

## Corporate Accountability and the Inter-American Human Rights System

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Irresponsible activities by corporate actors have severely affected human rights of persons worldwide. The peoples of the Americas have not been the exception. In our region, the Inter-American System has received information revealing this pressing problem mostly through the negative effects of extractive activities<sup>1</sup> performed by transnational corporations and the contribution of corporate actors to criminal activities.<sup>2</sup> This problem has been present for several years and its persistence today is notable and acknowledged by governments, corporations, and civil society alike. Seeking to reaffirm its historically relevant role in the promotion of the human rights movement, the Inter-American System has also started to address this issue through its various mechanisms.

The American region has a longstanding commitment to justice and human rights. This entrenched humanitarian identity is evident through the full institutionalization of human rights norms. The states of the Americas have contracted explicit obligations enshrined in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man and the various treaties conforming the Inter-American *corpus iuris*.<sup>3</sup> Furthermore, they also created international institutions with the authority to interpret these instruments and act whenever a state had failed to meet its obligations: the Inter-American

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<sup>1</sup> See DUE PROCESS OF LAW FOUNDATION, THE IMPACT OF CANADIAN MINING IN LATIN AMERICA AND CANADA'S RESPONSIBILITY: EXECUTIVE SUMMARY OF THE REPORT SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (2014), [http://www.dplf.org/sites/default/files/report\\_canadian\\_mining\\_executive\\_summary.pdf](http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf).

<sup>2</sup> See Press Release, Chiquita Brands, Chiquita statement on agreement with U.S. Department of Justice, (Mar. 14, 2007), <http://phx.corporate-ir.net/phoenix.zhtml?c=119836&p=irol-newsArticle&ID=974081&highlight>.

<sup>3</sup> This concept includes the Inter-American Convention to Prevent and Punish Torture; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "San Salvador Protocol" the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará"; the Inter-American Convention on Forced Disappearance of Persons; the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities; the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance, and the Inter-American Convention Against All Forms of Discrimination and Intolerance.

Commission on Human Rights and the Inter-American Court on Human Rights. Due to this delegation, the content of these treaties now includes an extensive catalog of human rights expectations, classified according to a duty to either respect or ensure human rights.<sup>4</sup>

Currently, the fragmentation of international law and globalization has contributed to deconstruct many of the assumptions sustaining the institutional framework crafted in the last century.<sup>5</sup> Consequent to this change in international law, the Inter-American System has also evolved and adapted to stand up to the new challenges of our times.<sup>6</sup> The Inter-American System is aware of the need to discuss and address corporate responsibility in human rights violations. Therefore, it has sought to open forums of discussion and frame situations in such a way as to contribute to forging a solution. One of the most recent efforts in this sense was the Inter-American Commission's call for a public hearing dealing with the extraterritorial jurisdiction of Canada over the effect of Canadian mining companies conducting extraction in Latin America.<sup>7</sup> Under this notable panorama of institutional willingness, the question then arises as to whether the Inter-American legal and political framework would be a useful forum to seek accountability of corporate executives.

Regarding this particular matter, it is evident that the Inter-American System would have to look at the issue mostly through the lenses of the state duty to "ensure" human rights—except when the corporation is a parastatal company or public enterprise in which case the duty to "respect" also arises—and would have to exert its authority under this approach. Following this perspective, the Inter-American Court has sought to demonstrate its awareness of the emerging problems of corporate responsibility and has addressed the problem of the extent of its jurisdiction by looking into the public or private nature of the corporate actor. According to its precedents, the Court has made clear that it has authority to adjudicate over human rights violations committed by executives of public corporations<sup>8</sup>

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<sup>4</sup> According to this classification, expectations deriving from the duty to respect place the state in a direct position to act or refrain from acting in order to meet international obligation. On the other hand, expectations emanating from a duty to "ensure" place the state in the indirect position to create the general conditions that would enable persons to assert their rights before third parties. *See Velásquez Rodríguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); *see also* Eduardo Ferrer MacGregor & Carlos M. Pelayo, *La Obligación de "Respetar" y "Garantizar" los Derechos Humanos a la Luz de la Jurisprudencia de la Corte Interamericana*, 10 *Estudios Constitucionales*, 141 (2012).

<sup>5</sup> *See* Martii Koskenniemi (Chairman of the Study Group of the Int'l Law Comm'n), *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

<sup>6</sup> The System performs this task through its various contentious, protection and promotion mechanisms. The contentious system is composed of the Case and Petitions system in charge of both the Commission and the Court. The protection mechanism is composed of the precautionary and provisional measures decreed by the Commission and the Court respectively. The promotion mechanisms under the charge of the Commission consist of the thematic and country reports, press releases and public hearings.

<sup>7</sup> *See* Hearing on the Impact of Canadian Mining Activities on Human Rights in Latin America, Inter-Am. Comm'n H.R., Rec. of the 153<sup>rd</sup> Period of Sessions (Oct. 28, 2014).

<sup>8</sup> As the Inter-American Court has established that a Peruvian publicly owned enterprise (SEDAPAL) incurred in violations of the rights to property of its workers through a modification of the social security regime to which they are enrolled. *See* *Abrill Alosilla and others v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 223 (Mar 4, 2011).

or corporations assuming the provision of public services.<sup>9</sup> In cases where private corporations commit atrocities, the Court has reaffirmed a state's responsibility to investigate and prosecute those responsible for criminal activities.<sup>10</sup>

The Inter-American Commission has maintained this approach. For instance, by granting precautionary measures to Honduran *Campesino* Leaders of the Bajo Aguán region, after the information provided by the petitioners suggested that the beneficiaries needed protection from a "death squadron" of private security forces hired by corporate actors acting in conjunction with public officials. In that case, the Commission reaffirmed the state obligation to ensure the life and personal integrity of the affected groups.<sup>11</sup> Similarly, through its thematic reports, the Commission received information suggesting that executives of Colombian public corporations played a role in designing the "Dragon Operation" aiming to eliminate syndical leaders.<sup>12</sup> Moreover, the Commission is also looking into two cases of human rights violations deriving from environmental impact caused by corporations in the Peruvian communities of Oroya and San Mateo de Huanchor.<sup>13</sup> Similarly, the Commission has recently issued an admissibility report in a case that alleges violation of indigenous people's rights by corporate actors.<sup>14</sup>

Following this overall tendency, it seems highly likely that the Inter-American System will be ever more open and disposed to address claims exposing criminal responsibility of corporate executives, or liability of corporations themselves. The interpretation of the American Convention on Human Rights as a living instrument<sup>15</sup>, along with the Inter-American openness to import universal standards<sup>16</sup> may present ways for victims and their representatives to formulate claims under the more recent documents codifying the responsibility of corporate actors under international law.

While the Inter-American System will not be able to establish the direct responsibility of an individual for the commission of international crimes, it could interpret the American

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<sup>9</sup> For instance, by establishing the responsibility of the Minchala Private Health Clinic in violating the right to personal integrity of Ms. Suarez Peralta. *See* Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 261, ¶ 154 (May 21, 2013).

<sup>10</sup> "The Court notes that it has insufficient evidence to allow it to conclude that private companies could have been implicated in the facts of this case, and that there had been negligence in investigating this supposed participation. In any case, it is for the competent domestic authorities to continue investigating whether this hypothesis is relevant to the facts of the case and, if so, to take the corresponding decisions". *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270, ¶ 378 (Nov. 20, 2013).

<sup>11</sup> *See* Campesino Leaders of Bajo Aguán, Honduras, Inter-Am. Comm'n H.R., Precautionary Measure No. 50/14 (2014).

<sup>12</sup> *See* Second Report on the Situation of Human Rights Defenders in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II. doc. 66 ¶ 273 (Dec. 31 2011).

<sup>13</sup> *See* La Oroya Community v. Peru, Petition 07/270, Inter-Am. Ct. H.R., Report No. 76/09 (2009); *also* Community of San Mateo de Huanchor and its Members v. Peru, Petition 03.504, Inter-Am. Ct. H.R., Report No. 69/04,(2004).

<sup>14</sup> *See* Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala, Petition 07/1566, Inter-Am. Ct. H.R., Report No. 20/14 (2014).

<sup>15</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct of H. R., (ser. A) No. 16, ¶ 114-15 (1999)

<sup>16</sup> *See* Gerald L. Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 Eur. J. of Int'l L., 1, 101, 109-11 (2008).

Convention and the international obligations of states in such a way as to prevent impunity for mass atrocities or other type of human rights violations committed by corporations and its executives. By monitoring states' compliance with their international obligations, the System could ultimately contribute to the objectives of justice. It is likely that the Inter-American System could promote both crime prevention and criminal prosecution for corporate liability.

Concerning the promotion of prosecution, both the Inter-American Commission and the Court emphasize the duty of states to investigate violations of human rights by private parties. Therefore, they could require a state to exercise its jurisdiction over particular criminal acts falling under its jurisdiction according to international law standards. Moreover, these bodies could also require domestic courts to prosecute and conduct diligent investigations against particular corporate executives suspected of being responsible for mass atrocities. In the case of transnational activities, the Inter-American System could also push states to assert their criminal jurisdiction over executives even if they reside elsewhere. The result of these recommendations or resolutions would be shifting the avenues pressing for bringing cross-border justice.<sup>17</sup>

Similarly, regarding crime prevention, the bodies of the Inter-American System could lead states to tighten domestic controls of corporate activities. While pushing for this preventive effect, the Inter-American system could request the respective states to regulate the activities of their companies abroad, and the domestic activities of foreign companies.<sup>18</sup> This characteristic becomes especially relevant in cases where both the matrix and the subsidiary offices of a transnational corporation are situated in the American region. The deterrent effect brought by more stringent regulation could also increase by promoting mechanisms in the Inter-American System itself. The press releases, public hearings and thematic reports of the Commission could assist advocating strategies seeking to produce an indirect shaming effect pressing jointly upon a particular company and a state.

Furthermore, the system would also be in a position to provide victims with considerable relief, as its integral approach to reparations includes not only compensation, but also measures of satisfaction and guarantees of no repetition.<sup>19</sup> Although these mechanisms would expect the state to produce the compensation, national authorities could then design domestic mechanisms to revert the costs upon corporations or its executives. Beyond this set of potential benefits, as of today the largest challenge to the Inter-American System is to develop concrete standards on the issue of corporate responsibility for human rights

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<sup>17</sup> For instance, while supervising compliance with its judgment in the *Case of Myrna Mack Chang*, the Inter-American Court has insisted that the State has the duty to end impunity and capture the responsible of the execution of Ms. Mack. By pushing for this process, the State of Guatemala has had to issue request of coordination with the office of INTERPOL in order to seek for the culprit internationally. See *Myrna Mack Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the President of the Court, "Resolves," (Inter-Am. Ct. H.R. Nov. 16, 2009), [http://www.corteidh.or.cr/docs/supervisiones/mack\\_16\\_11\\_09\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/mack_16_11_09_ing.pdf)

<sup>18</sup> For instance, the Inter-American Court has established the State duty to regulate the provision of health services by private parties, specifically referring to blood banks. See *Gonzales Lluy and others v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶ 178 (Sept. 1, 2005).

<sup>19</sup> On the reparations issued by the Inter-American System, see Inter-Am. Ct. H.R., *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1 (Feb. 19, 2008).

violations. The Inter-American jurisprudence has not had the chance to construct how states' obligations to ensure human rights are influenced by the *Guiding Principles on Business and Human Rights*. This relatively recent body of principles endorsed in 2011 by the Human Rights Council could serve to advance interpretations of the American Convention that would require states to establish a legal and institutional framework assuring that corporations and corporate executives will be appropriately regulated and supervised. The *Guiding Principles* could, for instance, develop the responsibility of states under the American Convention and/or Declaration. This would ensure that domestic legislation require transnational companies acting within the states' jurisdiction to meet domestically established requirements that aim to prevent executives from committing criminal activities.

In conclusion, the urgency to address this issue in the Americas is clear and evident. The Inter-American System, while remaining respectful to its mandate, is in a position to contribute to the solution in the different ways presented above. While the debate over corporate criminal responsibility evolves and further elaborates the adequacy of creating new international institutions or processes,<sup>20</sup> already existing institutions like the Inter-American System may still provide relief by supervising the state's obligations. Human rights mechanisms can play an important role in triggering the international legal processes aimed at prosecuting these kinds of atrocities and in providing remedies for victims. To meet its full potential and to develop more specific standards, it is expected that civil society will continue to rely on the Inter-American System's various mechanisms in order to address this pressing issue.

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<sup>20</sup> Such examples include the mechanisms proposed by other contributors to this Online Symposium. See Douglass Cassel & Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights* 29 (May 2015), <http://businesshumanrights.org/sites/default/files/documents/whitepaperfinal%20ABA%20LS%206%2022%2015.pdf>; Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (Dec. 2, 2014); Claes Cronstedt, *An International Arbitration Tribunal on Business and Human Rights* (version 5), BUSINESS & HUMAN RIGHTS RESOURCE CENTER (Apr. 13, 2015), <http://www.l4bb.org/news/TribunalV5B.pdf>.