one discovers that international law has already effectively recognized duties of corporations” (Ibid). And, as shown, from then to now there have been some advances in the international doctrine and the legal interpretations of existing laws.

Yet, the international protection of individuals against violations of human rights in the hands of multinational corporations is weak, it is full of non-authoritative instruments that only through wide interpretation could be found to be binding on corporations. Great efforts investing time, money and other resources have been made in researches that ended only in the absurd repetition of principles already expressed several times in the international arena. Academics and international organizations involved in the drafting of obligations cannot seem to overcome certain barriers related to the international personality of corporations, such as defining which specific human rights corporations must comply with, clarifying the status of certain rights under the ICESCR which are not directly affected by corporations, determining control and enforcement mechanisms, and clarifying issues regarding remedies, among others.

Chapter VI

Conclusions

Human rights law was developed to universally protect the individual and its dignity from abusive States; from its origins until now it has undergone major changes and has evolved as the circumstances required. However, this evolution is not sufficient to protect individuals from new international non-State actors, especially multinational corporations, and the infringement of their human rights. Today, the world faces new important economic and social challenges, and human rights law cannot be oblivious to them.

A State's territorial responsibility has proven to be insufficient for the protection of human rights, since new forms of globalized political, financial and economic relations have arisen, of which many involve the participation of multinational corporations. Thinking that only the State in which human rights are violated should respond to those violations is a simplistic and anachronistic notion which severely limits the capacity of human rights law to effectuate positive changes worldwide (Howland, 2008). The entire international community has an obligation to ensure that human rights are protected, and must guarantee that the States directly or indirectly involved in violations are made accountable. Each State must respond in proportion to the kind of intervention it had in the violation committed. In the case of MNCs' wrongful behaviour, there must be a concurrent responsibility between the home and host States, depending on the circumstances.

Moreover, the burden of human rights responsibility must be higher on developed States. Because developed and industrialized nations set the course and lead the changes brought about by the phenomenon of globalization, they must be responsible for the impacts they produce on human rights, such as the negative impacts brought by their multinational corporations acting in developing countries. Furthermore, industrialized States are usually the home States of the biggest MNCs operating across the world and, as such, have the tools and resources to prevent them from committing human rights abuses. Finally, developed States could also use those resources to first determine a country's social and economic situation and the possible impacts an investment could have on that country.

However, even State responsibility alone, whether territorial or extraterritorial, is not sufficient. International law must contemplate the possibility of obligations falling on other actors, such as the aforementioned multinational corporations. If MNCs have the ability and freedom to guide and modify the course of global economy and the lives of many people around the globe such as States do, they should also be accountable for and obliged by the same human rights laws imposed on States. Mahmood Monshipouri, Claude Welch and Evan Kennedy's opinion similarly establishes that because MNCs have gained powers traditionally conferred only to

states, they should perhaps be held to the same standards that international law presently imposes upon states (2003).

As explained before, international law has already accepted regulatory frameworks for some forms of corporate misconduct, such as the ones punishing and preventing corruption and environmental harm. Moreover, soft-law and general principles directly applicable to corporations have been lately created and launched into the international arena in order to make human rights mandatory for corporations. And, even domestic courts' decisions, in particular from the United States of America under the Alien Tort Claims Act, also indicate the existence of international human rights duties incumbent to corporations.

However, none of the international duties directly imposed on corporations have a binding nature nor are indicative of what the world currently needs. The lack of legally enforceable standards, of monitoring and enforcement mechanisms, and of clarity about the meaning of many of the standards themselves, give very little validity to the corporate duties' principles developed until now (Human Rights Watch, 2011). Furthermore, even if national laws recognise the human rights responsibilities of MNCs, not all countries have internal laws favourable for aliens to present human rights claims.

Consequently, international cooperation must work in the construction of an international system of instruments covering all different actors, especially MNCs, and their responsibilities regarding human rights, and must also create proper remedies and enforcement mechanisms. In the process of achieving a complete and comprehensive international order for the protection of human rights equally, each social actor must collaborate in the promotion of corporate accountability and incorporation of international human rights law in national legal systems. States, especially developed ones, should ensure that their national laws facilitate access to justice by those aliens whose rights have been violated by multinational corporations. Additionally, they must also aid in the creation of stronger and more transparent policies and laws in developing countries, as well as they should help to promote the rule of law and the independency of the justice system. Industrialised States must also carefully analyse the social and economic situation of a developing country and the impact an investment could have on their inhabitants, human rights. Moreover, they should not benefit from the host country's weaker position, internal conflict or possibly corrupted government.

Furthermore, NGOs, human rights defenders, labour leaders and all civil society organisations, whether local or international, should raise public awareness about the consumption of goods produced by companies violating human rights, and should continue to advocate for greater social and environmental responsibility. In consequence, promoting greater human rights responsibility for corporations is not only the isolated work of States or international organisations, but of every organ of society, as mentioned within the provisions of the International Bill of Rights. Once

this has been achieved, we will all be able to benefit from the construction of a more equal global society.

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