The Attribution of Extraterritorial Liability for the Acts of Private Parties in the Inter-American System: Contributions to the debate on corporations and human rights

Daniel Cerqueira

Senior Program Officer at the Due Process of Law Foundation

Introduction

In recent decades, supranational human rights bodies have developed a number of standards on the attribution of State responsibility for the acts of private parties. Although most of those standards are related to violations perpetrated by individuals operating as part of a para-State organization (e.g., paramilitary groups), there have been recent developments regarding the conduct of other categories of individuals, including corporations, that benefit from State acts or omissions. In the absence of an international treaty specifically designed to regulate violations committed by corporations, it has been the international human rights bodies that have sought to interpret the instruments currently in force with respect to the obligations of host States—and, to a lesser extent, of home States—for the activities of corporations.

To date, the most tangible outcome of the discussions in inter-governmental forums on corporations and human rights is the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011. In June 2014, a open-ended working group was created within the Council, the outcome of which is yet to be seen. Its mandate is to draft a binding treaty on "human rights and transnational corporations and other business enterprises." In spite of these recent developments in UN political bodies, it is its thematic rapporteurships and human rights treaty bodies that have contributed more to the debate on corporations and human

rights. One of the most important aspects of that debate is the extraterritorial liability of the home States of corporations that commit violations, whether directly or through corporate policies that acquiesce in the violations committed by their subsidiaries in third countries.

In contrast to the progress made by the UN Human Rights Council, the debates in the Permanent Council and other political bodies of the Organization of American States (OAS) are still at an early stage. In addition, the bodies of the Inter-American Human Rights System (IAHRS) have not issued specific decisions on the extraterritorial liability for human rights violations arising from the acts of corporations. Accordingly, this essay seeks to examine the aspects of the normative and jurisprudential framework of the IAHRS that are most relevant to the analysis of the international responsibility of the home States of corporations that commit human rights violations in third countries.

Obligation to respect and guarantee human rights as it pertains to acts of private parties under international human rights law

As a general rule, the provisions of the inter-American instruments regulating the obligations to respect and guarantee[1] human rights are worded similarly to those of other regional systems and the universal system. Like the UN's Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man does not contain a general clause on the obligation to respect and guarantee rights. Such general clauses emerged as a trend in human rights instruments especially in the 1960s. So, while the International Covenant on Civil and Political

[1] For the purposes of this essay, it is not necessary to provide an exhaustive definition of the obligation to guarantee rights. Suffice it to say that it involves the State duty to prevent, investigate, and punish human rights violations, as well as to provide the appropriate reparation mechanisms.

Rights (1966) and the American Convention (1969) contain introductory provisions with specific language about those obligations, the first article of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is much more limited, alluding only to the duty of respect and omitting the word "guarantee."

Despite the language in the international instruments, the approach of international human rights bodies to State obligations has been based on three main elements: respect, protect, and guarantee. The obligation to respect rights goes back to the liberal constitutionalism of the first half of the 19th century, whereby governments were required to abstain from violating the fundamental freedoms of citizens. Gradually, that abstention-based paradigm was supplemented by the obligation to protect and guarantee civil and political rights, as well as economic, social, and cultural rights. The paradigm later expanded to include the State obligation to take positive legislative, judicial, or other measures to give effect to human rights.[2]

In the constitutional sphere, the doctrine of the *Drittwirkung der Grundrechte* came to support the duty to protect and guarantee fundamental rights, not only in relationships between States and individuals, but also among private parties. Developed in the late 1950s by the German Federal Constitutional Court, the doctrine would influence the judicial branches of various States founded on the constitutional rule of law. In the international sphere, while the European Court

[2] An indication of this trend in positive international law can be found in the African Charter on Human and Peoples' Rights (1980), Article 1 of which specifies that the Member States "shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."

of Human Rights (ECHR) tacitly began to assimilate the doctrine of the *Drittwirkung* in the 1980s,[3] other supranational bodies would use a very similar rationale decades later.[4]

In the IAHRS, the Inter-American Commission on Human Rights (IACHR) has recognized that the duty to investigate human rights violations by private parties arises from both the American Convention[5] and the American Declaration.[6] The *erga omnes* nature of the obligations to protect and guarantee human rights has been reflected in the case law of the Inter-American Court since its earliest decisions,[7] and has been expanded in the judgement in *Blake v. Guatemala*.[8] In Advisory Opinion No. 18/03, on the legal status and rights of migrants,[9] the Inter-American Court referred expressly to the so-called "horizontal effect of human rights" in evaluating the obligation of States to guarantee the right to equality and non-discrimination in the relationship between employers and migrant workers. It follows that States parties to the IAHRS are obliged to take positive measures to guarantee human rights, including in relation to their actual or potential violation by private parties.[10]

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[3] See, e.g., ECHR. *Young, James and Webster v. The United Kingdom*, 13 August 1981; *X and Y v. Netherlands*, 26 March 1985. For a detailed explanation of the doctrine of the *Drittwirkung* and its incorporation into the case law of the ECHR, see Eric Engle, "Third Party Effect of Fundamental Rights (Drittwirkung)," *Hanse Law Review* 5, (2009): 165–73. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481552.

[4] See, e.g., UN. Human Rights Committee. (1999). *William Eduardo Delgado Páez v. Colombia*, CCPR/C/39/D/195/1985, July 12, para. 5.5 (for failing to meet its obligation to prevent murders in cases where there is sufficient evidence of risk to life); CEDAW. (2005). *Ms. A.T. v. Hungary*, January 26, para. 9.3 (for failing to meet its obligation to guarantee the appropriate structures and legal protection to prevent cases of domestic violence against women).

[5] IACHR. *Simone André Diniz v. Brazil*. Case No. 12.001. Merits. Report No. 66/06, October 21, 2006, para. 101.

[6] IACHR. *Jessica Lenahan (Gonzáles) et al. v. United States*. Case No. 12.626. Merits. Report No. 80/11, July 21, 2011, para. 130 (establishing that the States can be held responsible for violations of their duty to investigate and punish cases of domestic violence under the American Declaration).

[7] I/A Court H.R. *Case of Velásquez Rodríguez v. Honduras*, July 26, 1988, para. 176.

[8] I/A Court H.R. *Case of Blake v. Guatemala*, July 2, 1996.

[9] I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003, paras. 140, 147 and 150.

[10] For an analysis of the evolution of the case law of the Inter-American Court with respect to the State obligation to guarantee human rights in relationships among private parties, see Javier Mijangos y González, Indret

Extraterritorial liability in IAHRS case law

Through its essential function of monitoring human rights, the IACHR has made reference since the 1980s to violations by a particular State in the territory of others. In its 1985 *Report on the Situation of Human Rights in Chile*, for example, the IACHR addressed the murder of two high-ranking officials of Salvador Allende's government by National Intelligence Bureau (*Dirección de Inteligencia Nacional*, DINA) agents in the United States and Argentina.[11] Similarly, the IACHR noted the creation by Surinamese State agents of a climate of threats and harassment against Surinamese citizens in the Netherlands.[12]

Within the framework of the petition and case system, there are two scenarios in which the IACHR has addressed State responsibility for acts committed abroad: (1) when the acts or omissions have an impact outside the territory of the respondent State;[13] or (2) when the person or alleged violator of an international obligation is under the authority or effective control of the respondent State.[14] Accordingly, the IACHR has established that both the American Declaration[15] and the American Convention[16] have extraterritorial application with respect to acts of military occupation, military action, or detention.

Revista para el Análisis del Derecho, *The doctrine of the Drittwirkung der Grundrechte in the case law of the Inter-American Court of Human Rights*. Barcelona, January 2008. Available at: http://www.indret.com/pdf/496_en.pdf.

[11] IACHR. *Report on the Situation of Human Rights in Chile*. Chapter III, The Right to Life, subsection C. Executions Ordered by War-Time Military Courts. OEA/Ser.L/V/II.77, rev.1, May 8, 1985.

[12] IACHR. *Second Report on the Situation of Human Rights in Suriname*. Chapter V, Freedom of Movement and Residence, subsection E. Special Considerations: Terrorist Attacks on the Surinamese Exile Community, OEA/Ser.L/V/II.66.Doc. 21, rev.1, October 2, 1985.

[13] See IACHR. (1998). *Saldaño v. Argentina*. Report No. 38/99, paras. 15-20 (supporting the assertions made in decisions of the European Court and Commission); IACHR. *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia*. Inter-State Petition PI-02. Report on Admissibility No. 112/10, October 21, 2010 ("the States not only may be held internationally responsible for the acts and omissions imputable to them within their territory … human rights are inherent in all human beings and are not based on their citizenship or location … each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another state but subject to the control of its agents.")

[14] See IACHR. (1998). *Saldaño v. Argentina. 1998 Annual Report*. Report No. 38/99, paras. 17-20.

[15] IACHR. *Armando Alejandre Jr., et al. v. Cuba*. Case No. 11.589. Report No. 86/99, September 29, 1999; IACHR. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), March 12, 2002.

Although the OAS Charter establishes that transnational corporations are subject to the laws and jurisdiction of the courts of the countries in which they operate,[17] no decisions have been issued within the petition and case system in which IAHRS bodies have established criteria for attributing State responsibility for the conduct of corporations within the borders of third countries. Under current inter-American standards, the acts of corporations abroad are not considered directly attributable to their State of origin, unless those companies perform government functions with the support and cooperation of the State.[18] In spite of that gap, the standards already developed on the obligation to respect, protect, and guarantee rights in relation to the acts of private parties, in addition to more specific decisions on extraterritorial liability issued by other international legal bodies, make it possible to rule out a merely territorial definition of jurisdiction.

Some international courts have allowed for exceptions to the rule that private entities are distinct from the State in cases where a government establishes a policy of absolute control over an industry,[19] or when the corporation exercises official powers in conducting the activity for which it has been awarded a concession.[20] In addition, there seems to be some leeway in international law for the attribution of responsibility that requires more in-depth analysis of the concepts of: (i)

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[16] IACHR. *Franklin Guillermo Aisalla Molina (Ecuador) v. Colombia*. Inter-State Petition PI-02. Report on Admissibility No. 112/10, October 21, 2010.

[17] Article 36 of the OAS Charter establishes that "Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries."

[18] James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002), p. 112.

[19] *Philips Petroleum Co. Iran v. Iran, et al.* Iran-U.S. C.T.R. 1989, paras. 91-100 (explaining that the government of Iran assumed complete control of the petroleum industry, including a policy whereby the National Iranian Oil Company would sign petroleum contracts on the government's behalf).

[20] I/A Court H.R. *Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149.

support, acquiescence, or tolerance of the acts of private parties; and (ii) the link between the international violation and the authority of the respondent State.[21] With respect to the first element, there are several precedents in the IAHRS that, although they refer to support for or acquiescence to violations committed within the jurisdiction of the respondent State,[22] could be applied to violations perpetrated in the territory of other countries when the support or acquiescence comes from the respondent State. As for the nexus between the acts of private parties and the home State, the IAHRS could find support in the progress made in the European system, where the ECHR has held that the tolerance by a State's authorities for private conduct that violates the rights of third parties in another country's territory could give rise to responsibility of the home State.[23]

Final considerations

Although the international framework for the protection of human rights was designed in a historical context in which corporations did not play a leading role in human rights governance, we can now say that countless human rights violations are committed thanks to the direct acts or omissions of transnational corporations. The possibilities for human rights violations in the corporate sphere are probably more varied and potentially as serious as the ones that tend to be perpetrated by State agents. Under these conditions, international human rights bodies have sought to develop new interpretive guidelines from the instruments currently in force with a view

[21] IACHR. Report No. 39/00, Case 10.586, *et al.* Extrajudicial Executions, Guatemala, April 13, 2000, para. 586. ("The judiciary proved unwilling and unable to discharge its role in identifying, prosecuting and punishing those responsible. Where such a practice, attributable to the State or with respect to which it acquiesced, can be established, and the particular case can be linked to that practice, that linkage further defines the nature and scope of the claims raised, and aids in establishing the veracity of the facts alleged"); I/A Court H.R. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 126.

[22] I/A Court H.R. *Case of Ríos, et al. v. Venezuela*, January 28, 2009.

[23] ECHR. *Cyprus v. Turkey*, 10 May, 2001, para. 81.

to evaluating new situations in which the role of corporations and their home countries is key in addressing the complexity of the violations committed by corporations.

The way in which IAHRS bodies have approached the content of the obligations to protect and guarantee human rights, and certain decisions that acknowledge exceptions to the merely territorial definition of jurisdiction, provide some clear standards that could be used in the analysis of violations committed by corporations that are encouraged by the policies, practices, or omissions of their home countries. But in order for that normative and jurisprudential framework to provide effective responses to the increasingly common phenomenon of violations by transnational corporations, it is crucial for the IACHR to prioritize the processing of individual petitions that allege extraterritorial liability, and to address the issue by means of all the tools at its disposal (protection, promotion, and monitoring).