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Women's Rights and Corporate Social Responsibility: A Case of Gender-Based Violence

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ABSTRACT

Il seguente studio si sviluppa sulla base di una premessa fondamentale da cui è impossibile prescindere. Nonostante non si possa negare che la globalizzazione abbia portato innumerevoli innovazioni tecnologiche e abbia creato le basi per un maggiore sviluppo economico e sociale in tutto il mondo, è necessario riconoscere che ha generato, allo stesso tempo, maggiore povertà e disuguaglianza, specialmente nei paesi in via di sviluppo, confutando la tesi secondo la quale tale processo avrebbe concretamente creato più benessere a livello globale (Stiglitz, 2006). In particolar modo, l'emergere di nuove potenze economiche, quali le imprese multinazionali, e la mancata regolamentazione a livello internazionale di questi nuovi attori economici hanno portato all'aumento di violazioni di diritti umani nei paesi non industrializzati nei confronti delle categorie più vulnerabili di individui all'interno delle comunità locali in cui tali imprese operano (Cernic, 2010).

La ricerca si pone, quindi, come obiettivo primario, quello di indagare se le norme internazionali esistenti in materia di diritti dell'uomo siano sufficienti ad un'adeguata regolamentazione delle attività globali delle imprese multinazionali o se risulti necessario elaborare strumenti diversi al fine di garantire il rispetto, la protezione e promozione dei diritti umani e, in particolare, dei diritti delle donne.

La scelta del tema risulta, di conseguenza, essere rilevante in funzione di un contesto socioeconomico nuovo che, sin dall'inizio del nuovo millennio, ha generato preoccupazioni in seno alla comunità internazionale riguardo all'impatto che, potenzialmente, le imprese multinazionali possono causare sui diritti delle donne. A partire dall'ultimo decennio del ventesimo secolo, la globalizzazione economica, che è stata definita da Cernic (2010) come un processo che ha progressivamente portato ad una maggiore integrazione a livello economico generando, a sua volta, una dipendenza a livello globale tra gli Stati non solo dal punto di vista politico ed economico ma anche sociale e culturale, ha dato origine a cambiamenti significativi all'interno dell'ordine internazionale. Alla base vi è il neoliberalismo il quale, fin dagli anni '80, si è imposto come logica dominante, favorendo una decisa privatizzazione dei servizi, una liberalizzazione degli investimenti che ha portato alla circolazione di merci, capitali e servizi a livello globale, ed una deregolamentazione dei mercati che ha reso possibile la delocalizzazione delle attività produttive (De Feyter, 2007). Questi tre fattori hanno dato, di conseguenza, un forte impulso allo sviluppo di quelle imprese che vengono oggi definite 'multinazionali' e al loro sbarco in nuovi mercati al di fuori dei confini dello

Stato tradizionalmente inteso (Assemblea Generale ONU, 2000). Essendo gli attori maggiormente coinvolti nelle relazioni e negli scambi internazionali, le imprese multinazionali hanno iniziato a ricoprire un ruolo sempre più importante negli scenari politico-economici a livello internazionale, sfruttando il contesto estremamente favorevole per accrescere la loro influenza e potere, riducendo parallelamente la centralità di cui gli stati-nazione avevano goduto a livello globale sin dalla Pace di Westphalia (Muchlinski, 2007).

Tuttavia, nonostante la globalizzazione abbia le potenzialità per generare innumerevoli vantaggi sia nei paesi industrializzati che nei paesi in via di sviluppo, sono stati riscontrate notevoli difficoltà nel gestire tale processo in maniera efficace (Stiglitz, 2006). In particolar modo, le attività delle imprese multinazionali, le quali tendono a considerare il profitto come l'elemento essenziale per il prosieguo ed il successo dell'azienda stessa, rappresentano un serio pericolo per i diritti umani (Cernic, 2010) e, come vedremo, per i diritti delle donne nello specifico. Le donne risultano essere, infatti, i soggetti maggiormente vulnerabili di fronte allo strapotere delle imprese multinazionali, specialmente a causa di diseguaglianze sociali e culturali preesistenti nonché profondamente radicate nel tessuto sociale (Elias, 2008). Le disuguaglianze e lo squilibrio insiti nelle relazioni di potere tra uomini e donne nella società non sono, quindi, il risultato delle loro attività ma sono, piuttosto, inerenti, da un lato, al diritto internazionale e, dall'altro, alla struttura interna delle imprese multinazionali, in cui la superiorità del genere maschile crea forme di subordinazione e dominio nei confronti del genere femminile, come hanno più volte sottolineato gli studi femministi (Connell, 1998).

Dall'analisi della Dichiarazione Universale dei Diritti Umani, del Patto Internazionale sui Diritti Civili e Politici, del Patto sui Diritti Sociali, Economici e Culturali, della Convenzione sull'eliminazione su ogni forma di discriminazione delle donna (CEDAW) e delle convenzioni che sono state elaborate all' interno dell'ambito regionale europeo, americano ed africano emerge chiaramente come la legislazione internazionale in materia di diritti umani abbia fallito nel tentativo di elaborare degli strumenti efficaci al fine di garantire un' effettiva protezione contro le continue violazioni dei diritti umani delle donne commesse da imprese multinazionali, sia a livello intergovernativo che a livello regionale. Tali strumenti sono, infatti, caratterizzati da una serie di debolezze oggettive che ne pregiudicano l'efficacia in materia di protezione di diritti delle donne da parte delle imprese multinazionali. In primo luogo, nonostante le questioni di genere siano percepite come requisiti essenziali per il raggiungimento di una parità effettiva tra uomini e donne

e per la promozione del cosiddetto *empowerment*, garantendo alle donne una migliore qualità di vita, è innegabile la mancanza di una marcata prospettiva di genere che permetta di includere adeguatamente le esperienze, gli interessi e le preoccupazioni del genere femminile all'interno della legislazione internazionale in materia di diritti umani e che viene essenzialmente imputata, da parte della dottrina femminista, ad un approccio al diritto che può essere definito *male-oriented* (Charlesworth & Chinkin, 2000). Come testimoniato dagli studi di Catharine MacKinnon in materia, la concezione secondo cui l'uguaglianza tra i due sessi corrisponda al raggiungimento da parte della donna dello stesso trattamento e degli stessi diritti dell'uomo è sostanzialmente sbagliata in quanto si sottintende che i diritti della donna debbano essere essenzialmente misurati in funzione di quelli già in possesso del sesso maschile. Di conseguenza, poiché il diritto internazionale è sempre stato basato su costruzioni di genere fisse, predefinite, culturalmente e socialmente accettate, è possibile concludere che queste ultime di fatto costituiscano il fondamento nonché una delle maggiori cause delle disuguaglianze e delle discriminazioni di cui le donne sono sovente vittime (De Vido, 2016). In secondo luogo, tali strumenti di diritto internazionale non contengono norme direttamente in capo alle imprese multinazionali, in quanto gli obblighi in essi contenuti, da cui derivano delle precise responsabilità a livello giuridico, sono esclusivamente indirizzati agli Stati. Di conseguenza, le imprese multinazionali vengono lasciate libere di operare in una sorta di vuoto a livello normativo che permette loro di non essere soggette a particolari obblighi nel campo dei diritti umani. Sostanzialmente, la persistenza di violazioni dei diritti umani delle donne da parte di imprese multinazionali può essere spiegata grazie all'assenza di un'adeguata regolamentazione in materia di diritti umani nei confronti degli attori non statali nelle sopraccitate convenzioni; pertanto, in seguito a violazioni di diritti umani, è prevista esclusivamente la responsabilità dello stato nel quale tali abusi sono avvenuti, sulla base del mancato rispetto del principio di dovuta diligenza (Kinely & Tadaki, 2004).

In seguito, la ricerca si focalizza specificatamente sugli effetti negativi delle attività delle imprese multinazionali sui diritti umani delle donne, le cui violazioni derivano da concezioni prettamente tradizionali e patriarcali sui ruoli dell'uomo e della donna all'interno delle società, e si identificano principalmente con differenze in termini di remunerazione in confronto agli uomini a parità di prestazione lavorativa, nella ridotta partecipazione delle donne nel mercato del lavoro, in disuguaglianze in termini di accesso alla proprietà privata ed, infine, nella violenza di genere (Connell, 1998). Per poter sradicare totalmente tali abusi basati sul genere, è necessario, da un lato, demolire

l'approccio strettamente maschile che caratterizza non solo gli strumenti di diritto internazionale ma anche le imprese multinazionali favorendo l'adozione del *gender mainstreaming*, ovvero di politiche volte a considerare ugualmente le esigenze del genere maschile e femminile (Elias, 2008); dall'altro, invece, bisogna elaborare meccanismi di diverso tipo, sempre con lo scopo di promuovere una condotta responsabile da parte delle multinazionali volta a rispettare ed a proteggere i diritti delle donne.

In tal senso, si fa riferimento a degli standard che mirano a promuovere la responsabilità sociale delle imprese, i quali possono essere adottati sia a livello intergovernativo da parte di organizzazioni internazionali e regionali, sia da imprese multinazionali o da organizzazioni legate ad esse. Se, in merito ai codici di condotta elaborati a livello intergovernativo, è necessario mettere in luce la base volontaria e l'incapacità di adottare norme vincolanti volte a far applicare correttamente i principi ivi enunciati, per quanto riguarda i codici di condotta elaborati a livello delle imprese, la loro adozione è subordinata alla logica inerente al cosiddetto *business case* secondo il quale le multinazionali tendono a rispettare i diritti umani delle donne nella misura in cui da ciò derivi un sostanziale guadagno a livello finanziario ed a livello di immagine o reputazione tra l'opinione pubblica (Hart, 2010). Pertanto, l'impegno a proteggere, rispettare e promuovere i diritti umani delle donne non viene concretamente percepito come importante e degno di considerazione in sé, ma la responsabilità sociale d'impresa risulta essere semplicemente un pretesto che le multinazionali sfruttano per poter operare liberamente, veicolando un'immagine positiva al pubblico, il quale appezza il loro contributo sociale in termini di uguaglianza e *empowerment* delle donne all'interno delle loro attività.

Tutto ciò è reso possibile dall'assenza di meccanismi a livello giuridico in grado di riconoscere la diretta responsabilità delle multinazionali per gli abusi che esse compiono nei confronti delle donne, sia nello stato ospitante sia nello stato in cui le imprese risultano essere domiciliate. Tale lacuna del sistema giuridico a livello internazionale, la quale non è altro che il risultato di innumerevoli tentativi mirati a stabilire una disciplina di *hard law* per regolamentare due ambiti correlati e ugualmente essenziali, quali le attività economiche delle imprese multinazionali e i diritti umani (Marrella, 2009), è particolarmente evidente nel caso di violenza di genere che abbiamo analizzato nell'ultimo capitolo, ovvero *Caal v. HudBay Minerals Inc*. Le ricorrenti sono undici donne di una comunità indigena in Guatemala le quali, in occasione di espulsioni coatte volte a garantire il proseguimento delle attività estrattive, sono state sessualmente abusate

e stuprate da parte di rappresentati del servizio di sicurezza privato di una filiale operante nel paese ma sotto il controllo della compagnia multinazionale canadese HudBay Minerals Inc. Nonostante nella maggior parte dei casi la giurisprudenza canadese avesse rifiutato di accogliere casi riguardanti la violazione di diritti umani commesse in territorio straniero da parte di multinazionali, in una sentenza senza precedenti la Corte Superiore di Giustizia dello Stato dell'Ontario ha stabilito che le mozioni presentate dagli imputati, con lo scopo di dimostrate l'inammissibilità del caso ad essere giudicato da una corte canadese, non erano accettabili e che l'azione legale iniziata dalle undici donne della comunità indigena di Lote Ocho poteva procedere al processo (ONSC, 2013), il quale si svolgerà prossimamente in Canada. Nonostante il caso sia ancora in corso di svolgimento, la sentenza emanata nel 2013 rappresenta un notevole passo in avanti non solo nel tentativo di fornire giustizia ed un adeguato rimedio per le violazioni dei diritti umani delle donne da parte di una multinazionale canadese operante nel settore estrattivo nello specifico caso esaminato, ma si tratta piuttosto di un progresso dalla potenziale portata globale nel campo del riconoscimento della responsabilità giuridica delle imprese multinazionali per le violazioni dei diritti umani compiute all'estero (Russell, 2017).

In conclusione, dall'analisi condotta nei vari capitoli della nostra ricerca, è possibile constatare che, poiché gli strumenti elaborati dal diritto internazionale sui diritti umani così come i codici di condotta sviluppati sia a livello intergovernativo che a livello delle singole imprese si sono rivelati inefficaci nell'affrontare le violazioni dei diritti delle donne da parte di attori non statali, è necessario elaborare un strumento che sia capace di creare delle norme giuridicamente vincolanti per porre fine all'impunità delle multinazionali in termini di rispetto, protezione e promozione dei diritti umani (Awori et al., 2018). Tale strumento dovrà indispensabilmente adottare una prospettiva di genere al fine di sradicare definitivamente le relazioni di potere dominanti nelle società, le quali contribuiscono a perpetuare la diseguaglianza tra uomini e donne (De Vido, 2016).

1. INTRODUCTION

The present study starts by explaining how economic globalization and human rights interact, which serves as a fundamental basis in order to deeply analyse the concept of corporate social responsibility (CSR) in relation to multinational corporations and its main implications with regard to women's rights.

The reasons behind the choice of this topic are several. First and foremost, the interest in the concept of corporate social responsibility which has become a sensitive issue in the last few decades due to the major role multinational corporations started to play on an international scale. Furthermore, the willingness to analyse an issue, namely corporate social responsibility, that has already been widely discussed and studied by providing a different perspective based on gender. Finally, the interest in analysing a concrete legal case of women's human rights violations in order to effectively understand the implications involved in judicial, social and political terms.

As a consequence of the emergence of globalisation, some concerns emerged with the crucial role that multinational corporations have achieved in the international economic system. The basic premise of this study is that multinational corporations need to respect human rights obligations enshrined in international human rights law, particularly with regard to women's human rights, and to be held responsible and accountable for alleged violations of these commitments. Therefore, the general research question underpinning this study is the following: Does the existing framework of corporate social responsibility analysed on a gender-based perspective actually ensure the respect, protection and promotion of women's rights on the part of multinational enterprises?

In turn, this concern leads to the emergence of several and more specific questions which also reveal the structure of the study. First, it is necessary to investigate whether the existing international and regional legal framework is enough to ensure the application of women's rights on the part of multinational corporations or there is a need to develop different standards due to their specific legal status. Secondly, two questions emerge: what corporate social responsibility is and whether the self-regulation of corporations through the voluntary Codes of Conduct is actually effective to eliminate gender inequalities and to promote empowerment or other kind of transnational business initiatives are needed. Finally, the last question revolves around the issue of human rights enforcement. Particularly, an inquiry is carried out to analyse how the international legal system manages to enforce corporate violations of women's human rights.

Taking these questions as the main starting point, the study aims to achieve a number of objectives. First of all, the analysis of the level of protection with regard to women's rights through the main conventions that have been elaborated at international and regional level. Then, the explanation of the nature of multinational corporations by focusing specifically on their legal status, an aspect of crucial importance for the development of the study. Thirdly, analysing how corporations' practices in the field of women's human rights are regulated at international level and the role of corporate social responsibility within this context. Finally, the investigation of arbitration and judicial mechanisms which are useful to ensure the effective enforcement of human rights on the part of multinational corporations, which historically has always represented a very demanding task (Cernic, 2010:18), and the analysis of a concrete case to display the available possibilities for women to sue a corporation in case the latter has consistently violated their rights.

In the three following sections of this introductory chapter, we will provide a description of the context that allowed the development of the discussion about the social responsibility of multinational enterprises and women's rights and a definition of the most important terms while in the last section we will provide an explanation of the nature as well as of the structure of the study.

1.1 Economic globalisation and the emergence of neoliberalism

"Globalization risks downgrading the central place accorded to human rights by the Charter of the United Nations in general and the International Bill of Human Rights in particular." (ECOSOC, 1998)

The last decades have brought about significant changes in both domestic and international environment due to the emergence of the phenomenon of globalization (Cernic, 2010:1). Globalization is generally defined as a process of intensification of connections and of creation of international networks among actors from all over the world with a growing transnational interdependence among states in political, economic and social terms (Scherer & Palazzo, 2008:3).

First, at state level, it is possible to notice the endorsement of neoliberal ideology that since 1980s started to be dominant in policymaking in Western developed countries, leading to a progressive process of internationalization of the state according to which the latter is not primarily concerned with satisfying the interests of domestic constituency but rather with complying with transnational market dynamics (De Feyter, 2007:4).

Nowadays, neoliberalism can be interpreted as the underlying logic of economic globalization. It mainly contributed to an increased integration among the different countries of the world and their economies thanks to the breaking down of domestic barriers and the development of information and communication technology that led multinational corporations to increase their power globally (Beck, 1999:15). The main sources of this power rely on the freer circulation of goods, capital and services, to the liberalisation of foreign direct investment, to the removal of capital controls and to the displacement of labour force where it is most productive (De Feyter, 2007:5). Although its overall purpose was to increase the standards of living of people all over the world by boosting the development of poor countries and supporting their participation in international markets, issues emerged with the way in which it was managed, especially by developed and industrialized countries (Stiglitz,2006:4). Consequently, these processes are ambiguous as they effectively brought about a sensational rise in wealth at a global level, but at the same time large areas of the world were left out the great flows of goods, technology and information that globalisation entailed producing impoverishment and social inequalities among different countries in the world (Ulrich, 2007:43).

Therefore, economic globalization poses some challenges to the international economic and social system as the newly appearing phenomena are transnational in scope and they cannot be managed effectively at governmental level (Stiglitz,2006:5). Consequently, new actors emerged and gained prominence, achieving greater political influence on a global scale: international organizations in general, non-governmental organizations, transnational corporations and civil society (Scherer and Palazzo, 2009:4). Particularly, transnational corporations have experienced a sensational growth as a consequence of globalization: according to the United Nations Conference on Trade and Development, their number has more than doubled between the 1990s when barely 35,000 MNCs operated worldwide and the early twenty-first century when they became almost 77,000 (UNCTAD, 2006). This led to emerging concerns with regard to the respect of human rights on the part of these non-state actors (Cernic, 2010:2).

Human rights can be defined as rights having a positive impact on society as a whole (Cernic, 2010:6); fundamental human rights of individuals are the normative expression of universal moral values that are necessary for human beings for a life with dignity (Forsythe, 2006:3). Despite human rights are considered unalienable, a moral attribute characterising each person, there is need to codify them. Originally, in the aftermath of

the American and the French Revolution, human rights were recognised only at state level and included in national policies (Forsythe, 2006:3). The actual codification of human rights into a comprehensive body of international human rights law actually began at the United Nations level in the post-World War II context of international relations. The UN Charter signed in 1945 represented the first document to recognize human rights as 'universal', but no international entity was empowered with the authority to guarantee their respect (Forsythe, 2006:38). Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, human rights have been enshrined in a number of conventions representing milestones in the process of elaboration of human rights standards entailing binding obligations for all states; for instance, it is worthwhile to mention among them the International Convention Against All Forms of Discrimination Against Women (ICEDAW) that we will further examine in the following chapter (Ulrich, 2007:39). In spite of being widely ratified, there are still some states which decided not to endorse the treaties elaborated by the United Nations and their Committees; however, they are bound by obligations involved in human rights law provided that they have become part of customary international law (De Feyter, 2007:2). A parallel development took place at regional level with the elaboration of the European Convention of Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and People's Rights (ACHPR).

Furthermore, after the end of the Cold War, the international community focused on ensuring the respect of human rights in practice as well. The International Criminal Court (ICC), on the one hand, and the European Court of Human Rights and the Inter-American Court of Human Rights, on the other, represent the most important bodies of jurisprudence, at international and regional level respectively, involved in the effort to improve legal human rights' enforcement (Ulrich, 2007:40). However, it is necessary to take into account the shift that occurred in the post-Cold war era. We moved from a state-oriented international human rights system (De Feyter, 2007:10) where human rights were conceived as norms essentially designed to ensure that states abstain from actions violating fundamental rights of the individual, to a broader conception in which human rights are interpreted as a means to achieve social justice globally (Ulrich, 2007:40) and in which violations are perpetrated by a greater variety of actors than the state. This mainly reflect the distinction between the two generations of rights, namely civil and political rights, on the one hand, and economic, social and cultural rights, on the other (Cernic, 2010). However, nowadays this distinction has been erased as the United

Nations' approach to human rights is based on a commitment to the fundamental principle set out in the Vienna Declaration and Programme of Action according to which human rights, including civil, cultural, economic, political, social, cultural rights are "universal, indivisible, interdependent and interrelated" (ECOSOC, 2000:15). This essentially paved the way for the creation of a normative framework to manage globalization in a sustainable way.

Nowadays, it seems that one of the main consequences of globalizations is the increased scope for violations of fundamental human rights on the part of multinational corporations, the new actors that have emerged in the globalised world (Francioni, 2007:245).

A corporation is generally defined first and foremost as a legal entity having a separate personality and 'limited liability', and whose main motive is profit. Moreover, it can be also described as an "economic entity operating in one or more than one country or a cluster of economic entities operating in two or more countries" (Cernic, 2010:11), independently from the legal form they assume, from whether their operations and activities take place in the home country or in a foreign country and from whether they act individually or collectively. However, for the purpose of the present study, it is necessary to recognize that the emphasis on the adjective 'transnational' or 'multinational' seems to suggest that this kind of corporations needs to be distinguished from uninational companies (Cernic, 2010:10), and to treat them as a distinct type of business enterprises (Muchlinski, 2007:8). Indeed, multinational corporations are generally defined as "non-state actors with no legal personality to bear rights or duties under treaty or customary law" (Bantekas, 2004:310). Moreover, they influence the allocation of resources at international level as they retain specific characteristics: placing productive facilities in different countries, capitalizing effectively local factors, trading across borders and between subsidiaries, making use of expertise in foreign markets and of managing their organizational organizing structure on a global level by adopting the most advantageous division of power and authority (Muchlinski, 2007:8). As in some cases, they may also result being greater in terms of economic wealth and GDP compared to the state in which they operate, multinational corporations may create specific problems in the development of economic policy in the countries where they operate (Muchlinski, 2007: 10).

Therefore, since World War II a set of human rights obligations have been assigned to states which became obviously accountable for any concrete violations; individuals have

also become accountable for severe infringement of international human rights law, such as war crimes, crimes against humanity and torture, since the establishment of International Criminal Court (ICC) in 2002. However, it is still necessary to establish whether and to what extent human rights obligations enshrined in international human rights law can also be applied to transnational corporations and other business actors (Karp, 2014:26). The main concern is linked to the opportunity for multinational corporations to exploit their comparative advantageous position to the detriment of states and of the community in which they operate. The acknowledged motive behind the activities of multinational corporations is clearly the maximisation of profit which in most cases, however, is in contrast with the respect and the enjoyment of human rights on the part of local people and communities (UN General Assembly, 2000:9). Therefore, the new context created by economic globalization in which multinational corporations have underwent a rise in both power and influence, poses a challenge to the conventional notion according to which only states and individuals can be held accountable for human rights' violations (Muchlinski, 2001:31).

In many countries, the domestic legal system provides different legal practices in order to regulate the activities and the operations of multinational corporations. However, the purpose of this study is to move away from comparative debates about domestic laws peculiar to different jurisdictions in order to analyse how it is possible to address the problem of regulation of multinational corporations' behaviour with regard to human rights at the international public policy level (Karp, 2014:27). We will, consequently, distinguish between two different waves of international policy attempts to manage in a sustainable way the impact of these non-state actors in terms of human rights (Karp, 2014: 30). The first wave is represented by the so called 'Codes of Conduct', namely the OECD Guidelines and the ILO Tripartite Declaration of Principles, which mainly aimed at regulating the activities of those companies at the level of the host state rather than at that of the home state to which the company itself belongs. In contrast, the second wave of international public policy attempts is represented by the development of a United Nations' framework for corporate responsibility, including both the UN Global Compact and the UN Norms on the Responsibility of Transnational Corporations and Other Business Entities with Regard to Human Rights. Moreover, we will also examine the attempt of multinational corporations to self-regulate themselves through the adoption of voluntary Codes of Conduct whose main aim is to show the corporations' commitment to human rights.

Briefly, the international community's main challenge with regard to globalization is to ensure that two set of objectives are simultaneously achieved (UN General Assembly, 2000: 2). On the one hand, human rights norms and standards included in international law serve as a basis to provide the principles with which globalization should be managed: democratic representation, equality and non-discrimination, empowerment and accountability. On the other hand, the rules underlying the international economic system which are established by institutions such as the GATT and the WTO, the International Monetary Fund and the World Bank, are characterized by different dynamics: free trade, economic growth, employment and sustainable development. Consequently, it is necessary to match and harmonize the principles moving both international human rights law and the international economic system in order to build up an international community based on the full enjoyment of human rights for everybody (UN General Assembly, 2000:8).

1.2 The impact of activities of multinational corporations on women's rights

Globalisation do not only produce economic changes, but all aspects of human existence are involved, affecting also political, cultural and social conditions. Therefore, there is a need to assess how globalization policies have impacted on women and on the possibilities for employment and the enjoyment of social rights (DAW, 2001:1). Particularly, in recent times, it has become increasingly evident that the impact of multinational corporations on poor communities in developing countries can be detrimental for the enjoyment of human rights (Cernic, 2010:18), including women's rights.

"Globalization and continuing rapid technological advances offer unprecedented opportunities for social and economic development. At the same time, they continue to present serious challenges, including widespread financial crises, insecurity, poverty, exclusion and inequality within and among societies." (UN General Assembly, 2000)

Up until recently, human rights standards have not been conceptualized in a way that incorporated gender issues and women's rights (OHCHR, 2014:25). The fundamental principle of equality between men and women was generally set out in the Charter of United Nations signed in 1945 and in the Universal Declaration of Human Rights adopted in 1948, but they were effectively and concretely regulated since 1979 when a legally binding treaty was adopted by the United Nations' General Assembly, namely the

Convention on the Elimination of All Forms of Discrimination against Women (OHCHR, 2014:4).

According to the Beijing Declaration and Platform for Action (UN, 1995) which constituted an agenda for the empowerment of women and which is considered the most significant effort on the part of states to comply with human rights of women, globalization has posed many challenges in reaching the goals of gender equality, development and peace that were set out during the Fourth World Conference on Women (UN General Assembly, 2000: 25).

Although the impact with regard to gender and to women rights has not been fully assessed yet, it is possible to notice that while globalization has provided some women with greater and increased opportunities for development, others have been increasingly left behind and marginalized which effectively prevents them from benefiting from the consequences of this process (UN General Assembly, 2000:19). Therefore, globalization has affected women in different ways depending on the place their country occupies in the world economy: on the one hand, globalization may act as a catalyst for women in order to achieve greater standards of equality, opportunities and autonomy generally in developed countries; however, on the other hand, it may contribute to deepen inequality and to increase disparities within developing countries and among developed and underdeveloped countries (Wankel & Malleck, 2012: 137). Obviously, globalization must not be blamed for having introduced inequality within the international economic system, but it is clear that it had effectively contributed to worsen conditions of inequality and discrimination, especially those based on gender (ECOSOC, 2000:10).

Following WTO regulations which mainly contributed to shape the main characteristics of globalization, namely liberalization, deregulation and privatization (UN General Assembly, 2000:3), many developing countries have allowed the entry of foreign multinational corporations which, however, displaced manufacturing plants and industries in those countries in order to exploit the availability of cheap labour. Within this context, the issue of women's human rights has come to the forefront as gender relations have undergone fundamental transformations on a global level. Indeed, women are those who mostly have to bear the consequences of globalizations and hardships linked to low wage regimes, poor working conditions, instability of employment as in time of recession they will be the first to lose their jobs, and lack of the right to political representation (UN General Assembly, 2000: 26).

On the one hand, globalisation should be entirely rethought as there is a need to focus on people and communities and how they are affected by the consequences of this process rather than on the profit corporations may be able to maximise through foreign direct investment in developing countries (Stiglitz, 2006:25). This is the only possibility for globalization to be also more accountable to women. On the other hand, transnational corporations can potentially be the actors of change, but the possible negative effects should be carefully managed (Coleman, 2010:1).

The latter purpose can be achieved if women are considered critical levers to foster international economic development, especially in developing countries (Coleman, 2010:1). Many transnational corporations adopt initiatives aiming at improving human rights of women within the framework of corporate social responsibility programs and policies; however, this is only the beginning. Indeed, although the process of closing the gender gap and of empowering women all over the world, especially in developing or underdeveloped countries, may take a lot of time, in the end it will not only benefit the lives of women and of their families but of the international community as a whole, as multinational corporations will gain from tackling the issue of gender inequality (Coleman, 2010:7). Therefore, after many years in which gender has been excluded from CSR discourses and practices, women's empowerment is now recognised to be a significant facet to boost international development sustainably (McCarthy, 2017:603).

In this sense, a lot of initiatives have been carried out, for instance the World Bank's Gender Action Plan and the Global Private Sector Leaders Forum, the UN Global Compact, the Women's Empowerment Principles and many others. This demonstrates that UN organizations and agencies along with non-governmental organizations have adopted a gender mainstreaming strategy in policymaking. Gender mainstreaming refers to the process of analysing the implications for both women and men in policies or programs adopted at all levels in the political, economic and social spheres (UNDP, 2006:2). Theoretically, this should not focus exclusively on women's experiences but in practice this actually happens because of the way in which societies are shaped all over the world. In order to ensure human rights of women, it is necessary to carefully analyse and understand the structure and the power relations characterising societies in which women live as this has inevitably an influence in the potential fulfilment of those rights (OHCHR, 2014: 25).

1.3 Increasing pressure for corporate social responsibility: the business case

By about 2000, state sovereignty was not anymore what it once was (Forsythe, 2006:25). Towards the end of the twentieth century in most developed countries, neoliberalism stepped in at both political and economic level, shifting the emphasis from the need for government intervention to an increased importance of the marketplace whose forces should be left working autonomously (Hart, 2010:585).

Neoliberalism coupled with the process of globalization contributed to the weakening of domestic power that proved to be inadequate in regulating corporations operating across national boundaries, due to its territorial limitations (Amao, 2011:1). This triggered two fundamental consequences: on the one hand, nation-states were losing their influence and authority in managing multinational enterprises' behaviour; on the other, a loophole in the regulatory framework left room for transnational corporations to extend the scope of their activities (Scherer & Palazzo, 2008:13) and to play a crucial role in shaping not only the international economic system but also international communities and societies as a whole (Beck, 1999:14). There is no institution of global governance that retains the ability to tackle the problems created by multinational corporations such as human rights violations, environmental damages, poverty or corruption, and to sanction them for their misconduct (HRC, 2009:5). Therefore, the shift from a national to a global economy paved the way for multinational corporations to exploit the regulatory vacuum in global governance to their advantage, especially in developing countries where the power and authority of the state is weak or almost absent (Scherer & Palazzo, 2008: 16).

Parallel to this process, it is worthwhile to highlight the increasing importance of the role that civil society played at international level, the so-called process of 'globalization from below' (Scherer & Palazzo, 2008:17). Civil society's influence strengthened in the decision-making processes both within government and within corporations, demanding greater transparency and different conditions of legitimacy for multinational corporations' activities and operations. Civil society and international public opinion became more concerned with business practices which are constantly examined and checked (Scherer & Palazzo, 2008:17).

Within this context, there was an increasing pressure for multinational enterprises to engage in corporate social responsibility (CSR) standards (Hart, 2010: 285). Therefore, one of the main consequences that globalization has triggered is the negative and increasingly harmful impact of multinational corporations which in turn has favoured a widespread call for corporate responsibility and the adoption of soft laws and self-

regulations (Amao, 2011:1). While regulatory gaps started to appear in the structure of global governance with an erosion of the national power of the state, business firms are asked to play a more important role in global governance through an increase in social and political responsibility (Scherer &Palazzo, 2008:13).

From a legislative perspective, the lack of a concrete and widespread government intervention left room for the idea of enterprises' self-regulation to develop as a reflection of the tendency to deregulate at state level. At the same time, however, there was a rising pressure on multinational enterprises to behave in a socially accepted and responsible fashion. Indeed, what CSR essentially puts forward is the principle according to which corporations are not only responsible to their shareholders but also to people and communities which are deemed to be indirectly affected by the corporations' practices, namely stakeholders (Bantekas, 2004:311).

While government was perceived to be less important, business became increasingly more pervasive in the global economy; consequently, the 'business case' for corporate social responsibility was used to justify self-regulation on the part of multinational enterprises. With 'business case for CSR', we mean the underlying assumptions according to which multinational enterprises tend to benefit from adopting a socially responsible attitude in their activities and operations (Hart, 2010:586). The main rationale behind the business case is that by adopting CSR standards, corporations will be generally more inclined to behave ethically boosting and supporting social, cultural or environmental changes while improving their financial status (Hart, 2010:586). This is the result of an effective acknowledgement that corporate social responsibility is beneficial to both corporations and local communities.

Therefore, multinational corporations became politicized as they adopt a broader outlook with regard to the notion of responsibility which is not limited to the legal framework but also to the social one, and, at the same time, they contribute to tackle specific political and social challenges in cooperation with both the state and civil society representatives (Scherer &Palazzo, 2008:19).

Writing in 1998, the year of the fiftieth anniversary of the Universal Declaration of Human Rights, the UN Human Rights Commissioner in charge at that time asked herself: "Why should business care about human rights?"[1]. In the answer, she stated that both business and human rights need each other reciprocally, making reference to two main

[1] Mary Robinson was UN Human Rights Commissioner in charge in 1998 when she delivered a speech known as *'The business case for human rights'*.

assumptions: on the one hand, business would not develop in a sustainable way without a stable framework in which human rights can flourish; on the other hand, corporations which did not respect, protect and promote human rights could not benefit from high standards of reputation among the international public opinion (Muchlinski, 2001:38).

What should be evaluated is whether CSR actually improves multinational enterprises' practices, or it is only a means to shield themselves behind a widespread image of good reputation (Hart, 2010:588). Indeed, due to its voluntary nature, corporate social responsibility's approach apparently seems to shift the attention away from the need to create international legal standards (Amao, 2011:2). However, advocating for comprehensive and legally binding rules to regulate multinational enterprises behaviour coupled with concrete attempts to elaborate them has always characterized the debate around CSR and the overall impact of multinational corporations on human rights.

1.4 The nature and the scope of the study

The study is mainly divided into three different parts. Each of them will analyse gender at a different level: first, a brief overview is provided about how gender has been actually treated in the international and legal framework; secondly, a gender-based perspective is presented with regard to corporate social responsibility; finally, corporate social responsibility in relation to gender is analysed within the legal framework at international level through the lens of a specific case.

Looking deeper in the structure of the study, the first part corresponds to chapters 2 and 3. The former will focus on how human rights of women have been protected internationally through the elaboration of different conventions at both United Nations' and regional level, and through the action of different UN bodies. Particularly, the tool which today is still considered the most valuable in the work towards the achievement of women's full equality in actual practice is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). It still represents a landmark for gender equality within the state, society and international community and against any violations perpetrated by individuals, the state or non-state actors (Schopp-Schilling & Flinterman, 2007:1). In contrast, the latter will point out the emerging issues with regard to women's rights protection in a globalised world in relation to the action of multinational corporations. We will go through the question whether MNEs contribute to the protection and enhancement of human rights of women or due to their lack of international legal

personality they are not bound to international human rights obligations with regard to the issue of gender and, therefore, they actually contribute to their worsening.

The second part is identifiable with chapter 4 which is of crucial importance for the study. Indeed, it will provide an analysis of the concept of corporate social responsibility through a gender-based perspective. First, it will start by presenting an overview of the existing international public policy instruments for regulating corporate practices in the field of women's rights. The focus of the analysis will not only be the United Nations framework but the European one as well. Moreover, it will also explain what CSR is and what the normative and legal impact of Corporate Codes of Conduct is about, which will reflect the ability of companies to abide to human rights principles and, particularly, to respect women's rights in their operations and activities. This is considered the basis to understand how CSR could actually become a means to eliminate gender inequalities and to promote women's empowerment in business by pointing out the potential areas of action if CSR were to achieve that purpose. Finally, a set of transnational business initiatives are examined, all representing different ways to boost the improvement of women's rights, especially in the labour market.

The third part corresponds to chapter 5 in which it is claimed that in a globalised world, a sophisticated and complex set of rules is needed in order to manage the activities of transnational corporations in a sustainable way while ensuring the respect, protection and promotion of human rights at international level. Therefore, it is possible to draw a line between human rights protection, international arbitration and corporate social responsibility. Provided that as a consequence of globalisation, TNCs have become the main actors in the globalised world, there is a potential for the emergence of a new form to discuss and solve human rights disputes, namely international arbitration. In turn, the latter will leave room for corporate social responsibility to flourish and for international human rights standards to be applied within the framework of international trade (Marrella, 2007:266). Finally, all the previous theoretical considerations will be concretely applied to a case of gender-based violence, namely *Caal vs. Hudbay Minerals Inc*. Three lawsuits were filed in Superior Court of Ontario in Canada, against the Canadian mining company Hudbay Minerals and its subsidiary HMI Nickel Inc; we will focus on the lawsuit started by a group of Guatemalan women alleging women's rights violations in the company's mining project carried out in Guatemala (BHRRC, 2010).

2. PROTECTION OF HUMAN RIGHTS OF WOMEN WITHIN THE INTERNATIONAL AND REGIONAL FRAMEWORK

Up until recent times, international law has not proved particularly keen on considering and incorporating gender issues, although they are deemed crucial in order to reach gender equality worldwide and to ensure women a better quality of their lives (Charlesworth & Chinkin, 2000:1).

The broad set of instruments dealing with women within international human rights law may indicate the building up of an adequate framework for the protection and the advancement of women (Charlesworth & Cinkin, 2000:213). Since its creation, the United Nations have represented the main framework not only to ensure the respect of fundamental human rights, but it has also provided an opportunity for women to voice their concerns in order to achieve full equality with the elimination of all forms of discrimination, as well as empowerment (Schopp-Schilling & Flinterman,2007:1). At the same time, regional bodies and instruments have emerged within the European, African and American framework, trying to promote and foster the protection of human rights in general and of women's rights in particular. However, as according to recent studies the conditions of women's life have not improved and violations of human rights concerning women have not stopped occurring, women are still considered to be the most vulnerable and the less fortunate with regard to human rights protection (Moussié, 2016:8). Therefore, how is it possible that despite the affirmation of the principles of equality and of non-discrimination the respect, protection and fulfilment of women's rights have not still been fully achieved? What must be judged is whether the human rights instruments, mechanisms and organs created at both international and regional level are actually effective in order to guarantee the full enjoyment of human rights on the part of women (Reanda, 2003:30) or other standards should be developed.

2.1 International human rights instruments: the main implications for women's rights

Since the very beginning, international human rights law mostly aimed at ensuring the right to "equal treatment and non-discrimination on the basis of sex" in the attempt to protect women's rights (Charlesworth & Chinkin, 2000:213). The first international human rights instrument to proclaim the principle of equality in terms of rights between men and women was the Charter of the United Nations signed in 1945. After having

highlighted the belief in human rights and recognized the dignity and worth of human beings, the preamble also affirmed "the faith in equal rights of men and women" (UN, 1945:1). Furthermore, in article 1, among the vast array of purposes that the United Nations aimed to achieve and that member states are asked to respect, it is claimed that in order to foster international cooperation among all countries in the world, there is a need to encourage and promote human rights and fundamental freedoms independently from any distinction based on "race, sex, language, religion" (UN, 1945:2). Other subsequent provisions of the Charter include the goals of achieving equality and eradicating discrimination in practice. For instance, Article 8 of the Charter posited that the United Nations should "place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs" (Charlesworth & Chinkin, 2013:9).

These principles are also enshrined in the Universal Declaration of Human Rights signed in 1948 and in its Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights adopted by the UN General Assembly in 1966 and entered into force in 1976, which together represent the fundamental international standard for human rights, known as the International Bill of Human Rights. Since that moment, the United Nations and their bodies have taken the lead and played the most important role in the work towards the realization of human rights of women and the achievement of full and complete equality in all spheres of their life (Schopp-Schilling & Flinterman, 2007:1).

2.1.1 The Universal Declaration of Human Rights (UDHR) and its Covenants

While the Charter has to be considered the first international instrument to spell out the principles of equality and non-discrimination, the Universal Declaration of Human Rights generated international consensus for their application thanks to its powerful language and moral force (Reanda, 2003:13).

In the preamble of the Universal Declaration of Human Rights, there is basically a restatement of the Charter's belief in human rights, in the dignity and worth of all human beings and in the principle of equality between men and women (UN, 1948:1). However, during the drafting process leading to the adoption of the Convention, a discussion emerged with regard to issues related to articles 1 and 2 (Morsink, 1991:230). First, article 2 of the Universal Declaration of Human Rights represents an advancement compared to the mandate of the Charter in fostering non-discrimination between men and women as well as a milestone in the universal application of this principle in all spheres

of life (Morsink. 1991: 230). On the one hand, in addition to those already included in the Charter, it expanded the list of discriminatory factors by introducing colour, individual opinions, personal origins, birth and status which can be interpreted as the present economic status or the political, jurisdictional, international status of the country to which one belongs. On the other, it stated that without any exception, 'everyone' is entitled to enjoy human rights as they belong to the category of 'human beings' (UN, 1948:2). Secondly, with regard to the importance of the wording in both provisions, it has to be highlighted that in article 2 both words 'everyone' and 'no one', repeated also in all articles throughout the entire text of the Declaration, delivered a complete and innovative non-sexist message (Morsink, 1991:233). Moreover, with regard to article 1, the early proposal for the formulation of the provision did not contain the word 'all human beings', but rather the formulation 'all men'[2] (UN, 1948:2). Although since the first session of the drafting process, there was a fierce discussion about the usage of such an exclusive language that, according to some, still recalled the historical and patriarchal primacy of men over women, in the end the compromise phrase 'all human beings' was adopted thanks to the intervention of the Commission on the Status of Women (Morsink, 1991:233). In spite of not involving an explicit reference to equality between men and women, this phrase together with 'everyone' and 'no one' represented the willingness on the part of the State Parties to the Declaration to prohibit any discriminatory implications on the grounds of sex suggesting superiority of men over women, and to clarify that all the human rights provision included within it equally apply to both men and women (Morsink. 1991:236).

Within the Universal Declaration of Human Rights, concrete references to women's rights do not abound (Morsink. 1991:255), but they are rather limited to few articles. First, while article 10 affirms the principle of equality for both men and women before the law (UN, 1948:3), article 16 ensures that equal rights of both sexes should be granted in marriage, claiming that equality should be respected during its duration and dissolution, and in setting up a family (UN, 1948:4). Within this context, article 25 aims at ensuring an adequate standard of living at both individual and familiar level, and at protecting two vulnerable categories, namely mothers and children, that are entitled to special attention and measures precisely for this reason (UN, 1948:6). Furthermore, another important provision to underline in relation to the principle of equality between men and women is article 21 which recalls article 2 in declaring that everyone has an equal right to participate

[2] It could be traced back to the US Declaration which explicitly posited that "all men are created equal".

in the government of a country as well as in public services independently from its race, religion and nationality. Moreover, in the third paragraph by asserting that the authority of the government derives from the will of the citizens of the country through the means of elections according to the principle of universal and equal suffrage (UN, 1948:5), the article is actually recognizing democracy as the best political configuration in order to ensure the realization of human rights and the contemporary achievement of women's rights (Morsink. 1991:250). Finally, in article 23 the principle of equal pay for equal work is enshrined and it should be granted without any kind of discrimination, included that on the grounds of sex (UN, 1948:5). Consequently, the article could be interpreted as supportive of the quest of women's rights for the same principle (Morsink, 1991:252). Therefore, the reason why women's rights are not explicitly mentioned within the Universal Declaration of Human Rights, as we have outlined at the beginning of this chapter, lies in the lack of sexist implications within the document. Consequently, there is no need for a straightforward reference to women's rights as they are interpreted to automatically overlap with international human rights standards and fundamental freedoms (Morsink. 1991:255).

Finally, with regard to the scope of the application of the Universal Declaration of Human Rights, the Preamble established that "every individual and every organs of society" has to commit to the respect of human rights, a provision which seems not to exclude entities such as multinational corporations (Kinley & Tadaki, 2004:948). However, as this statement does not entail a legally binding obligation in relation to the recognition and compliance with human rights, it needs to be complemented with two additional provisions included respectively in article 29 and 30. While the former entails several duties towards the community which everyone, meaning any kind of actors, has to respect, the latter prohibits everyone to carry out any action having the potential to endanger or effectively prevent the enjoyment of the rights and freedoms included in the Declaration (UN, 1948:7). In this respect, it is necessary to recall that only some of the rights set forth in the Declaration have become customary international law while for the rest the document remains a non-binding instrument. Therefore, although both provisions may be actually interpreted as entailing a legal obligation for non-state actors, such as multinational corporations, not to violate human rights of the community in which they operate, as it is not clear whether articles 29 and 30 have achieved the status of customary international law, they can merely be interpreted as ethical duties (Kinley & Tadaki, 2004:949).

Furthermore, thanks to the adoption of the International Covenants on Civil and Political Rights (ICCPR), on the one hand, and of the Economic, Social and Cultural Rights (ICESCR), on the other, the prospects for the respect of human rights and fundamental freedoms on a global scale consistently improved.

As the Charter of the United Nations and the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights (UN General Assembly,1976) recognizes the dignity inherent to all human beings, but it also provides states with the necessary conditions and instruments to respect, protect and fulfil civil and political rights. The overarching and founding principles of the Covenant are to be found in articles 2 and 3. Article 2 contains the general obligations according to which each State Parties to the Covenant should ensure that all individuals within their territory and jurisdiction enjoy the civil and political rights set forth in the Covenant without discrimination by introducing its principles within the legislative system and by adopting all the necessary measures in order to achieve it; moreover, individuals are endowed with the right to be recognized an effective remedy in case their rights are violated (UN General Assembly, 1976:173). Article 3 sets out the principle of non-discrimination between men and women that has to be applied to all the civil and political rights of the Covenant; moreover, states are allowed to engage in positive actions aimed at eliminating gender-based discriminatory practices (UN General Assembly, 1976:174). While State Parties to the Covenant are not allowed to derogate the articles including founding values, such as the right to life (article 6), the prohibition of torture and of cruel, inhuman and degrading treatment (article 7), the right to liberty and security of the person (article 9), the right not to be imprisoned for the inability to comply with a contractual obligation (article 11), the right not to be found guilty of a criminal offence that is not recognized as such (article 15), the right to be recognized as a person before the law (article 16) and the right to freedom of thought, conscience and religion (article 18), article 4 provides States Parties with the right of derogation under specific circumstances (UN General Assembly, 1976:174). Finally, the right to gender equality and non-discrimination on the grounds of sex is also mentioned in the field of justice, as article 26 ensures equal treatment and protection to every individual before the law (UN General Assembly, 1976:179). On this article, the Human Rights Committee has later adopted a General Comment[3] which provided for a more elaborated definition of discrimination which was absent in the original article:

[3] See. Human Rights Council. (1989). *General Comment No. 8*. UN Doc. CCPR/C/21/Rev.1/Add .1.

"the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status and which has the purpose or effect of nullifying or impairing the recognition. Enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." (Charleworth & Chinkin, 2000:215)

In addition to the engagement by State Parties to apply all the principles set out in the Covenant as of article 2, article 28 provides for the introduction of a supervisory and independent body of experts, namely the Human Rights Committee (UN General Assembly, 1976:179). Its task mainly consisted in monitoring the achievement of human rights and the implementation of the Covenant within the State Parties' domestic borders through the analysis of the reports supplied by the states themselves concerning the measure they have concretely carried out in order to ensure civil and political rights, and through the elaboration of general comments in case additional information on the part of the states is needed (Reanda, 2003.14). On the one hand, it has triggered positive consequences as the results achieved by State Parties in carrying out structural changes to ensure the introduction of Covenant's human rights standards in the national legal and legislative framework are encouraging thanks to the obligation the article entails for them. On the other hand, however, the Committee was not parallelly empowered with the ability to evaluate whether states have actually complied with the obligations deriving from the Covenant, and with the possibility to make recommendations in order to improve their practices, which actually limited the scope and the effectiveness of its action. This state of affairs has been improved only thanks to the adoption in 1976 of the Optional Protocol to the ICCPR that allowed the Committee to receive and consider the petitions submitted by individuals concerning alleged violations of human rights incorporated in the Covenant (Reanda, 2003:14), or those made by a State against another one.

With regard to the Covenant on Economic, Social and Cultural Rights (UN, 1967), it sets out the basic social and economic conditions allowing all human beings to enjoy an adequate standard of living and fundamental freedoms. To that purpose, an array of crucial rights are enshrined within it: the right to a safe and healthy labour environment and decent working conditions (articles 6,7,8), right to social security and social insurance (article 9, 10(2), 11(1)), right to food (article 11), right to housing (article 11), right to water and sanitation (articles 11, 12), right to education (articles 13 and 14), right to a healthy standard of living (articles 11, 12), right to a free marriage and family (article 10), and, finally, cultural rights (article 15). According to article 2, States Parties to the

Covenant have the obligation to undertake the necessary actions in order to apply the substantive human rights principles contained in article 1 and from 6 to 15, either individually or thanks to international assistance and cooperation (UN, 1968:2). Moreover, this principle has to be implemented on a non-discriminatory basis by eliminating any form of discrimination of both public and private nature, which is crucial in the realisation of economic, social and cultural rights (IWRAW, 2004: 19). While all the other articles of the Covenant provide for the principle of progressive realisation on the basis of the recognition that some states may lack adequate resources for implementation, the provision on the elimination of discrimination represents an obligation that all State Parties should respect and implement immediately (IWRAW, 2004:21). Additionally, in some circumstances the implementation process may involve the adoption of special measures that are specifically addressed to improve women's conditions and to tackle the perpetuation of forms of discrimination against them (IWRAW & ESCR, 2003:18). Article 3 should be interpreted in harmony with article 2(2), as the two reinforce each other mutually; moreover, as the General Comment No. 16 points out (IWRAW, 2004:18), its formulation recalls both the Universal Declaration of Human Rights (article 2) and the Covenant on Civil and Political Rights (article 3). Therefore, under article 3 of the ICESCR, State Parties have the obligation to grant the principle of equality between men and women in the realization of economic, social and cultural rights set forth in the Covenant, and to address all the conditions favouring the persistence of gender discrimination (UN, 1967:3). In turn, this commitment could be divided into three more specific obligations (ECOSOC, 2005). First, under the obligation to respect, states need to avoid being involved either directly or indirectly in discriminatory practices or in women's rights violations. Secondly, according to the obligations to protect, states are required to eradicate prejudices and stereotypes based on gender, to undertake constitutional, legislative and administrative measures to grant equality and non-discrimination, and to provide for adequate remedies. Thirdly, with regard to state obligation to fulfil, while article 3 in the same way of article 2 is regulated by the immediate and mandatory implementation instead of its progressive realization, the fulfilment of equality should not be understood as limited to the legal and judicial sphere, introducing and affirming this principle exclusively within constitutions, laws, policies and regulations; in contrast, substantive equality has to be reached as well, thanks to the application of formal mechanisms and instruments (IWRAW, 2004:23). Moreover, derogation for the principles of equality and of non-discrimination is not allowed under

the ICESCR, meaning that the States Parties to the Covenant are forbidden making reservations on those rights, as it is established by General Comments No. 16 on article 3 (IWRAW & ESCR, 2013:18).

With regard to enforcement mechanisms, the body entitled to ensure the compliance of the State Parties with the obligations deriving from the ICESCR is the Committee on Economic, Social and Cultural Rights[4] which has to monitor that States parties actually provide periodic reports concerning the implementation of policies of legislative and judicial nature as well as other kind of measures in order to protect and promote the economic, social and cultural rights enshrined in the Covenant (IWRAW, 2004:9).

In conclusion, the International Bill of Human Rights has been the first international human rights standard to proclaim the principle of equality between men and women advocating for its achievement and to work towards the creation of a system ensuring an increased protection of human rights (Reanda, 2003: 18). However, if one takes into account that violations of women's rights and gender-based discrimination persist also in those countries that have included the principles of the Universal Declaration on Human Rights within their constitutional system or that are subject to legally binding obligations as a result of the adoption the two International Covenants, it is clear that the application and implementation of the International Bill of Human Rights in general poses several challenges to the protection of women's rights and it deals only marginally with alleged human rights violations (Reanda, 2003:13). These problems mainly came about due to the interpretation of the provisions, to the way in which the latter are treated within the national legal framework and in practice, and finally to the lack of a satisfactory monitoring system at international level (Reanda, 2003:14). Therefore, although the importance of human rights discourse enshrined within the International Bill of Human Rights should not be undermined, as Charlesworth and Chinkin stated in their pioneering study, "the need to develop a feminist rights discourse so that it acknowledges gendered disparities of power, rather than assuming that all people are equal in relation to all rights" is imperative on an international scale (Charlesworth & Chinkin, 2000:211). Indeed, although the Universal Declaration enunciated that women's rights have to be interpreted within the general framework of universality and indivisibility of human rights (UN, 1948), women's concerns may be overlooked within the traditional human rights discourse which tends not to take into consideration the specific power relations existing between men and women within societies and often fostering the emergence of deeply

[4] It is not directly established by the Covenant, but rather by the Economic and Social Council.

seated patterns of inequalities (Charlesworth & Chinkin, 2000:8). Consequently, the need to adopt additional and specific measures in order to effectively ensure them the full enjoyment of their rights started to emerge in the period immediately after the adoption of the International Bill of Human Rights and it was actually recognized in 1979, as a result of the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women, a watershed in the international history of human rights of women (Reanda, 2003:12). Not only were women's rights reframed on a global scale, but a monitoring system was put in place recalling that already existing for human rights protection, which generated greater interest on the part of the international community in issues related to both women and human rights.

2.1.2 CEDAW: the nature, the scope of the convention and its evolution in the international context

Since 1946, the UN Commission on the Status of Women (CSW) operated into the UN framework with the precise mandate to elaborate recommendations and reports to the Economic and Social Council that would later be adopted by the UN General Assembly, and to tackle immediate and pressing issues concerning women's rights (Charlesworth & Chinkin, 2013:12). However, it actually carried out the preparatory work for the subsequent adoption of the Convention on the Elimination of All Forms of Discrimination against Women (Schopp-Schilling & Flinterman,2007,11). First, among the drafts prepared by the CSW, there was the Declaration on the Elimination of Discrimination against Women (UN General Assembly, 1967) which is actually considered as the forerunner of the CEDAW. Within it, any form of discrimination against women is considered a breach of human dignity and states are explicitly asked to eliminate laws, regulations, customs or practices preventing women from enjoying equal treatment and rights compared to men (OHCHR, 2014:5). Secondly, after 1975 was declared by the CSW the "International Women's Year", the First UN World Conference on Women was organized that year in Mexico City. It was a turning point due to the recognition that more concrete efforts had to be put in place in order to build up an effective legally binding and practical framework for the respect, protection and fulfilment of women's rights, as increased difficulties were perceived in eliminating discrimination against women and in granting gender equality through the treaties that had been developed up until that time (Schopp-Schilling & Flinterman,2007:11). Its main outcome was the World Plan for Action which focused on "the preparation and the adoption" of the Convention on the

Elimination of All Forms of Discrimination against Women[5] , which was consequently adopted on 18 December 1979 by the UN General Assembly after long and strenuous negotiations and entered into force on 13 September 1981 with twenty states ratifying it (Schopp-Schilling & Flinterman, 2007:12).

The CEDAW was enshrined in an already existing basic human rights architecture which involved the Charter of the United Nations and the International Bill of Human Rights. However, among the existing international human rights instruments, the CEDAW is considered a landmark international agreement recognizing women as individual bearers of human rights for the first time (Schopp-Schilling & Flinterman, 2007:10), and establishing an international bill of rights for women (Raday, 2012:512). While the basic human rights framework already established the principle of equality between men and women as well as that of non-discrimination on the grounds of sex, the CEDAW provided a different perspective. Not only it aimed at guaranteeing gender equality all around the world and at fighting against discrimination independently from whom carries it out, being it the state, an individual, an international organization, a national or a multinational enterprise, but the Convention also envisaged monitoring mechanisms in order to foster its implementation allowing women to enjoy human rights in all spheres of their lives, within the household, within the community or within society as a whole (Schopp-Schilling & Flinterman, 2007:10).

The Convention on the Elimination of All Forms of Discrimination against Women is composed of a preamble and thirty articles. In the Preamble, it recalls both the Charter of the United Nations and the Universal Declaration of Human Rights in relying on human rights and fundamental freedoms as the inalienable basis to affirm the dignity and value of human beings and the need for equality between men and women:

> *"all human beings are born free and equal in dignity and rights and […] everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex". (UN General Assembly, 1979:1)*

Therefore, while discrimination against women was still present and widespread at international level hampering the political, economic, social and cultural participation of women within society on equal grounds as men, this statement clearly represents a call for a radical transformation of society and of the traditional roles that it used to assign to men and women (Raday, 2012:513). These considerations are placed within the political

[5] As it is set out in the *Report of the World Conference of the International Women's year. Mexico City, 19 June – 2 July 1975* elaborated by the United Nations in 1976.

and economic context that characterized the 1970s, emphasizing the fight against racial discrimination, colonialism, and warfare at international level; in order to guarantee peace, development and welfare all over the world, both men and women should participate equally within state structures, society and family (Schopp-Schilling & Flinterman, 2007:16).

Furthermore, it is possible to identify different sections within the Convention itself on the basis of their content (Schopp-Schilling & Flinterman, 2007:17). First, the articles from 1 to 5 and article 24 are devoted to explaining the definition and the main obligations to which states are subject with regard to women's rights. Articles from 6 to 16 are generally describe how states are bound to take into consideration and to respect the different definitions and obligations set out in framework articles. Finally, articles from 17 to 23 and from 25 to 30 deal with procedure and, particularly, with the guidelines for the establishment of the Committee; with the possibility to acceding and ratifying the Convention by presenting some reservations; and with the mechanisms devised in order to solve disputes among the members of the Convention, following its interpretation and application.

Therefore, in order to completely understand why, at the time of its adoption, the Convention was deemed to be an innovative instrument within the international human rights treaty framework, it is necessary to have an insight into the crucial concepts and definitions it provided (Schopp-Schilling & Flinterman, 2007:16). First and foremost, in article 1 the Convention sets forth a different definition of the term 'discrimination' compared to the existing national and international legal standards. While the latter explicitly condemn any kind of arbitrary, unjust and unjustifiable distinction, exclusion or restriction in treatment between women and men on the grounds of sex, the Convention claimed that the source of discrimination to which women has been and actually are subject comes precisely from the fact of being women (CEDAW, 2004:8). Discrimination is considered to be an obstacle to the development in political, economic, social and cultural terms as it prevents the full enjoyment of human rights on the part of women within society, but also within families. Consequently, under the framework articles, the State parties to the Conventions have to respect three obligations in the attempt to tackle discrimination against women (CEDAW, 2004:8). First of all, it is necessary to pay attention to the laws, policies, programs and regulation that at first sight seem to be neutral in terms of gender, as they may produce indirect or even direct discriminatory practices (Schopp-Schilling & Flinterman,2007:17). Particularly, indirect discrimination against

women is subtler as well as more damaging than the direct one as it risks perpetuating past discrimination based on stereotypes or on subordination of women by men (CEDAW, 2004:15). Secondly, in article 2, the Convention clearly puts forward the means through which member States should get rid of all discriminatory practices through the necessary policies and programmes (UN General Assembly, 1979:2), specifying that the task should be accomplished "without delay": states do not only have the obligation to refrain from favouring and allowing discrimination against women, but they should also avoid failure to prevent the appearance of those practices through the implementation of positive actions (Schopp-Schilling & Flinterman, 2007: 21). Thirdly, State parties should cope with existing stereotypes based on the concept of gender not only in individual relations but also in legislation as well as in societal structures and political institutions (CEDAW, 2008:9). During the discussion for the drafting of the Convention, the issue of gender was not deeply investigated, but it is necessary to be aware of how it was generally perceived as a category of analysis in international human rights law within the present study since the notions of 'gender' and 'sex' may not immediately result clear and some misunderstanding may arise. While 'sex' seems to suggest a fix, immutable characteristic favouring determinism on the basis of biological differences existing between men and women, 'gender' more comprehensively focuses on social interactions between men and women and the cultural aspects involved within them (Charlesworth & Chinkin, 2000: 3). For instance, within the UN framework[6], it is defined as:

"the social meanings given to biological sex differences. It is an ideological and cultural construct but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait." (CEDAW, 2004:15)

Therefore, while the two approaches may be interpreted as complementary to each other, the latter specifically addresses the need to consider both men and women throughout gender analysis (Charlesworth & Chinkin, 2000: 3). If we merely consider the notion of 'gender' as a synonym interchangeable with 'women', we will limit ourselves in avoiding taking into consideration the issues linked to masculinity and femininity, the power relations that have crystallized into society throughout centuries and that are inherent to the gender relationships between men and women, and the LGBTQI rights

[6] See United Nations. (1999). *World Survey on the Role of Women in Development*. New York, 1999, page ix. in CEDAW (2004:15)

(De Vido, 2016:17). In summary, the considerations emerging out of feminist investigations play a fundamental role in the following analysis of international and regional human rights law from a gender perspective. Indeed, this definition of the notion of 'gender' perfectly reflects what the Convention sets out in article 5(a) according to which States parties have the obligation to remove all the potential prejudices and practices that may led to discrimination based on the superiority or inferiority or on stereotyped roles of either man or women (Schopp-Schilling & Flinterman, 2007: 19).

The obligations to which states are subject in articles from 1 to 5 and in article 24 serve as a basis for the interpretation of their substantive content and subsequent implementation (CEDAW, 2004:8). The Convention proposed a distinct conception of equality (Schopp-Schilling & Flinterman, 2007:18) that extends well beyond the realization of formal and de jure equality, meaning the legal side of equality which is achieved if the policies adopted are actually neutral with regard to gender. Indeed, substantive or de facto equality should be granted as well: it mainly deals with how policies concretely affects women, considering the biological and socially, culturally constructed differences with men, and with tackling inequality effectively (Raday, 2012:515). Therefore, States Parties to the Conventions have the obligations to respect, protect and fulfil the principle of equality and the elimination of discrimination embracing all spheres of their lives is not limited to the legislative framework but also to the adoption of practical measures to achieve them (Raday, 2012:512). In article 2, it is clearly affirmed that State parties both "condemn discrimination against women in all its forms" and are engaged in "the practical realization of these principles" (UN General Assembly, 1979:2). This leads us to consider two crucial underlying assumptions (Schopp-Schilling & Flinterman, 2007:20). On the one hand, the obligation of state parties to include the principles of equality between men and women and of non-discrimination within national constitutions and legislations is not enough as it is necessary to concretely implement those principles by undertaking "all appropriate means" (UN General Assembly, 1979:2). On the other hand, however, states are provided with discretion to adopt the means they believe more adequate for the attainment of the purpose, which are clearly not restricted exclusively to legal measures, as it is more forcefully restated in article 3 (UN General Assembly, 1979:2) and in article 24 (UN General Assembly, 1979:9) of the Convention[7].

[7] While the former claims that adequate and practical measures are needed in order to guarantee the advancement of women, the latter puts forwards the need to adopt any means leading to the complete achievement of the rights included in the Convention itself at national level.

In order to achieve equality between men and women in practice, the Convention (UN General Assembly, 1979) put forward the need to suppress women's trafficking and prostitution (Article 6), and to eliminate discrimination within the political and public sphere of society (Article 7). Then, State Parties to the Convention retain the obligation to ensure that women have effectively access to the electoral process, that they participate in both the decision-making process and in associations operating within the national territory, and that they have the possibility to adequately represent the country at international level (Article 8). With regard to nationality, equality with men should be granted to women in case they want to acquire, change or maintain it, and towards their children (Article 9). Moreover, in order to achieve substantive equality a set of adequate measures should be adopted in different fields, such as education, employment, healthcare (Articles 10-12), as well as in economic and social spheres, like the household, law and finance, culture (Article 13,15,16). Finally, article 14 takes into consideration rural women who should not be excluded from the process of boosting equality and eliminating discrimination as they play a vital role in contributing to development of those areas (UN General Assembly, 1979: 3).

In order to deeply understand the scope of the Convention and its evolution on an international scale, it is necessary to take into consideration a number of aspects. First, since its establishment, the Convention could rely on the vital role the Committee on the Elimination of Discrimination Against Women[8] has played within the UN human rights system and particularly in fostering progress toward the elimination of discrimination and in the achievement of full equality with men (Schopp-Schilling & Flinterman, 2007:3). According to article 21 of the Convention (UN General Assembly, 1979:8), the Committee was empowered with the task of clarifying and providing a deeper understanding of the essence and the content of the Convention through the adoption of general recommendations on specific provisions that were elaborated on the basis of report analysis and information delivered by State parties and that have to be submitted first to the General Assembly through the ECOSOC and then to the Commission on the Status of Women through the Secretary-General (CEDAW, 2004:2). However, although the connection between the Convention and the UN World Conferences on Women is of utmost importance, both the First UN World Conference in Mexico in 1975 representing

[8] It gathered for the first time in Vienna in 1982 and it is composed of eighteen experts, almost exclusively women, which are elected by the States Parties to the Convention although they operate autonomously within the Committee. While up until 2008 the Committee was included in the UN Division for the Advancement of Women, it then moved to the Office of the UN High Commissioner for Human Rights.

the framework within which the Convention actually took shape, and the Second UN World Conference on Women in Copenhagen in 1980, which actually enshrined its adoption in a special ceremony, missed an important step: the recognition of the principles of equality and non-discrimination against women as a human right (Schopp-Schilling & Flinterman, 2007:37). The social conditions experienced by women at that time should be addressed and tackled in order to achieve economic development, but they were not supposed to be involved and considered part of the existing international body of human rights, which condemned the Convention to stay in the shadows and remain largely unknown for a period (Schopp-Schilling & Flinterman, 2007:39).

Therefore, in spite of being mostly recognized as a ground-breaking work, the Convention has also been subject to some critiques linked to two main reasons, which, however, do not completely undermine the transformative potential of the Convention as such. On the one hand, the international human rights architecture as it has developed within the UN framework does not seem to be adequate to cope with the worse standards of living characterising women's life compared to men's one due to the construction of an international structure for the recognition of women's rights which is substantially shaped in a gendered way (De Vido, 2016:17). According to feminist scholars and their research, international human rights instruments tend to take the male model as the dominant norm, refraining from the potential and consistent incorporation of a women's perspective (Charlesworth & Chinkin, 2000:231). Except from the Children's Convention and the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, the choice of the masculine pronoun to refer to all other international human rights mechanisms and the great amount of masculine vocabulary employed in human rights law testify the persistence of subordination of women to men and of hierarchies built up according to gender and sex considerations (Charlesworth & Chinkin, 2000:232). Moreover, the adoption of a landmark convention such as the CEDAW specifically protecting women's rights have consequently produced a lack of application of human rights norms included in mainstream human rights instruments to women (Charlesworth & Chinkin, 2000:218). Finally, another point that is worth considering is the international legal understanding of equality and non-discrimination which are often interpreted as the positive and negative side of the same principle: on the one hand, equality refers to the lack of discriminatory practices; on the other hand, the respect of the non-discrimination principle ensure equality (Charlesworth & Chinin, 2013:33). This represents a limited approach which merely aims at achieving equal

treatment of women compared to men, reflecting the tendency to interpret women's rights in function of a male standard. Therefore, according to Catharine MacKinnon[9], the male dimension is interpreted as the official measure against which women's rights should be tailored: the removal of discriminatory practices is subordinate to the achievement of an equal status as men, as a result (Charlesworth & Chinkin, 1991:632). However, adopting this conception means tackling only a restricted number of problems concerning discrimination without having the capacity to substantially and directly address the ultimate causes at the roots of women's inequality (Charlesworth & Chinkin, 2013:33). Consequently, affirming that international law in the field of human rights is male-oriented should not be interpreted as a denial of its relevance and importance on an international scale, but it simply means recognizing its limited and simplistic conception of women's rights, which may represent the starting point for future and consistent changes (De Vido, 2016:17). On the other hand, the analysis of the articles of the Convention suggests a treatment of women as a homogeneous group (Raday, 2012:514), a problem that was later solved thanks to the adoption of the General Recommendations No. 26 (CEDAW, 2008), No. 27 (CEDAW, 2010), No. 28 (CEDAW, 2010), all providing a differentiation among different categories of women.

In addition to the rise of feminist critiques, the Committee also faced difficulties in the implementation process which risked undermining the force and the regulatory potential of the Convention itself (Charlesworth and Chinkin, 2000:220). The only monitoring instrument it had at its disposal was the elaboration of general recommendations[10] as a consequence of State Parties submitting periodic reports, which, however, had no legally binding character (Charlesworth &Chinkin, 2000:220). Moreover, the possibility provided by article 28, according to which State Parties are allowed to make reservations to the Convention when ratifying or accessing it (UN General Assembly, 1979:9), poses some challenges to the effectiveness of the Convention itself. Indeed, in the decade following its adoption, the Convention on the Elimination of All Forms of Discrimination Against Women retained the highest percentage of reservations by State Parties compared to the other existing human rights treaties or conventions (Schopp-Schilling & Flinterman, 2007:36). Therefore, the Committee had to work strenuously in order to strengthen the Convention and its implementation at international level through the collaboration with UN Conferences, agencies, programs, funds and civil society.

[9] See C. Mackinnon, (1987), *Feminism Unmodified: Discourses On Life And Law*.
[10] As it is established by article 18 of the Convention.

The situation started to change only thanks to the UN World Conference on Human Rights that took place in Vienna in 1993 whose main outcome was the Vienna Declaration and Programme for Action which for the first time explicitly claimed that "human rights of women and of the child-girl are an inalienable, integral and indivisible part of universal human rights" (Schopp-Schilling & Flinterman, 2007:39). Since that moment, the implementation of the human rights of women and of the girl became a prime concern not only for the State Parties to the Convention but also for those of the United Nations' system as a whole. There were also other important results that were achieved by the Vienna Declaration and Programme of Action: the need to achieve the full and equal participation of women within all spheres of society at regional, national and international level coupled with the elimination of any form of discrimination against them; the call for the elimination of violence against women as in breach of the dignity and the worth that belong to all human beings, as it is set out in the General Recommendation No. 19 (CEDAW, 1992); the withdrawal of the possibility to make reservations to the Convention according to the Commission's Suggestion No. 4; the call for further cooperation between UN agencies and the Committee; finally, the Committee was endowed with the introduction of an additional monitoring mechanism, namely the right of petition (Schopp-Schilling & Flinterman, 2007:41). Moreover, the latter also started to elaborate more detailed recommendations with the precise purpose of explaining and clarifying specific articles of the Convention. In summary, the Vienna UN World Conference on Women has to be considered a milestone as it contributed to the increasing the role of CEDAW within the international human rights framework. It also recognized that in order to guarantee women's capacity to reach equal power and place not only in the political, economic and social sphere, but also in the private sphere of the family (Raday, 2012:530), it is necessary to embrace policies, measures, programmes whose purpose lies in creating larger opportunities and in rearranging institutions and the international system in order to eliminate the historically grounded gender stereotypes that hampered the achievement of full and concrete equality between men and women (CEDAW, 2004:9).

Another crucial development increasing the value of the Convention was provided by the Fourth UN World Conference on Women taking place in Beijing in 1995. The main outcome of the Beijing Conference was to strengthen both the Convention and, particularly, the scope of action of the Committee; moreover, it continued the work started by the Vienna Conference based on the urgent need for the elaboration of a concrete

procedure concerning the implementation of the right of petition (Schopp-Schilling & Flinterman, 2007:47). A concrete advancement was represented by the adoption of the Optional Protocol to the Convention (UN General Assembly, 1999) which established that if women who have suffered from human rights violations have exhausted all the available national remedies within a state signatory to the Convention, they are entitled to file a complaint to the Committee which would initiate a legal action aimed at assigning a proper and effective remedy to the victim (Schopp-Schilling & Flinterman,2007:2). Since that moment, the latter reached an increasingly important role as it can encourage women and women's organizations to directly influence international civil society in order to make pressure on government with regard to the respect of women's rights, enhancing the realization of the principles set out in the Convention (Reanda, 2003:23). Moreover, it is worthwhile outlining a distinction put forward by the Beijing Declaration and Platform for Action, namely the one between 'human rights of women' which are considered universal, inalienable, integrable and indivisible, and 'women's rights' which are not endowed with the same features (Charlesworth & Chinkin, 2000:248). In spite of the recognition of additional forms of violations of women's human rights, including violence against women, the former expression is still limited in providing women with an equal status in terms of enjoyment of basic rights and fundamental freedoms compared to men. Therefore, there is still a need to strengthen the scope for women's rights within international human rights law which should be redefined in order to more effectively incorporate and protect women's interests (Charlesworth & Chinkin, 2000:249).

However, challenges towards the achievement of the full and complete equality of women under the framework of the CEDAW have been posed also by two social philosophies, namely religious traditionalism and, more importantly, the neoliberal ideology. With regard to the former, it is possible to recognize that some religions actually legitimize the perpetration of discriminatory practices causing detrimental effects on women and preventing the realization of women's civil and political rights in both private and public sphere. On this basis, many States Parties to the Convention had decided to access and ratify it but, at the same time, they had made reservations due to their adherence to a traditionalist religion which represents an obstacle to the full enjoyment of their rights on the part of women (Raday, 2012:515). In contrast, the challenge brought about by neoliberalism primarily concerns social and economic rights. Particularly, a discrepancy emerged in the way women are considered within the framework of the CEDAW and within the neoliberal ideology: under the Convention, women are rights-

holders, meaning that State Parties have the obligation in both public and private sphere to remove any form of discrimination against women, which is an application of the due diligence principle whose purpose consists in preventing and reducing potential episodes of discrimination perpetrated by non-state actors, namely individuals, organizations or corporations; in contrast, within neoliberal policies, aiming at implementing deregulatory practices and privatization, women are considered objects or beneficiaries of development (Raday, 2012:525). By analysing the underlying relationship between women's rights and economic development, it emerged that projects to boost development through structural adjustment policies and the economic and financial crisis produced adverse impacts on the enjoyment of human rights and fundamental freedoms on the part of women and failed in promoting and effectively achieving substantive equality (Raday, 2012:516). Particularly, the process of implementation of the CEDAW Convention has been increasingly threatened by globalization thanks to which multinational corporations had the opportunity to become more and more powerful worldwide thanks to the displacement and outsourcing of investments outside the countries in which corporate headquarters are located by establishing branches or subsidiaries in foreign countries in order to exploit the fiscal and labour advantages (Schopp-Schilling & Flinterman, 2007:106). However, in some circumstances, either the financial power of multinational corporations is so huge compared to that of the state or the host country is so governmentally weak that in a way or another they manage to escape the national law and regulations to which they are bound under the national legal system. Obviously, these circumstances will produce detrimental effects on the economies, on the local communities and on the lives of women with regard to their possibility to fully benefit from human rights and fundamental freedoms that belong to them according to the CEDAW (Schopp-Schilling & Flinterman, 2007:106).

In the last few years, it is possible to notice great efforts on the part of the international community to regulate the activities of corporations by making them accountable and responsible for their operations not only in their home country but also in developing countries with regard to the respect, promotion and fulfilment of human rights (Schopp-Schilling & Flinterman, 2007:107). Globalization should be managed in a way leading to sustainable development that could be achieved only through the full and complete realization of human rights, involving women's rights as well; consequently, economic development and its policies should become sensitive to the issues of gender (UN General Assembly, 2002). Particularly, according to article 2 of the Convention, the obligation to

eliminate any form of discrimination against women is not limited to the activity of the state and its entities, but it extends to non-state actors as well, including multinational corporations (Schopp-Schilling & Flinterman, 2007:109). Moreover, as it is recognized by the CEDAW Committee in General Recommendation No. 28 the "obligations of State Parties […] also extends to acts of national corporations operating extraterritorially" (CEDAW, 2010). This means that, on the one hand, in the case the State under which a corporation is subject in terms of jurisdiction discovers violations of women's human rights in the foreign countries where the corporation carries out its activities and operations, it should take the necessary measures in order to tackle the situation and to prevent further episodes to occur. On the other hand, the CEDAW Committee could intervene in order to effectively implement the agenda for sustainable development that also ensures the achievement of women's rights since discrimination against women still exists in different areas of the world, as the reports provided by the State Parties to the Convention testify (Schopp-Schilling & Flinterman, 2007:109). Notably, it is entitled to make recommendations encouraging to States Parties to introduce more forceful and effective legislation in order to increase the enforcement of the Convention or to ensure accountability for violations of women's rights through the means of private litigation as State Parties have the obligation to monitor the activities of multinational corporations which in turn have to comply with national law and, therefore, to respect the principles and the norms put forward in the Convention (Schopp-Schilling & Flinterman, 2007:109). Moreover, the Committee also called for codes of ethics to be elaborated, adopted and implemented on the part of multinational corporations parallelly to their acknowledged contribution towards economic growth and increases in employment rate. These measures are perceived as crucial on the part of the Committee to ensure decent working conditions, equality between men and women, and social and health security for workers: these principles are generally enshrined in corporate social responsibility standards (UN General Assembly, 2002: 50).

In the following chapters, we will develop more in detail this argument by analysing the different mechanisms which aim at making multinational corporations directly accountable and responsible for women's human rights.

2.1.3 The other United Nations' bodies involved in the task

Although its role has always been overlooked due to the great influence that the Commission on Human Rights has retained within the UN system, the UN Commission

on the Status of Women has carried out an extremely important work in order to promote gender equality and women's empowerment since its establishment in 1946, as a subsidiary body of the ECOSOC, the Economic and Social Council (Galey, 1984:464). It is an intergovernmental and political body whose mandate consists in elaborating recommendations and reports that should be submitted to the Economic and Social Council in order to foster women's rights in all spheres of their existence, including the political, the social and the cultural field, and in making recommendations with regard to pressing problems concerning women and calling for prompt action (Schopp-Schilling & Flinterman, 2007:11). In order to achieve its ultimate gaol, the Commission developed a set of international conventions that were adopted between 1952 and 1962, well before the Convention on the Elimination of All Forms of Discrimination Against Women entered into force, representing a comprehensive instrument for the protection and the implementation of the principle of equality and non-discrimination against women. They mainly were the Convention on the Political Rights of Women in 1952, the Convention on the Nationality of Married Women in 1957 and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in 1962, which all shared a limited scope and the lack of any procedure for their implementation (Reanda, 2003:19). In 1988, the UN Commission on the Status of Women was renamed into the Division for the Advancement of Women, which was maintained up until its more recent incorporation into UN Women (Charlesworth & Chinkin, 2013:15). Moreover, the Commission also engaged in cooperative relations with other UN bodies such as the ILO and the UNESCO, in order to boost women's rights in the field of employment, retirement and education through the elaboration of additional international mechanisms (Galey, 1984:465).

Furthermore, after the Mexico and Beijing conferences on women, additional institutions were created within the United Nations' framework in order to specifically address women's concerns. First, the International Research and Training Institute for the Advancement of Women (INSTRAW) was established in 1976 by the ECOSOC whose main task consisted in carry out research, training and in gathering information in order to boost development by ensuring a parallel advancement in the living conditions of women worldwide (Charlesworth & Chinkin, 2013: 16). Secondly, in 1984 the United Nations Development Fund for Women was set up and designed in order to adequately include women in initiatives fostering development and innovation at both national and regional level (Charlesworth & Chinkin. 2013:17). Thirdly, a Special Adviser on Gender

Issues and the Advancement of Women (OSAGI) was created in 1996 and then incorporated within the ECOSOC a year later by the Secretary- General Kofi Annan who recognized the need for developing a concrete policy in order to mainstream a gender perspective throughout the whole UN system (Charlesworth & Chinkin, 2000:17). Therefore, the work of the Special Adviser was mainly focused on promoting 'gender mainstreaming' which has to be adopted and institutionalized within all UN bodies at any level; it was specifically defined by the Economic and Social Council in the following way:

"Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal is to achieve gender equality." (ECOSOC, 1997)

Therefore, laws, policies and regulations should not anymore focus on endowing women with special protection, but rather they should ensure equal treatment between men and women "as if the doctrine was not gendered to women's disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies" (MacKinnon, 1991:3). The means through which the task is supposed to be accomplished are several: the adoption of both policies and strategies involving a gender perspective in the different sectors and areas of action; the use of legally binding instruments such as directives instead of guidelines having no legal effects; the improvement of already existing tools in order to make the process of mainstreaming gender more effective; the subsequent setting up of instruments aiming at evaluating and monitoring their impact; and the formulation of accountability mechanisms (ECOSOC, 1997).

As a consequence of the emergence of the Convention on the Elimination of All Forms of Discrimination Against Women, the Committee on the Elimination of Discrimination against Women started to play a fundamental role as it represents an exception within the other UN bodies: instead of a political mandate, it has been empowered with a legal mandate aimed at safeguarding the application of the duty to respect the non-discrimination principle against women enshrined within the Convention (Charlesworth & Chinkin, 2013:19). Consequently, a fruitful and active cooperation emerged between the Committee and the UN bodies, agencies, programs and funds (Schopp-Schilling & Flinterman, 2007:42). Among them, it is worthwhile highlighting the collaboration

between the CEDAW and the United Nations Development Fund for Women (UNIFEM) with the latter contributing to the spreading and the promotion of the Convention and, particularly, of the principle of empowerment of women through civil society and nongovernmental organizations. Then, considering the activity of the United Nations Population Fund (UNFPA), it is necessary to mention the outcomes that were reached at the Cairo Conference on Population and Development held in 1994. Within this forum, education is recognized to be the most critical instrument in order to create the conditions for women's empowerment although this effort is continuously undermined by a set of interrelated and detrimental factors due to the bad health conditions leading to a high rate of maternal and infant mortality, and to the persistence of trivial and traditional practices, including female genital mutilation. Moreover, a round table was organized for the first time on the issue of "Human Rights Approaches to Women's Health with a Focus on Sexual and Reproductive Rights" to which all human rights treaty bodies concerned with the issue, several UN agencies and NGOs participated and were asked for the first time not only to reflect upon the question at hand but also to undertake a fundamental collaboration (Schopp-Schilling & Flinterman, 2007:43). Finally, also the United Nations Educational, Scientific and Cultural Organization (UNESCO) decided to cooperate with the CEDAW during the works for the preparation of the Fourth UN World Conference on Women. Particularly, a joint manifesto entitled "Toward a Gender-Inclusive Culture Through Education" was developed in 1995, taking on article 10 of the Convention as a fundamental basis in order to ensure the women's right to education (Schopp-Schilling & Flinterman, 2007;45).

Nevertheless, the effort to set up ad hoc institutions with the ultimate purpose to protect women's rights within the UN institutional framework resulted ineffective as those bodies enjoyed limited support and visibility on an international scale and did not contributed to foster a consistent change for women's lives (Charlesworth & Chinkin, 2013: 20). Although the Beijing Conference already highlighted the need to improve the status of the UN system designed to protect women's rights, the UN General Assembly[11] asserted that the CSW, INSTRAW, CEDAW, DAW and UNIFEM had to be "review and rationalize within the context of ongoing efforts to revitalize the Economic and Social Council in pursuance of a stronger, more unified program for the advancement of women" (Charlesworth & Chinkin, 2013:22). Moreover, it specified that this effort should be necessarily located within the more comprehensive process of UN's reform that was

[11] See A/RES/50/162 of 22 December 1995.

initiated by Kofi Annan in 1997[12] and was further supported at the Millennium Summit in 2000 when he set up a High-Level Panel on Threats, Challenges and Changes which in 2004 proposed some modifications to the existing institutions characterizing the UN system (Charlesworth & Chinkin, 2013:7). These revisions specifically involved two important UN bodies that were concretely engaged in the protection of women's rights and in the promotion of both gender equality and women's empowerment, namely the Security Council and the Human Rights Council. The former did not undergo significant changes, but it was simply called to strengthen its attempts to protect women's rights in the fields of both peace and security (Charlesworth & Chinkin, 2013:38). A gender mainstreaming approach should be taken into consideration in a vast array of resolutions, all concerning the need to protect both women and younger girls in situations of armed conflict and crisis in which the potential for alleged violations of women's rights tends inevitably to increase.[13] At the same time, the contribution of women in processes of peace achievement and construction was considered vital (OHCHR, 2004:21). Conversely, the Human Right Council is considered the most important intergovernmental body within the UN framework in the work towards the respect, protection and fulfilment of human rights in general. Both this new body created by the UN General Assembly in 2004 and its forerunner, namely the Commission on Human Rights, have always adopted resolutions concerning women's rights. Particularly, as a consequence of the Beijing Declaration and Platform for Action it has been considered crucial for all agencies, bodies, programs and funds to engage in the practice of gender mainstreaming aimed at keeping women's rights at the centre of the international agenda and at prompting states to respect the obligations to which they are subject in that field (OHCHR, 2004:19). Its activity is crucial as the Human Rights Council has been empowered with specific capabilities and powers to tackle violations of human rights, especially from a legal perspective. First, special sessions may be convened in order to cope with alleged violations of human rights in different situations of emergency, which may also include women's rights. Secondly, a procedure generally known as universal periodic review allows the Council to periodically evaluate whether states comply or not with the obligations related to human rights; within the reports submitted to the Council

[12] See the Report of the UN Secretary- General "Renewing the United Nations: A Program for Reform. Report of the Secretary-General" in which he called for" "an extensive and far-reaching set of changes [to] move the Organization firmly along the road to major and fundamental reform."

[13] This started to became apparent since the adoption of resolution (S/RES/1325) on women and peace and security on 31 October 2000 by the UN Security Council. See http://www.un.org/womenwatch/osagi/wps/

through this specific mechanism women's rights always represent an issue deserving specific attention (OHCHR, 2004:20). Furthermore, concerning the implementation of women's rights in practice, through the special procedures mandate holders, the Human Rights Council engaged in the important task of evaluating the situation in relation to the application of women's rights. Some of these mandates are precisely engaged in the activity of deepening the understanding of human rights law in foreign countries missions and activities of cooperation with national governments and of advocacy, and they offered the opportunity to provide a better account of the situation concerning women and alleged violations of their rights (OHCHR, 2004:21). Finally, in 2011 the Human Rights Council appointed the newly formed Working Group on Discrimination against Women in Law and Practice with the precise purpose of fulfilling the potential of the CEDAW by operating in close cooperation with the Committee and other human rights bodies (Raday, 2012:530). Its tasks mainly include creating a legal environment in which laws involving both direct and indirect discrimination against women were eradicated one and for all; adopting both laws and practices favouring the implementation of the principles of equality and non-discrimination; and promoting gender equality and empowerment of women within the framework of the millennium development goals (Raday, 2012: 515).

Nevertheless, an inherent shortcoming characterizing the 2004 report of the High-Level Panel[14] was the almost complete lack of references to women's rights as well as to women's ad hoc institutions (Charlesworth & Chinkin, 2013:22). Therefore, as a consequence of a paper elaborated by Centre for Women's Global Leadership and the Women's Environment and Development Organization and endorsed by a great number of women's NGOs, within the 2006 report the High-Level Panel started to incorporate gender issues, advancing the proposal for a reform of the existing structure through the building up of a new entity specifically devoted to the protection of women's rights. Indeed, it affirmed that "gender equality and women's empowerment are taken seriously throughout the UN system" (Charlesworth & Chinkin, 2013: 25). After a significant debate spread leading to the elaboration of a 'gender architecture' in the 2006 report, in 2010 the UN General Assembly decided to incorporate and merge in a unique institution, namely UN Women[15], all the UN bodies that up until that moment were engaged in the task of promoting a gender perspective within the UN human rights framework. While according to its Executive Director, UN Women's mission consists in "the elimination of

[14] See Doc. A/61/583 of 9 November 2006.
[15] Its formal nomenclature is Gender Equality and Women's Empowerment as it is a combination of a legal concept, namely gender equality and of a policy objective, namely women's empowerment.

discrimination against women and girls, the empowerment of women, and the achievement of equality between women and men as partners in and beneficiaries of development, human rights, humanitarian action and peace and security" (Charlesworth & Chinkin, 2013:29), the new UN Secretary-General Ban-Ki-Moon claimed on the day of the beginning of its work that UN Women would be crucial for "UN efforts to promote gender equality, expand opportunity and tackle discrimination around the globe" (Charlesworth & Chinkin, 2013:26). Therefore, while UN Women is the result of the process of reform of the UN agenda aiming at increasing resources and effectiveness in its operations, its substantial roles involve the backing of intergovernmental bodies including the UN General Assembly, the ECOSOC and the Commission on the Status of Women; the support to member states in achieving and effectively implementing the standards with regard to women's rights; and the contribution to make the UN system more transparent and accountable for the commitments on the goal of gender equality and women's empowerment (UN Women). To achieve that purposes, the following priorities were set out: support to the quest for women's leadership; fight against violence against women; increased and more active participation of women in peace and security processes; and policymaking and budget management reflecting women's rights and concerns (Charlesworth & Chinkin, 2013:28).

2.2 The regional framework for the protection of women's rights

The respect, protection and fulfilment of human rights of women is not only enshrined in international human rights instruments and mechanisms, but also in regional human rights treaties.

The most valuable and advanced system for the protection of women's rights at regional level is the European one which is based on two instruments which are respectively developed by two separate institutions, namely the Council of Europe and the European Union: the European Convention on Human Rights and the Charter of Fundamental Rights.

The Council of Europe is the European leading human rights organisation; composed of six bodies among which the European Court of Human Rights, its main purpose is to foster human rights, democracy and the rule of law. All the 47-member states, including the 28 members of the European Union, ratified the European Convention on Human Rights (CoE, 2010) which was originally adopted by the Council of Europe in 1950 and whose main purpose was to create a legally binding instrument implementing the

principles and the rights affirmed in the Universal Declaration of Human Rights, a political document and, therefore, not legally binding. This represented both an opportunity provided to European citizens to enjoy human rights in a more comprehensive way, and an obligation on the part of member states to adapt their national legal system to the principles of democracy, rule of law and respect for human rights set forth in the Convention. Moreover, since 1998, all member states are subject to the jurisdiction of the European Court of Human Rights (ECHR) which also became compulsory as a consequence of the adoption of Protocol No. 11 to the Convention (FIDH, 2016:109). The main task of the Court consists in monitoring the implementation of the Convention within member states; as it has not been empowered with the possibility to start off a case, complaints for alleged violations of the rights of the Convention can only be filed by individuals provided that they have exhausted all national remedies at their disposal, or by inter-state applications (CoE, 2014:5). Another crucial aspect is included in article 1 of the Convention according to which before starting the judgement of a case, the Court should always establish whether the issue falls within its jurisdiction[16] (FIDH, 2016:112). However, while the extra-territorial jurisdiction has been applied in order to judge cases in which human rights violations against individuals had been perpetrated by state organs or actors operating outside the national territory, it has not been still possible to employ it to protect individuals from abuses carried out by non-state actors, for instance multinational corporations (FIDH, 2016:112).

With regard to the protection of women's rights, article 14 of the Convention puts forward the non-discrimination principle, claiming the prohibition of discrimination in the enjoyment of the rights included in the Convention on any grounds, including that of sex (FIDH, 2016:110). On the basis of the recognition of equality of all persons before the law and of the attempts to concretely enforce the general prohibition of discrimination, Protocol No. 12 examines it more deeply and specifically, setting forth the norms adopted by the Convention concerning its territorial application, the relationship to the Convention, the procedure for signature and ratification, the entry into force and its depositary functions (FIDH, 2016:111).

As a consequence of the adoption of the European Convention of Human Rights, many other conventions were elaborated within the Council of Europe which, however, were not included in the constitutional order. Among them, it is worth mentioning the European

[16] According to the interpretation of the Court, jurisdiction does not refer only to the national territory of a state, but it indicates that the Convention has extra-territorial application, though this is limited to specific circumstances.

Cultural Convention (CoE, 1954) and, particularly, the European Social Charter (CoE, 1961). The latter was firstly adopted in 1962 while a revision was approved in 1996 and entered into force in 1999, protecting economic and social rights as opposed to the European Convention on Human Rights that focused on civil and political rights (FIDH, 2016:126). Within the Charter, women's rights are specifically protected in article 20 which ensures equal opportunities and treatment within the labour environment, forbidding discrimination on the grounds of sex (FIDH, 2016: 129). However, due to the nature of the rights included within it, the European Social Charter is applicable only within the national territory of each state while foreigners, being it individuals, corporations or nongovernmental organizations, are ensured protection in the case they belong to one of the State parties or in the case they are resident or workers in one of those states. Obviously, this represents a huge obstacle in the attempt to make corporations directly accountable for the human rights violations they have committed in non-State Parties (FIDH, 2016:128).

In contrast, with regard to the framework for the protection of human rights established within the European Union, it must be highlighted that despite its 28 members are all part of it, the European Union has not ratified the European Convention on Human Rights. After the European Court of Justice first ruled out this possibility in 1996 on the basis of article 352 of the TFEU, a provision was specifically introduced within the Treaty of Lisbon entailing an obligation for the European Union to access the ECHR (article 6 TEU); however, this landmark event has not been achieved yet. Although in 2014 the European Court of Justice delivered another opinion rejecting the draft agreement that was prepared for the accession of the EU to the Convention for not complying with EU law (FIDH, 2016:110), it is expected that sooner or later this provision will be effectively implemented, creating a common space for human rights' protection and promotion in Europe. Moreover, in the same provision of the Lisbon Treaty, it is affirmed that the protection of human rights and fundamental freedoms is a task entitled to the European Charter of Fundamental Rights (European Commission, 2000) that was then recognized as a legally binding instrument in the same way as the Treaties. The Charter, however, does not include new rights as they have all been derived by the previous treaties signed in the field of human rights and in which they are actually rooted. For instance, equality before the law and the principle of non-discrimination are respectively included in articles 20 and 21 (European Commission, 2000:6). In conclusion, the Council of Europe and the

European Union are distinct organizations which, however, are engaged in a complementary and cooperative manner in the task of human rights' protection.

Furthermore, two additional regional instruments are engaged in the task of women's rights protection. First, the African Charter on Human and People's Rights (OAU, 1981) enshrined a wide set of rights including both civil and political rights, and economic, social and cultural rights which, however, differently from the instruments elaborated within a 'western' framework is addressed to communities and peoples rather than to individuals (Charlesworth & Chinkin, 1991:636). Concerning women's rights, among the former is necessary to highlight the principle of non-discrimination (article 2) and of equality before the law (article 3) while among the latter the right to decent working conditions and to equal pay for equal work (article 15), and rights that are specifically granted to women (article 18). However, in addition to the frequent employment of the masculine pronoun 'his' suggesting the reference to the rights of man, another significant hurdle threatens the enjoyment of the rights enshrined in the Banjul Charter on the part of women. The "promotion and protection of morals and traditional values recognized by the community", as it is set out in Article 17, poses several challenges to the implementation of the principle of non-discrimination against women as well as to the respect of human rights put forward more generally in other provisions (Charlesworth & Chinkin, 1991:637).

Secondly, the Inter- American system for the protection of human rights in general is founded on the American Convention on Human Rights (OAS, 1969). The rights enshrined within it are ensured and enforced thanks to the establishment of two main bodies within the structure of Organisation of American States (OAS), including the countries of the American continent as a whole and the Caribbean: the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights (FIDH, 2016:164). The main purpose of the Inter-American Commission on Human Rights is to foster and safeguard the human rights enshrined in the Charter avoiding discrimination on all grounds within the application process; particularly, it receives petitions concerning human rights violations perpetrated by one of the member parties to the OAS structure (FIDH:2016,167). In contrast, in spite of dealing with issues of application and interpretation as well, the Inter-American Court on Human Rights has not been empowered with the ability of rendering judgements over a case which is a prerogative of the Commission, except in specific cases (FIDH, 2016:180). In summary, the Inter-American system has been recognized as having a great potential to respond to corporate

human rights abuses: states have the obligations not only to refrain from carrying out illegal acts violating human rights of individuals, but they also have to prevent non-state actors, such as transnational corporations, to commit corporate abuses. Therefore, even in the case in which violations of human rights are not directly imputable to state, the latter could be made accountable for the abuses due to the lack of due diligence, meaning the has not succeeded in effectively preventing them to occur or in correctly addressing them (FIDH, 2016:164).

In conclusion, at the beginning of the twenty-first century women continue to suffer from living conditions restraining their chances to fully enjoy human rights, especially with regard to the non-discrimination principle, although is widely included in many international human rights instruments (De Vido, 2016:18). This is mainly due to a combination of factors, including not only climate change, environmental destruction, persistence of patriarchal norms, values and habits, conflicts, but also a changing economic situation and the effects of globalization. Indeed, what both the international and the regional framework for the protection of human rights and, particularly of women's rights share is that they only have the power to tackle women's rights abuses perpetrated by states within and outside its national territories; even in the case in which it is clear that they have been committed by a non-state actors, it is only possible to recognize the international responsibility of the state because of the lack of due diligence (Kinley & Tadaki, 2004:937). For this reason, in the following chapters multinational corporations will be analysed more specifically, exploring different possibilities in order to make these non-state actors directly accountable for women's rights abuses.

3. WOMEN'S RIGHTS AND MULTINATIONAL CORPORATIONS: THE NEED FOR REGULATION AT INTERNATIONAL LEVEL

As we have briefly mentioned in the introductory chapter, economic globalization and the waves of privatization and deregulation resulting from the spread of neoliberal ideology within international policy circles have fostered the increasing power of transnational corporations worldwide. A report submitted by the Special Representative of the Secretary General to the Commission on Human Rights in 2006[17] concerning the intertwined issues of business and human rights stressed the scope of this phenomenon by estimating that about 70.000 transnational corporations with more than 700.000 subsidiaries or affiliates are spread all over the world[18] (Marrella, 2009:230). Particularly, John Ruggie stated that these business entities:

"are no longer external arm's-length transactions […]. In this respect, then, what once was external trade between national economies increasingly has become internalized within firms as global supply chain management, functioning in real time and directly shaping the daily lives of people around the world." (Marrella, 2009:230)

Different studies could be highlighted in order to further appreciate the extent of corporate power, meaning "the excessive control and appropriation of natural resources, labour information and finance by an alliance of powerful corporations and global elites in collusion with government" (Moussié, 2016:5). First, an NGO known as Global Justice Now provided a ranking of the top 175 global economic entities, considering both the data elaborated by the CIA World Factbook concerning governments and the Global Fortune List 500 regarding corporations. It is possible to notice that while in 2014 the economic entities in the world were 64% corporations and 34% governments, in 2016 the percentage of corporations rose up to 69% and the one of governments fell, reaching the 31%. Secondly, according to Fortune 500, in 2016 the revenues of the world's largest multinational corporations amounted to $3.7 trillion while they generated profits for $1.5 trillion; however, an increasing trend reveals that both power and profits of multinational corporations are increasingly represented by a restricted group of 147 transnational business entities out of 43.060, corresponding to the 40% (Moussié, 2016: 10). Moreover, a map concerning the location of the greatest global companies in the ranking shows that despite the recent appearance of multinational corporations in developing countries they

[17] UN Doc. E/CN.4/2006/97.

[18] External trade between different nation-states has turned into global supply chain management internalized within large business entities.

are mostly concentrated in the United States and Europe; recently, though, multinational corporations headquartered in China have experienced a sensational growth leading some of them to be included within the top five (World Economic Forum). In contrast, by weighing up the biggest corporations of the Fortune 500 with the size of some national economies, we obtain striking and unpredictable results. If we compare the world's largest company, namely the US retail giant Walmart, with the world's biggest economic entities, it is easy to notice that it ranks just after the nine biggest world economies, including the US, China, Germany, France, UK, Italy, Brazil and Canada and that, consequently, it has a highest revenue in relation to other major global economies, such as Australia and India (World Economic Forum). Although it is necessary to recognize the comparison has some limitations as government revenues are generally lower than a country's GDP, by observing the revenues of the three largest multinational corporations in 2011, namely Royal Dutch Shell, Exxon Mobil and Walmart, it is quite surprising to notice that they outweigh the GDP of 110 countries, representing the 55% of the overall number of nation-states in the world (Moussié, 2016:10). Briefly, this kind of analysis is useful in order to understand, on the one hand, the importance of multinational corporations in a globalised economy and, on the other, the decline in the influence nation-states play on the world stage. Indeed, while the latter's ability to exercise their sovereignty and to control international market is limited at the national level, multinational enterprises operate in international markets all over the world with no potential limitation. Therefore, globalization does not equal the development of international trade as it already existed, but rather the increasingly important role of multinational corporations leading to the displacement and distribution of the production process at transnational level (Marrella & Galgano, 2004:71).

Nevertheless, the concentration of economic power in the hands of a bunch of large multinational enterprises in the globalised era has contributed not only to the distortion and modification of economic but also of political and social structures, leading to the appearance of extreme inequality and to an increase in the scope for human right's violations, as a result of which women have proved to be the most vulnerable and oppressed actors (Moussié, 2016:8). Consequently, in the following chapters, we will analyse thoroughly the nature of multinational corporations, their impact on women's rights and how they can be made directly accountable for alleged violations of human rights, given the international and regional framework we have previously depicted.

3.1 The nature of corporations: the different nomenclatures and meanings

In order to correctly understand the current debate revolving around the role and involvement of non-state actors and, particularly, the impact that one specific business entity in the globalised world has on human rights, it is necessary to explore the origins of the term 'multinational corporation', its meaning and the evolution in usage.

The term 'multinational'[19] was associated for the first time to corporations in relation to the experience of US firms in the 1960s. Multinational corporations were considered as enterprises headquartered in one country whose activities and operations are not limited to the home country, but they also expand to foreign countries (Muchlinski, 2007:5). That was precisely the period in which greater international attention was devoted to the emergence of modern and large business entities as a result of a set of circumstances characterising the 1960s and 1970s (Francioni, 2007:246). The disruption of the Bretton Woods system, the OPEC-oil crisis, the wave of scepticism and hostility towards Western Capitalism that mounted in Eastern European countries within a Cold War climate, the Chilean scandal involving the International Telegraph and Telephone Corporation and leading to the overthrown of the government of Salvador Allende and to his death contributed to the creation of an international framework in which the operations of multinational corporations were called into question due to the increasing power they retain, especially in developing countries. This argument was forcefully supported by the 'Group of 77' composed for the majority of developing countries that asked within the UN for a 'New International Economic Order'[20] (Muchlinski, 2007:4). Therefore, the way in which multinational corporations expanded globally seems to have caused economic dependence and exploitation in the host country rather than fostering development. For this reason, the early tentative steps toward the development of regulations for multinational corporations could be traced back exactly to that period (Francioni, 2007:246). The UN Economic and Social Council (ECOSOC) decided to appoint a new body, the Group of Eminent Persons, with the specific task of assessing the impact of multinational corporations worldwide, specifically in the fields of development and international relations (Muchlinski, 2007:4). The first report elaborated by the Group in 1974 was crucial in order to provide the conventional framework that

[19] The definition firstly appeared in a paper by David E. Lilienthal entitled 'The Multinational Corporation' published within the context of the Carnegie Institute of Technology.
[20] Through the NIEO, developing countries called for a more concrete and equal participation within international forums without being exploited by developed countries.

was needed to deal with the issues concerning multinational corporations and, particularly, with foreign direct investment. Since that moment, a distinction clearly emerged between two terms that have been alternatively employed in order to define multinational corporations: while in its report the Group of Eminent Persons originally adopted the economists' definition of multinational corporations, in a subsequent session of the ECOSOC the term 'transnational corporations' was recognized as the official one to be used within the UN framework (Muchlinski, 2007:6). Which is, therefore, the difference between them?

A 'multinational enterprise' differs from the conception of 'multinational corporation' that came about in relation to their history and development within the US; indeed, from an economic perspective, it is defined as a corporation engaged in foreign direct investment outside its home country that is allowed to exercise not only financial control over it but also managerial influence (Muchlinski, 2007:5). 'Enterprise' replaces 'corporation' in order to highlight that we are not referring exclusively to incorporated businesses or to corporations based on the relationship between the parent company and the subsidiaries spread in different parts of the world. As a result, the legal form that multinational enterprises decide to uphold is not important in order to identify them as 'multinational'. However, in 1974 according to the Fifty-Seventh Session of ECOSOC, another term started to be adopted within the UN framework, namely 'transnational corporation'. While a 'multinational corporation' is recognised as a business entity which is owned and managed at different levels in several countries, a 'transnational corporation' means a company which is owned and controlled in one country, but whose operations extend to different foreign countries (Muchlinski, 2007:6). Although theoretically this definition has always been present within the UN system, in practice it was not actually considered very much as the term 'transnational' have always been employed in order to refer to operations of those business entities across borders.

Since then, a number of international organizations, such as the ILO, the UNCTAD, the OECD and other UN bodies have been involved in the task of developing a clear definition of what 'multinational enterprise' actually means, although the flexibility of the concept made it very difficult (Zerk, 2006:50). First and foremost, the ILO's Tripartite Declaration defined multinational enterprises as "enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based" (Weissbrodt & Kruger, 2003:908). Much in the same way as the OECD Guidelines, it is specified that this

instrument does not require a specific definition of multinational enterprises, but its stated purpose is to make easier both the understanding and the interpretation of the document. According to the UNCTAD's World Investment Report published in 2000[21], transnational corporations have to be interpreted as "incorporated or unincorporated enterprises comprising parent companies and their foreign affiliates" (Zerk, 2006:51). Parent companies, therefore, are entities controlling either assets or other companies which are identified as foreign affiliates located outside the national territory by owing part of the equity capital stake (normally the 10%) which allows the foreign investor to having an influence in the management of those enterprises (Zerk, 2006:51). Following Muchlinski (2007:6), in an updated version of the OECD Guidelines released in 2001, multinational enterprises are conceived as:

"companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed."

Therefore, member states to the OECD agreed on the crucial characteristic of multinational enterprises (MNEs): a business entity headquartered in one country whose main ability lies in coordinating the activities and operations of the enterprise's subsidiaries and affiliates located in different countries through control relationships (Muchlinski, 2007:7). This represents a broad economic conception that does not take into account the nature of the foreign direct investment, the legal form or the kind of ownership (whether they are private, state or publicly listed enterprises), but it rather focuses on the ability of multinational enterprises to distribute the internal functions and tasks within the value chain by enjoying advantages in terms of costs and efficiency characterising different locations worldwide (Ruggie, 2017:3). This means that the production process is broken down throughout the value chain, but the standards are established by the leading firm and spread across the whole enterprise's structure, up until reaching all the entities and companies incorporated within the global supply chain. While before the emergence of globalization international trade was managed through external exchange among nation-states, nowadays it is managed by multinational corporations which are characterised by integrated networks of transnational economic activity, shared strategic vision and connected to national economies thanks to international transactions (Ruggie, 2013:1). Furthermore, in 2003 the UN Norms provided a broad definition of

[21]See http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=654

'transnational corporation' which is depicted as an "economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively" (Backer, 2005:146). However, it has to be highlighted that the application of the Norms extends beyond transnational corporations to other business entities.

Nevertheless, it is necessary to emphasise that multinational enterprises may take on a variety of legal forms: they may be identified as subsidiaries or affiliates of the same corporation, joint ventures, cross-border production networks, alliances, trading companies or enterprises which are suppliers of goods and services and are regulated by the usage of private contracts (Ruggie, 2013:21). For instance, looking at multinationals managed through contractual relationships, we can mention different famous brands: Starbucks is a firm producing coffee thanks to the alliances established with other partner enterprises, distributing this good to retail outlets and selling it in retail stores spread across the world; Apple is a production network as while the design of the product takes place in the US, the assembly process is carried out by suppliers mainly located in China, but also in the US, where in turn firms outsourced the production process to other countries with lower costs (Ruggie, 2017:3). In contrast, the Total group can be considered an example of a conventional vertically integrated firm as it includes almost 900 subsidiaries and affiliates operating in 130 countries all over the world and it manages all the aspects of the oil and gas industry, from exploration to the production and refining process up until the marketing and trading phase (Ruggie, 2017:3). In relation to this, subsidiaries or affiliates are acknowledged as separated legal entities which are subjects to the obligations deriving from laws, policies and regulations in force within the country where they concretely operate, and which are linked to the parent companies thanks to equity relations. At this point, a fundamental distinction concerning multinational enterprises' economic and legal form has to be emphasised as it will be crucial in the analysis of their legal personality: they are economic and business entities which directly control and manage their activities and operations although their scope is global, but they are not explicitly recognized as real subjects within the international legal framework, as we will examine later on (Ruggie, 2017:4).

In summary, the previous considerations underscore the difficulty in tracing a clear and exhaustive definition which precisely describes the main features of multinational corporations and of their activities (Carreau, 2003:27). They obviously provide useful

guidelines in order to determine whether a firm could be ascribed to the category of 'multinational corporations' or not, but they will always involve some degree of inaccuracy as no legal instrument has elaborated up until now a definite and exclusive picture (Muchlinski, 2007:7). However, for the purpose of the present study we have to focus on what all large business entities have in common: multinational corporations constitute the primary actors involved in the system of international economic relations since they carry out the greatest part of business transactions and trade on an international scale, they realise almost the entirety of foreign direct investments worldwide and finally they are the main sources of international payments (Carreau, 2003:26). Therefore, multinational corporations represent the natural product of the development and liberalization of the international economic system that has taken place since the end of World War II and has not stopped yet (Carreau, 2003:27). While the critiques for the exploitative and dominative role that these business entities exercised on developing countries in the aftermath of World War II vanished, as a consequence of the emergence of business enterprises in those countries incorporated in the global supply chain of renowned multinational corporations, new and more severe concerns came about with regard to the role they play within the international division of labour and economic globalisation (Carreau, 2003:27).

Going beyond the attempt on the part of international organizations to define multinational corporations as a concept, a basic premise concerning the main features attached to these business entities needs to be introduced and explained before focusing on how multinational corporations' activities affect human rights and women's rights more specifically. If one looks into the mainstream globalization literature, the process starting at the end of the twentieth century is deemed to be homogeneous, bringing about economic and political benefits on equal terms worldwide thanks to a greater integration made possible by technological advancements (Connell, 1998:8). Consequently, multinational corporations are depicted as economic actors "socially disembedded from the social, cultural, and economic context that they either come from or invest into" as well as the main expression of the advantages that globalization is supposed to bring about worldwide (Elias, 2008:407). Indeed, as it emerged since the publication of the UNCTAD's World Investment Report in 1994[22], the phenomenal rise in both power and influence of multinational corporations through the means of FDI within the new globalized and integrated economy tended to be constantly associated with gender

[22] See http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=642

neutrality (Elias, 2008:408). However, this was an essentially misleading viewpoint as globalization was nothing more than the reflection of a world society in which gender relations are highly unequal and unevenly connected on a global scale (Connell, 1998:8). The decision concerning the adoption of this particular approach was specifically driven by the need to demonstrate the beneficial impact in terms of both economic and social performance of multinational corporations' activities of direct investment in foreign countries (Elias, 2008:408). Therefore, although it was vastly renowned that women working within the labour environment created by multinational corporations and women living in local communities close to their industrial facilities were exposed to more severe conditions and to greater detrimental impacts, these issues were mainly imputed to pre-existent social inequalities grounded on "broader cultural phenomena, such as rural–urban migration, gender subordination in society and other cultural factors" (UNCTAD 1994:203), rather than being interpreted as the outcome of corporate structure and practices (Elias, 2008:408). However, the contribution of feminist thought has progressively dismantled this common and accepted wisdom by challenging the main assumptions concerning the world order and gender equality, and by pointing out the extensive patriarchalism which gave rise to a dividend between men and women in world societies based on the persistence of gender pay gaps, the unequal share of labour market participation, inequalities in ownership and access to land, and finally to sexual privileges, as it will be deeply analysed later on (Connell, 1998:12). These conditions paved the way for the rise to dominance of a masculine ideal within multinational corporations' framework which is defined by Connell as 'transnational business masculinity'[23]:

"It is reasonable to conclude that the hegemonic form of masculinity in the current world gender order is the masculinity associated with those who control its dominant institutions: the business executives who operate in global markets, and the political executives who interact (and in many contexts merge) with them." (Elias, 2008:409)

Therefore, multinational corporations can be considered a primary vehicle for shaping and promoting gender identities and roles at international level: foreign managers operating transnationally are the most visible expression of the hegemonic masculinity's assumptions and discourses predominant within these large business entities (Elias, 2008:410). At the same time, however, it is clear how the concept of 'transnational business masculinity' parallelly excluded the consideration of female concerns within

[23] For further explanation see Connell, R. W. 2000. *The men and the boys*. Berkeley: University of California Press.

corporate structure, policies and practices which, in contrast, expresses the adoption of Taylorist working systems based on "low-waged, controllable, feminized employment" (Elias, 2008:411).

In conclusion, for the purpose of the present study, it is imperative to adopt a gender-sensitive approach that is rooted in the recognition not only of the male dominant standard characterizing international human rights law but also of multinational corporations as hegemonic masculinized actors within the globalized political economy whose conduct is mainly driven by gendered discourses of rationality and competition as they are theorized in mainstream economic literature (Elias, 2008:409). This is mainly the result of two intertwined factors: on the one hand, the host state's focus on increasing competitiveness in the global economy as well as on boosting development actually prevents a forceful action aimed at curtailing the transnational business masculinity at work. The reduced power of the states on the activities of multinational corporations within their national territories prompted states to adopt laws, policies and regulations reflecting the male bias while producing detrimental impacts on specific groups of people, namely local and rural women or women workers (Elias, 2008: 412). On the other hand, multinational corporations became the vehicle for a hegemonically masculine gendered culture to spread to business management practices on a global scale (Elias, 2008:414).

3.2 Multinational corporations and international law: the scope of women's rights violations

Since the Beijing Conference in 1995, new powerful forces appeared changing the world enormously at political, economic social and cultural level. Neoliberal ideology paved the way for trade and financial liberalization that would later cause the emergence of an integrated world economy, for deregulation within the labour environment and for privatization of basic services within society. At the same time, neoliberal policies that have been adopted and implemented in both the US with Ronald Reagan and in the UK with Margaret Thatcher in that period concretely accelerated the expansion of multinational corporations. Indeed, according to the so called 'logic of the marketplace', markets all over the world regulated themselves autonomously and competition was left going freely, preventing in this way an excessive intervention on the part of the state. Neoliberal ideology based on the freedom of the market is, hence, at the roots of the unrestrained power multinational corporations have gained on the international stage which also represents a clear signal of a representative democratic system (Fleur,

1994:912). At the same time, however, the sensational growth of multinational corporations' importance and influence has undermined the traditional primacy of the nation-state as the main actor at international level and the basic mechanisms of representative democracy (Fleur, 1994:914), and it has generated serious concerns with regard to the enjoyment of human rights and fundamental freedoms, especially on the part of women (Moussié, 2016:6).

Although the transnational activities of multinational organizations impact both the home state in which they are domiciled and the host state in which they concretely operate though the outsourcing of economic investments, we will now focus on how the latter is specifically affected. Engaging in international direct investment within a foreign country entails an obligation to respect the legal standards that are applied at domestic level within that territorial state (Marrella, 2009:233). However, as the economic power multinational corporations retain may outweigh that of the state, the political authority of the state to devise adequate laws, policies and regulations and to enforce them with the ultimate purpose of promoting a responsible business conduct will automatically decline (Carreau, 2003:28), which triggers a critical risk for the international political economic system as a whole. Unless at both national and international level new mechanisms are devised in order to obtain an adequate level of control of the transnational activities of these large business entities (Carreau, 2003:29), multinational corporations operating in a vast array of different countries will manage to escape from regulation on the part of both the host and the home state, on the one hand, and from the monitoring activity at international level, on the other, which may consequently result in deficiencies in the application, promotion and fulfilment of human rights and fundamental freedoms (Amao, 2011:8). Therefore, the need on the part of less developed countries to attract foreign direct investments is coupled with the risk of a decline in the level of protection of both human and social rights (Marrella, 2009:233).

In order to understand the disastrous impact linked with the extensive presence of multinational corporations, and the extent of human rights violations and of environmental damages they have generated within their activities and operations, it is necessary to analyse the process and the factors leading these international business entities to acquire such a great share of power, wealth and influence (Moussié, 2016:12).

First, multinational corporations can rely on formal power through which they influence the adoption of both national and international laws, policies and regulations favourable to their interests: while they facilitate capital accumulation and profit

maximization, they tend to overlook the potential detrimental consequences this attitude triggers in relation to human rights and the environment (Karp, 2014:30). For instance, according to Marrella (2009:233), the negotiations of bilateral investment agreements (BITs) in developing countries, and especially in export processing zones or weak governance zones tend to vanish the attempts on the part of the host state's government to establish adequate standards to protect and promote human rights in the activities of multinational corporations within the national territory as they generally succumb to the need to attract foreign direct investment in order to boost economic development. Mobility of capital, which mainly figures as one of the main features of globalization, creates a competitive environment in the international arena for securing foreign direct investments in the long term as their loss would risk producing an increase in employment ratio and increasing political instability (Moussié, 2016:22). Moreover, this kind of agreements provides multinational corporations with a mechanism for investor-trade dispute settlements whose purpose consists in protecting investment in foreign countries, particularly in relations to issues such as expropriation, compensation, discriminatory practices as compared to national enterprises (Kinley & Tadaki, 2004:946). However, they practically empowered corporations with the ability to sue the government of a country in which they operate if its policies complying with human rights obligations deriving from international legal standards concerning the safeguard of labour rights, of the environment or of equal and secure land rights directly threaten the potential accumulation of corporate revenues (Moussié, 2016:16). While the discipline of foreign direct investments embraces both the prerogative of the host state concerning the maintenance of its national sovereignty without any interference on the part of business entities and the need of multinational corporations to be protected against damages within the host state's territory, it is necessary to recall two fundamental principles enshrined in customary international law (Marrella, 2003:867). On the one hand, the host states is not allowed to require a private entity to adopt a responsible business conduct and to abide to specific standards unless a consistent connection exists with the local community; on the other hand, the host states is subject to the obligation to prevent and to clamp down on any tort committed within its national territory independently from the perpetrator causing an adverse impact on individuals (Marrella, 2003:868). Then, legal reforms entailing the permission for the appropriation of natural resources and for the building-up of enormous capital on the part of multinational corporations in developing countries have been elaborated within the institutions such as the IMF and the World Bank which

had a decisive role in this process as up until the 1970s they supported developing countries in external borrowing (Moussiè, 2016:13). However, as a consequence a severe debt crisis that broke out in the 1980s, the IMF became a lender of last resort and started requiring structural adjustment and the implementation neoliberal policies and reforms as one of the conditions to accept loan agreements. The latter inevitably led multinational corporations to benefit from a set of substantial advantages: trade and financial liberalization increased the scope for bilateral and multilateral trade agreement at the detriment of developing countries; deregulation of labour markets consequently weakens the protection of workers' rights; privatization policies consistently reduce public spending for basic services; and the adoption of specific tax laws entailed a significant shift toward an export-led development process (Moussiè, 2013). Finally, the prospects for the enjoyment of human rights on the part of individuals living in developing countries are further threatened by the subtle alliance between transnational corporations, financial institutions and developed countries' governments which ensure that corporate interests are always represented within the centres of power and within the decision-making fora at international level, consequently influencing and shaping the enactment of new laws, policies and regulations in the field of foreign direct investment (Moussié, 2016:20). In some specific instances, multinational corporations may also exploit the financial resources they have at their disposal in order to lobby governments though the support of political campaigns in exchange for the endorsement of corporate interests within the decision-making process (Ruggie, 2017:5), or due to their significant influence with regard to a peculiar issues, they may be directly involved in the decision-making process (Moussié, 2016:21). Within this framework, multinational corporations may be tempted to engage in the elaboration of corporate social responsibility standards (Moussié, 2016:22), as we will examine in the next chapter.

Briefly, the impact of multinational corporation on human rights can be measured on the fact the detrimental effects of business operations are primarily rooted in still pervasive ideologies like white supremacy, capitalism and patriarchalism which are based on discrimination underlying an erroneous conception of gender, race, class; at the same time, they are also dependent on the corporate drive for maximization of profit in their activities and rising influence within public opinion (Moussié, 2016:8). For instance, according to the estimates of the Special Representative of the Secretary-General on the Issue of Transnational Corporations and Other Business Enterprises, John Ruggie, which were elaborated on the basis of the information gathered by the non-profit organization

Business and Human Rights Resource Centre about corporate policies and practices in almost 180 countries worldwide, 320 cases of alleged human rights abuses have been reported (Ruggie, 2013:65). From these data, different considerations emerge: corporations may negatively impact a broad variety of rights, ranging from labour rights to rights concerning health, family, justice, etc.; corporate human right abuses occur most frequently in developing countries rather than in developed countries of Europe or North America; finally, the extractive and mining sector accounts for the highest number of allegations producing harmful consequences in terms of livelihood and of rights of minority populations (Ruggie, 2013).

Consequently, the likelihood that multinational corporations' activities and operations result for women in a consistent decrease in human rights protection is real and it actually underscores the persistence of massive power imbalances between transnational business entities and women as individuals (Marston, 2014:29).

First and foremost, women's rights within the labour environment are specifically protected by a set of instruments that have been developed throughout decades by the ILO. While it is possible to appreciate the ILO Declaration on Fundamental Principles and Rights at Work (ILO, 1998) entailing an obligation for all member states to eliminate any form of discrimination with regard to employment, and by the ILO Declaration on Equality of Opportunity and Treatment for Women Workers (ILO, 1975) which forbids any kind of discrimination on the basis of sex preventing women from enjoying equality within the working environment (DIHR,2018:8), the ILO also adopted two additional conventions, namely the Equal Remuneration Convention (ILO, 1951) and the Discrimination (Employment and Occupation) Convention (ILO, 1958). Nevertheless, those rights have not been completely achieved and implemented worldwide yet, as women's enjoyment of human rights in the workplace is mostly undermined by the activities of multinational corporations that tend to exploit the persistence of gender stereotypes and inequality within society in order to maximise their revenues. Although the ILO identified discrimination against women based on sex to be the dominant one within the labour environment (Marston, 2014:6), the discriminatory practices that women suffer also because of class, race, ethnicity, sexual orientation, disability and migrant status significantly influence the type of work they are generally engaged in, the conditions in which they work as well as the compensation they receive for it (UN Women, 2015:16).

Among them, the most crucial and severe discrimination deals with the persistence of the gender pay gap, meaning that women systematically receive lower wages compared to men although the amount of work is the same. Moreover, informal work which is defined as "wage employment in informal establishments and households, self-employment, unpaid family work, or informal wage employment in formal establishments" is still widespread, meaning that many women receive low wages, work in poor and dangerous labour environments, and enjoy no or limited access to social security schemes and labour rights (DIHR, 2018:17). These conditions may also involve a higher risk to be regularly exposed to abuse and violence, producing both physical and mental distress (DIHR, 2018:18). For instance, Apple which is considered among the companies having a strong brand has been fiercely criticised for not having respected women's rights; particularly, within the manufacturing and assembly plants that are located in different Asian countries poor labour conditions have been reported within the supply chain where women suffered from low wages, excessive working hours, violence and harassment (ITUC, 2016:33). Finally, women have also resulted to be discouraged and less prone to engage in the activity of unionizing due to the threat of violence that transnational corporations may perpetrate against union organizations, on the one hand, and to the lack of support by the government in respecting, promoting and fulfilling women's labour rights at national level, on the other (DIHR, 2018:19). The reduced bargaining power is also dependent on cultural and social stereotypes associating women with parenting roles rather than with their concrete skills and capabilities within the working environment (Charlesworth &Chinkin, 2000:6). Consequently, globalization has created the fruitful conditions to improve the scope for women to work and earn a living themselves, but at the same time, women's employment occupations mainly converge at the lower hand of the global supply chains or in the so-called export processing zones (EPZs), both characterized by the presence of "irregular contracts, substandard working conditions, long working hours and lack of social and unemployment benefits" (Marston, 2014: 31). Therefore, women may end up being segregated at the bottom of the employment hierarchy, practically contributing to reinforce a division of labour according to which men are supposed to be engaged in skilled and higher paid labour while women are influenced by society's expectations to choose part-time labour with low wages or unpaid, informal and poor-quality work, preventing them from escaping the prejudicial socio-economic conditions in which they are constrained (UN Women, 2015:84). Indeed, according to the UNDP Human Development Report elaborated in 1995, "men receive the lion's share of income

and recognition for their economic contribution while most of women's work remains unpaid, unrecognized and undervalued" (Charleswort & Chinkin, 2000:7). As multinational corporations engage in a continuous quest for maximisation of profit and value, labour rights are perceived not to be useful to that achievement while labour is interpreted to be a mere commodity (ITUC, 2016:3). Briefly, in order to bring about substantial progress in the achievement of women's rights within the labour environment (UN Women, 2015:12), there is an imperative need to adopt gender mainstreaming in policymaking, ensuring them a minimum wage and protecting them against the threat of sexual harassment and violence (Marston, 2014:7).

Thereafter, it is recognized that privatization[24], meaning the shift in service provision from the public to the private sector, may lead to adverse consequences and practices creating inequality among the recipient of those services (DIHR, 2018:28). First, it effectively hinders the possibility of the enjoyment on the part of women of their social and reproductive rights as well as of the right to health as it becomes increasingly difficult for them to afford private services in that field (Moussié, 2016:32). Secondly, privatization prevents younger girls from enjoying the right to equal opportunities and treatment in education as in the case it is managed by private entities, it is highly likely that the rate of female attendance to school will decrease compared to men provided that the education of boys tends to be prioritized by families due to their perceived future return. Moreover, according to the UN Committee on the Elimination of Discrimination against Women[25], the privatisation process in the field of education may involve severe risks for younger girls due to loose regulations and lack of control over private providers exposing them to sexual abuse by the school personnel, to the perpetuation of stereotypes based on gender within the educative path, and to the absence of the necessary information with regard to sexual and reproductive health (DIHR, 2018: 29). Thirdly, privatization is relevant also with regard to the enjoyment of the human right to water and sanitation[26] as it may be undermined by increases in prices and water cut-offs as a

[24] According to the General Comment No. 24 elaborated by the ECOSOC in 2017, privatisation is not considered a forbidden practice, but states are asked to provide an adequate standard for service delivery in order to ensure the enjoyment of fundamental economic, social and cultural rights.

[25] As it is reported in Action Aid et al. (2014). *Privatization and its impact on the right to education of women and girls*. http://www.campaignforeducation.org/docs/reports/GCE_Submission_Privatisation_CEDAW_2014.pdf .

[26] It was considered as such for the first time in the final document of the Rio +20 Conference on Sustainable Development while within the Millennium Development Goals, the access to safe and affordable drinking water and sanitation is recognised as crucial in order to achieve women's empowerment, among other purposes. See De Vido. (2012). *The right to water: from an inchoate right to an emerging international norm.*

consequence of privatization, and it may also involve concrete risks for the health and the security of both women and children that have to travel back-and-forth long distances in order to encounter drinkable water. At the same time, the lack of this right may also prevent them to engage in other useful economic, social or cultural activities[27] (DIHR, 2018:30).

Finally, with regard to the privatization of land and natural resources, although women produce the half of the food cultivated globally and up to 60-80% of food in developing countries, they own less than 20% of lands. Therefore, discriminatory practices against women in the field of property are still extensive nowadays: women are not entitled to equal rights on the ownership, use and control of land; they can exclusively enjoy secondary rights, meaning that they are subordinated to those retained by the male family members; when they are allowed to control land, they tend to receive smaller and poor-quality lots of territory; finally, in many legal system around the world women are not allowed to inherit land and property from their husband in case they remain widow (Global Initiative, 2015:2). Moreover, women's rights to land are severely threatened by the rising influence of multinational corporations that through the practice of land-grabbing have caused forced eviction, dispossessions, displacements and migration of women farmers, peasants and indigenous communities, increasingly exposing women to episodes of sexual harassment and gender-based violence perpetrated by private security personnel. Consequently, women's access, management and control of land are crucial in order to increase women's status both within the family and the community: land would not only enable women to produce food and ensure the entire family the enjoyment of healthcare, social and educational services, avoiding women's entry into the realm of informal, low paid or unpaid labour (DIHR, 2018: 23), but also to achieve greater authority, decision-making influence and economic independence within the household and an increased level of involvement within the community (Global Initiative, 2015:2). Women's rights to land basically represent a precondition for women in order not to be deprived of their basic human rights and fundamental freedoms but simultaneously they would also prevent land-grabbing and exploitation of natural resources on the part of multinational corporations, favouring a more sustainable management of the environment (Global Initiative, 2015:3).

[27] As it is reported in Action Aid Australia, 6 *reasons why privatization impacts women's rights*, online at: http://www.actionaid.org/australia/privatisation-womens-rights .

In conclusion, it is possible to claim that since World War II and, particularly, since the emergence of neoliberal ideology and policies, while trade liberalization, the parallel deregulation of labour markets and privatization of basic services all over the world have created greater prosperity, a more unequal world has parallelly emerged (UN Women, 2015:12). Women's lives are characterized by inequality, under-fulfilment and a lower quality compared to men (Charlesworth & Chinkin, 2000:14) as the enjoyment of women's rights has been consistently threatened by the more prominent role, power and wealth of multinational corporations in the globalised era (UN Women, 2015:12).

3.3 Invisibility of multinational corporations' responsibility: their legal personality

In defining multinational corporations, we have highlighted that all over the world they can be conceived as one single enterprise with shared vision, mission, strategy, operations and revenues. However, in spite of being acknowledged as economic entities enjoying increased relevance within the international system, they actually lack legal recognition which poses significant challenges to the global governance system (Ruggie, 2017:4). Kofi Annan on the day of his appointment as UN Secretary General posited that there was a need to "identify and […] clarify standards of corporate responsibility and accountability for transnational corporations" and to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation" (De Brabandere, 2011:2).

Before examining how international legally binding instruments addressed non-state actors' rights and obligations as well as their enforcement and why multinational corporations are not endowed with a well-defined and effective legal personality, we should first analyse the distinction between 'subject' and 'object' and between the concepts of 'responsibility' and of 'liability' or 'accountability', as defined by international law.

By 'subject' of international law, we mean actors that directly own specific rights and are entitled to respect some duties and obligations for which they may be held accountable; in contrast, those actors that are merely characterised by derivative legal personality are considered as 'objects' of international legal standards (Fleur, 1994:897). In order to understand whether multinational corporations can be considered 'subject' or 'object' of international law, it is necessary to explore the status of their legal personality. Generally, an entity is recognized to have 'international legal personality' if it meets the

following conditions: it enjoys rights and obligations under international law, it is able to entertain legal relations on an international scale, and it can enforce rights and obligations deriving from international law (Zerk, 2006:73). In other words, international legal personality means identifying which entities are legal persons and which are their competences within a given system (Carreau & Marella, 2012:367). However, it is worth highlighting that the notion of legal personality is not immutable, but it is defined in function of how the necessities and needs are shaped within the existing international society (Carreau & Marrella, 2012:367). As a result, it could be also be depicted as a transformative concept that varies according to the historical evolution of the international order and of the society it aims at regulating (Marrella, 2009:193).

Therefore, as a consequence of the emergence of globalization, it would be quite restrictive to examine the issue of international legal personality exclusively from the point of view of international law as traditionally conceived under the Westphalian system as it would mean avoiding to take into consideration the fundamental shifts the international economic order underwent thanks to the appearance of new actors, such as intergovernmental and non-governmental organizations and, especially, multinational corporations (Marrella, 2009:192). Thus, the possibility to recognize new entities in addition to states as subjects of international law endowed with legal personality has progressively become crucial for the development of international law. Indeed, according to Carreau and Marrella (2012:367), it is possible to identify three different subjects of international law on the basis of a distinction grounded on responsibilities attached to each of them.

First, states are considered subjects of international law as the source of their legal personality could be directly derived from international law which clearly establishes the rights and the obligations to which they are subject, and which entails both conceptions linked to state's responsibility, namely the formal and the material perspective. While the former includes the internal responsibility the state retains with regard to the establishment of political powers and the organization of the economic and social systems, on the one hand, and the external responsibility concerning the relations it entertains with other members of the international community, the latter refers to the jurisdiction of the states to lay down and to enforce laws, policies and regulations deriving from international law (Carreau, 2003:370).

Secondly, intergovernmental organizations (IGOs) are recognized as 'derived subjects', meaning that they are institutions created thanks to multilateral and

intergovernmental agreements which, however, are not endowed with the full and original responsibility of states as it is established by the International Court of Justice[28] (Carreau & Marrella, 2012:425). In its Advisory Opinion issued in 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*[29], the latter also put forward two conditions that have to be achieved in order for a non-state actor to be identified as a subject of international law (Chetail, 2013:109). On the one hand, it should enjoy both rights and obligations; on the other, it should enforce those rights when needed through the mechanisms of international claims. According to these criteria, in the aftermath of the Second World War other actors than states have acquired legal personality under international law, namely some international organizations (Carreau & Marrella, 2012:425). For instance, the Organization of the United Nations was recognized by the ICJ as:

> *"an international person. That is not the same thing as saying that it is a State, which certainly, it is not, or that its legal personality and rights and duties are the same as those of a State. […] What it does mean is that it is a subject of international law and capable of possessing rights and duties, and that it has the capacity to maintain its rights by bringing international claims." (Carreau & Marrella, 2012:426)*

Therefore, while intergovernmental organizations have to be considered as moral persons within the national jurisdiction of its members (Carreau & Marrella, 2012:426), within the international order they are endowed with some specific competences that derive from the acquisition of international legal personality. In particular, international organizations can conclude an agreement with states, other international organizations or private persons; they are allowed to bring about a claim to the competent international institutions; they have the power to protect their agents; they can appear in front of an international tribunal either as an applicant or as a defendant; and finally, they are allowed to openly question the international responsibility of other institutions in case of violations of their rights or, conversely, they can be subject to these kind of allegation by the same actors (Carreau & Marrella, 2012: 433). In summary, international organizations could be described as subjects of international law, which, however, entails specific rights and responsibilities compared to states (Marrella, 2003:195).

[28] The ICJ played a fundamental role in the process of building up of the existing doctrine of international legal personality applied to IGOs, providing an essential contribution also to the development of contemporary international law. See Carreau, D., Marrella, F. (2012). *Droit International,* p. 429.

[29] ICJ. *Reparations for Injuries suffered in the service of United Nations*. Advisory Opinion, ICJ Reports 1949, 174, at 179.

Thirdly, in relation to multinational corporations, three different conceptions of legal personality have emerged (Chetail, 2013:107). The first one is based on an analogy with the state according to which multinational corporations are recognised as subjects of international law provided that they comply with the following conditions: the entity should be endowed with the ability to settle international agreements, to manage diplomatic relations and to present international claims. It is considered a restrictive conception as it does not encompass the variety of actors that have emerged in the international scene in the last few decades; moreover, states are endowed with a particular status within the international legal framework due to their ability to be both subject and architect of international law (Chetail, 2013:108). Secondly, a more extensive conception relies upon the blurring process concerning the traditional dichotomy existing between an object and a subject of international law[30], which is deemed to completely encompass the complex reality of contemporary international law and more specifically of international economic law (Marrella, 2003:194). Therefore, for a multinational corporation to be endowed with legal personality, a simple requirement is needed: enjoying rights as well as obligations established and recognized by international law without having the capacity of finalizing international agreements and of bringing international claims (Chetail, 2013:109). A third and intermediate conception was developed within the framework of the International Court of Justice, as we previously outlined; according to the criteria elaborated by the Court of The Hague, in the aftermath of the Second World War other actors than states have acquired legal personality under international law independent from the one of their founders, which paved the way for a significant revolution in the recognition of international legal personality (Carreau & Marrella, 2012:425). Parallelly, thanks to the establishment of complaint mechanisms and to the recognition of international responsibility for war crimes, international human rights treaties conferred international legal personality on individuals (Kinley & Tadaki, 2004:945). Indeed, according to the interpretation the Permanent Court of International Justice delivered in 1928 within the *Advisory opinion on the Jurisdiction of the Court of Dantzig*, states and IGOs were not the exclusive subjects of international law anymore as international legal personality could be assigned also to individuals, at least in a partially or subsidiary manner[31] (Carreau & Marrella, 2012:441).

[30] According to the New Haven school and to the former President of the International Court of Justice, Professor Rosalyn Higgins, international law should be considered as a process.

[31] The PCIJ affirmed that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating

Consequently, in much the same way it has been possible for other non-state actors, transnational corporations may potentially be recognized as subjects of international law though with limited liability (Marrella, 2003:195)**.** Nevertheless, in a ruling case of the International Court of Justice, namely the *Barcelona Traction, Light and Power Co Case*[32], the legal personality of multinational corporations has been assumed to be equal to those of individuals within a nation-state (Fleur, 1994:894). This means that the rights and obligations to which multinational corporations are subject are defined by the state where they operate and by the state in which they are actually domiciled which, in turn, are responsible under international law to ensure that corporate activities conducted within the national territory do not constitute a breach of international law, including human rights standards (Fleur, 1994:895). However, due to the perceived inefficiency of both the home and the host states to set out and enforce adequate standards promoting a responsible corporate behaviour respectful of human rights, growing concerns towards non-state actors' increasing power and influence accompanied by the great progress registered in human rights law triggered a debate on the issue of multinational corporations' legal personality, which may potentially increase their involvement and consideration and change their status in international law (Zerk, 2006:74). On the one hand, some part of the doctrine actually denies the possibility that multinational corporations may acquire legal personality on the basis of two arguments (Chetail, 2013:111): it will reduce the supremacy of the state that anyway has already been undermined by the emergence of an increasingly pluralistic international order (Kinley & Tadaki, 2004:945); moreover, multinational corporations concretely lack the ability to directly enact law, policies and regulations. On the other hand, a growing part of the doctrine agreed on multinational corporations having a limited legal personality, an assumption that could be ultimately proved by examining whether they are endowed with rights and responsibilities, and with the ability to assert their rights through judicial mechanisms under the international legal system (Kinley & Tadaki, 2004:946). Three sources of international law are useful in order to attain that purpose. First, as multinational corporations engage in foreign direct investment, contracts are signed between the host state and the corporation itself, stating that their operations and activities are regulated by international law and providing international arbitration mechanisms in case a dispute arises (Chetail, 2013:113). The fact that multinational corporations enjoy

individual rights and obligations and enforceable by the national courts." See *Advisory opinion on the Jurisdiction of the Court of Dantzig*, p. 18.

[32] ICJ. *Barcelona Traction, Light and Power Co Case* I.C.J. 1970 I.C.J. 3.

"specific international capacities" in a set of particular circumstances, such as the establishment of a contract between a transnational business entity and the state, is recognized by the Arbitrator of the case *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*[33] which established that if the previously signed contract is infringed by one of the two parties for any reason, the violation will be judged according to the principles of international law (Fleur, 1994:501). Furthermore, the most common way to confer legal personality on multinational corporations is through international treaties, which mainly deal with investment. For instance, we can mention the Convention leading to the creation of the International Centre on Settlement of Investment Disputes (ICSID), the Energy Charter Treaty or the United Nations Convention on the Law of the Sea (Chetail, 2013:115). However, as treaties establishing directly rights and obligations for multinational corporations are not so widespread in the international legal framework, it is necessary to turn to State Parties, either the home or the host country, which are entitled to enact and enforce the measures needed to regulate the operations and activities of corporations. Therefore, the rights and obligations involved in this kind of conventions applied only indirectly to multinational corporations which, in this sense, result more objects rather than subject of international law (Chetail, 2016:116). Finally, customary international law, including the already mentioned treaties on investments and the codes of conduct we will deeply analyse in the following chapters, has achieved greater importance in the past few years. However, due to the lack of a binding character, codes of conduct are considered a form of soft law and, therefore, they cannot actually contribute to the achievement of a well-defined and effective legal personality and to the creation of legally binding standards for regulating multinational corporations' behaviour (Kinley & Tadaki, 2004:948). Moreover, multinational corporations are also empowered with the possibility to enforce their rights. For instance, the Convention elaborated by the World Bank to which we have previously made a reference established that corporations may resort to a binding legal instrument for arbitration, namely the International Centre for Settlement of Investment Disputes (Kinley and Tadaki, 2004:947).

The increasing economic power multinational corporations have gained as a consequence of the emergence of the global economy contributed to the collapse of traditional legal structures inherited from classic international law which still assigned to

[33] Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, YCA 1979, at 177 et seq.

these business entities less rights than states (Carreau & Marrella, 2012:462). As a consequence of the ICJ ruling of 1970, multinational corporations acquired equal legal personality as individuals within a nation-state, which prompted a greater recognition as actors participating within the international political economic framework. On the one hand, the numerous attempts on the part of different institutions at both international and regional level to more effectively regulate, manage and supervise the activities of multinational corporations abroad turned these business entities into an object of international law, as we will examine more in detail in next chapters. On the other hand, they may also be considered as subject of international law to the extent that they have to comply with a set of international norms which also apply to States or that they can conclude international agreements with other legal entities, such as states. The recognition of multinational enterprises as subject of international law in these two limited instances has mainly been accepted provided that one of two following circumstances is present: the lacunae that characterized international law in this field, and the absence of the states from particular areas which have become exclusive territory of private economic power (Carreau & Marrella, 2012: 464). Briefly, although multinational corporations have turned into important actors within the international political economic order in the last few decades due to the enormous economic power they retain and their bargaining power which in some instances is even greater than that of traditional actors such as states, their legal status has still not been properly defined preventing them to effectively acquire international legal personality (Carreau & Marrella, 2012:464).

At this stage, it is necessary to highlight that 'responsibility' is deemed to be a broader concept than 'liability' and 'accountability' which mainly refers to civil, criminal and administrative responsibilities under national legal systems. Indeed, while the former generally refers to international legal responsibility, 'corporate responsibility' specifically refers to the legal responsibility of corporations as well as to that of both states and individuals concerning corporate human rights violations (Cernic, 2010:14). Therefore, without denying the increasing relevance and power they have achieved worldwide in the last few decades (Fleurs, 1994:893), the question that will be addressed here and in the following chapters as well is whether existing international legal standards effectively ensure adequate regulation, addressing the challenges involved in multinational corporations' activities with regard to the protection of human rights and, particularly, of women's rights.

Multinational corporations' responsibility is deemed to be invisible within the international legal system and this is mainly associated with two main factors. On the one hand, international human rights law does not traditionally encompass human rights protection against private actors, but it has always been devoted to ensuring the protection of individuals preventing the state from employing excessive and arbitrary power (Kinley & Tadaki, 2004:937). Therefore, a dualistic approach started to be adopted with regard to states' obligations to respect, protect and fulfil human rights in relation to the activities of multinational corporations (De Brabandere, 2011:5): international legally binding treaties and customary international law may involve a vertical application, aimed at making states responsible for human rights violations preventing individuals from enjoying fundamental rights and freedoms belonging to them, but also a horizontal application, concerning state's responsibility for human rights violations committed within the national boundaries between private actors, as we have analysed in detail in chapter 2 (Kinley & Tadaki, 2004:937). On the other hand, as non-state actors are not directly subject to human rights obligations under international law, multinational corporations' behaviour is primarily regulated by domestic civil and criminal law systems, which in turn are backed by states' obligations deriving from international legal standards to protect all legal persons within their jurisdiction (De Brabandere, 2011:5). Consequently, depending on the jurisdictions to which multinational corporations are subject, different legal practices have been elaborated and have been subject to challenges concerning the ability to ensure an adequate level of human rights protection (Karp, 2014:27). However, since limited legal personality prevents multinational corporations from being directly subject to obligations under international law, they cannot be directly hold responsible for human rights violations occurring at international level, as neither binding provisions imposing those entities to refrain from such abuses nor enforcement mechanisms have been elaborated by international law (De Brabandere, 2011:6). Exceptions may be represented by particular but very rare cases where customary international law entails obligations directly binding multinational corporations which, therefore, can be found responsible if they commit genocide, war crimes, torture or they are involved in forced disappearances and slavery practices. Enforcement, however, does not take place at international but rather at national level, according to the legal standards in force either in the home state or in the host state (Ruggie, 2013:88).

In relation to this, we have to recall a consideration we have previously underlined: in spite of enjoying full possession of its subsidiaries, the multinational corporations' parent

company have a separate legal personality compared to the former (Ruggie, 2013:22). As a result, the parent company could not be held responsible for violations committed by a subsidiary unless there is plain evidence of a negligent conduct, fraud or a violation that had been directly perpetrated by the parent company or of which the latter was aware, but it has decided not to intervene in order to prevent the damage (Ruggie, 2017:4). However, since some multinational corporations may outweigh developing states in terms of economic power and these countries could not disregard foreign direct investments which represent an essential condition to boost economic development, the lack of adequate mechanisms and resources in order to countervail multinational corporations' power makes extremely demanding for the host states to monitor their activities and to investigate alleged violations of human rights despite the ratification of international human rights treaties (Ruggie, 2013:83). Alternatively, states may be directly involved in human rights abuses in collusion with multinational corporations, which definitely prevents any effort to cope with multinational corporations' behaviour (Fleur, 1994:910). Consequently, in addition to favouring the further increase in the power and influence multinational corporations, it also extends the scope for corporate human rights violations and the lack of access to an adequate remedy for victims (De Brabandere, 2011:6). Individuals which have suffered corporate human rights violations are not endowed with the possibility to resort to international legal mechanisms for arbitration, but they are reduced to prove that the abuses on the part of business entities are imputable to the state under whose jurisdiction they operate. In most cases, however, states have neither the ability nor the willingness to engage in the task of tackling such abuses attributing direct responsibility to multinational corporations, as we will later examine (Fleur, 1994:896).

Therefore, for a large period, multinational corporations have operated in a legal and regulatory vacuum that have allowed them to escape from direct accountability and responsibility for human rights violations committed abroad (Kinley & Tadaki, 2004:935). The lack of an international human rights regime regulating multinational corporations' behaviour explains the persistence of corporate human rights abuses all over the world. A fundamental question arises: how can multinational corporations be held directly accountable for their activities and operations which in many cases contribute to a severe worsening in the level of human rights protection in a world dominated, on the one hand, by business entities aiming at maximising their revenues and values and, on the other, by nation-states struggling to retain their power in the global governance structures? Existing international human rights standards have proven

unsuccessful in ensuring 'hard' direct responsibility for corporate abuses due to the increasing power and reach that multinational corporations have achieved globally and to the widening inability of the global governance system to control and regulate their activities and operations through effective legal enforcement measures (Ruggie, 2013: 12). Therefore, in order to create an international legal system which allows to impose legally binding obligations on multinational corporations, it is imperative to recognise multinational corporations not only as a mere 'object' bereft of international legal personality, but rather a fully-fledged 'subject' bearing rights and obligations, including the respect, protection and fulfilment of human rights, which should not exclusively remain in the hands of nation-states (Kinley & Tadaki, 2004:945). Nevertheless, while identifying multinational corporations as subjects of international law endowed with legal personality remains troublesome, 'soft' legal instruments have emerged in the attempt to regulate multinational corporations' behaviour (De Brabandere, 2011:8): both international and regional organizations have sought to elaborate a great variety of documents, stemming from the codes of conducts to guidelines, principles, declarations, regulations and decisions (Fleur, 1994:897), as we will see in the next chapter.

4. CORPORATE SOCIAL RESPONSIBILITY: A GENDER-BASED PERSPECTIVE

As previously explained, since the end of the Second World War multinational corporations have been left free to extend their activities and operations all over the world and to substantially consolidate their power and role within the international political economic framework. While corporate scandals have emerged as a consequence of mounting human rights abuses on the part of these business entities, traditional international human rights law failed in the attempt to regulate their conduct and to put an end to these continuous and severe violations, mainly due to the lack of recognition of multinational corporation as international subjects endowed with legal personality. At the same time, however, because of their misbehaviour multinational corporations may see the status of freedom and impunity within which they operate threatened by the growing pressure exercised by international public opinion and NGOs.

For this reason, it is necessary to introduce the concept of corporate social responsibility and to identify one crucial distinction between the so called 'corporate social responsibility from above' and 'corporate social responsibility from below' (Marrella, 2007: 289). While the former refers to the Codes of Conduct elaborated mainly at intergovernmental and at governmental level, such as the International Labour Organisation Tripartite Declaration concerning Multinational Enterprises and Social Policies, the OECD Guidelines for Multinational Enterprises, and the initiatives developed within the UN and within the EU regional framework, the latter is associated with the Codes of Conduct adopted directly by the business community or by multinational corporations. A specific perspective oriented at examining how women's rights are incorporated in these instruments will be adopted throughout our analysis. Furthermore, the effectiveness of the adoption of 'business case' to promote gender equality and women's empowerment will be discussed in the attempt to evaluate whether corporate social responsibility standards offers adequate protection to women's rights or other kind of initiatives are still needed.

4.1 Defining corporate social responsibility

The role of multinational corporations within the political economic order started to be discussed at international institutional level in relation to international law and human rights (Backer, 2005:119). The movement around corporate social responsibility emerged

as a consequence of the lack of an adequate international legal system for regulating multinational corporations' behaviour, leading to the emergence of a great number of codes of conduct for multinational corporations or elaborated directly by these business entities between the end of the twentieth and the beginning of the twenty-first century (Zerk, 2006:2). Before further going into this realm, it is necessary to answer a crucial question: what is CSR?

As a concept, corporate social responsibility is extremely blurred and difficult to grasp; therefore, elaborating a precise definition has been a major challenge that involved different disciplines (Amao, 2011:67). In addition, it is necessary to precise that although the most employed term is obviously 'corporate social responsibility', in many instances it is also possible to simply find 'corporate responsibility' in which the word 'social' has been removed as it seems to suggest too much the focus on labor rights limiting other plausible interpretations (Zerk, 2006:32).

One of the broadest and most relevant definitions of CSR has been elaborated by Carroll[34] in the attempt to provide a conceptual framework for corporate responsibility in the field of human rights (Rita & Agota, 2014:79). Starting from the premise that traditionally states have been the primary actors to hold responsibility for human rights protection, it has to be investigated whether multinational corporations can be entitled to bear the same obligations of states to respect, protect and fulfil human rights at national and international level (Cernic, 2010:28). According to Rita and Agota (2014:77), the concept of corporate social responsibility can be useful in that respect since it has been defined by Carroll as:

"the conduct of a business so that it is economically profitable, law abiding, ethical and socially supportive. To be socially responsible then means that profitability and obedience to the law are foremost conditions when discussing the firm's ethics and the extent to which it supports the society in which it exists with contributions of money, time and talent."

Therefore, his definition describes CSR as a concept composed of four dimensions of business performance, namely the economic, legal, ethical and philanthropic, which are reflected in the five-tiered pyramid of corporate responsibility for human rights (Rita & Agota, 2014:79). The bottom level functions as the basis for further development of the corporate responsibility discourse and it is represented by the national and international value system. From that foundations, the obligations multinational corporations have to

[34] Although the original definition has been subsequently modified, for the original one, look at Carroll, A., B. (1979). *A three-dimensional conceptual model of corporate social performance*. Academy of Management Review, No.4, pp.497–505

respect, protect and fulfil in the field of human rights are derived, constituting the second level. The latter are specifically considered horizontal obligations aimed at ensuring basic human rights and fundamental freedoms of individuals, local societies and indigenous communities affected by private actors' activities as opposed to vertical duties emerging between the individual and the state. Consequently, the third level identifies the responsibility that states, corporations and individuals have to bear in the field of human rights. In relation to corporations, direct responsibility is established on the basis of national legislation while obligations for legal persons, including corporate officials and mangers, and for states to prevent any corporate interference on the enjoyment of human rights on the part of individuals are imposed through international human rights law. Therefore, obligations concerning human rights responsibility of multinational corporations are enshrined first and foremost in national legislations, then in the international legal order and finally in corporate self-regulations, the latter being recognized as the fourth level concerning accountability. Finally, reaching the top of the pyramid means that a harmonious society have been built through an effective protection of basic human rights and fundamental freedoms, resting on the philosophical foundations provided by the lower levels. Briefly, the five-tiered approach to corporate social responsibility based on interconnected levels constituting a pyramid is substantially a holistic model to determine who bears the responsibility for human rights violations, "a comprehensive platform for the formulation of a normative framework through national and international policies" (Cernic, 2010:31).

More recently, different definitions of the concept have come out outside the scholarly debate focusing on varying aspects depending on the interest group in question: while business groups tend to emphasise the voluntary character of corporate social responsibility, NGOs mainly focus on the ethical imperative prompting business enterprises to behave responsibly, ruling out the potential of CSR as a voluntary and non-legally binding standard (Zerk, 2006:30). Notably, after being described for the first time as a voluntary initiative in 2001 by the European Commission in its Green Paper, in 2011 the Commission provided a new definition of CSR stating that it has to be measured on the basis of multinational corporations' impacts on the community in which they operate. More specifically, the new policy on CSR set out a necessary requirement a multinational corporation has to comply with in order to achieve its corporate social responsibility goals: the implementation of a "process to integrate social, environmental, ethical, human

rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders" (EU Commission, 2011:6).

However, the reference to whether the CSR concept has a legal value or not may be confusing as its relationship to law entails additional difficulties in clearly defining CSR due to the emergence of the 'voluntary vs. mandatory debate', resting on two different conceptions with regard to the legal dimension of CSR (Amao, 2011:70). On the one hand, business entities advocated for the maintenance of a voluntary framework for CSR. Indeed, according to the so-called 'business case for CSR', multinational corporations can achieve a better performance and more substantial profits if they result more attractive to investors, employees and consumers simply thanks to the adoption of policies aiming at enhancing corporate responsibility. On the other hand, NGOs deemed that a voluntary framework for CSR based on the business case is insufficient in order to ensure a responsible business conduct (Zerk, 2006:33). Moreover, the debate about whether CSR has to be voluntary or translated into mandatory obligations is based on some fundamental misconceptions: in many issues related to CSR such as working conditions, health and safety legally binding regulations as of national judicial systems already exists; then, it is mistaken to conceive CSR and the law as two separate fields because they are actually deeply intertwined and because it means overlooking the important steps forwards that have been made in most national jurisdictions as well as internationally; finally, the assumption according to which devising international legal standards to regulate multinational corporations' behaviour necessarily leads to a more responsible conduct and to a higher respect for human rights is not so plain and simple (Zerk, 2006:35). Therefore, the 'voluntary vs mandatory debate' over CSR has not contributed neither to the clarification of the meaning of corporate social responsibility nor to the solution of problems related to it.

Consequently, in order to tackle problems related to globalization, liberalization, privatization, foreign direct investment and human rights abuses it is necessary to adopt a multi-layered approach involving international, national and self-regulatory instruments aiming at the reduction of the detrimental impacts of multinational corporations while ensuring the provision of public goods (Zerk, 2006:36). For the purpose for the present study, we will broadly define CSR as the set of voluntary commitments to fostering sustainable development and social and environmental protection within multinational corporations' activities wherever their location is (Calkin, 2016:162). Therefore, although the primary raison d'etre of business entity will always be represented by profit and value

maximization, through CSR these goals could be combined in a triple bottom line approach which does not involve only financial gains, but it also focuses on delivering positive social and environmental impacts. As we will see in the next chapters, this is particularly valid for the issues of gender equality and women's empowerment, as introducing a gender mainstreaming in CSR standards allows corporations to play an important role in women's rights protection (Calkin, 2016:163). Although these contributions are not endowed with a legally binding character which results to be obviously more convenient from both a political and financial perspective than institutional regimes involving legal sanctions, the commitment to those standards and principles may at least contributes to create a level playing field constituting the basis from which 'hard law' mechanisms can be developed from the bottom-up (Zerk, 2006: 101).

4.2 The international and regional regulation for corporate practices impacting women

4.2.1 The development of Codes of Conduct: the ILO's and the OECD's initiatives

Many intergovernmental organizations as well as governments are involved in the attempt to regulate the activities and operations of multinational corporations through the development of Codes of Conduct.

The first successful example of Codes of Conduct could be identified in the ILO Tripartite Declaration concerning Multinational Enterprises and Social Policies which was adopted by the Governing Body of the International Labour Office in 1977 (Cernic, 2010:207). As it is clearly set out in the Preamble of the Treaty of Versailles creating the organization, the ILO's purposes consist in the achievement of achieving peace, justice and humanity and the development of fruitful conditions to enhance economic growth (Amao, 2011:29). Therefore, since the 1970s the ILO started to become involved in the task of providing guidelines aimed at regulating multinational corporations' operations.

The Tripartite Declaration consists in a joint document elaborated and negotiated by a group of three actors, namely governments, employers and workers in order to provide guidelines and recommendations that multinational corporations are advised to apply on a voluntary basis and exclusively within the ILO member states (Cernic, 2010:208). The declared and ultimate purpose of the document is not only to reduce and tackle the negative impact of multinational corporations' operations, but it also underlines the future

positive economic and social effects they may generate, improving both economic development and labour conditions all over the world, with a particular emphasis on the potential contribution of these business entities to fostering an increase in human rights protection (ILO, 1977:2). It specifically addressed corporate conduct in four different realms: employment, training, working and living conditions, and industrial relations (FIDH, 2016:85). First, within the general policies the Tripartite Declaration encourages the state parties to comply both with fundamental freedoms and human rights principles included in the Universal Declaration of Human Rights and its related Covenants, and with a number of labour rights which were included in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Indeed, in spite of not having endorsed those conventions, as a consequence of their membership to the organization all states have the obligation to respect, promote and fulfil the right to freedom of association, the abolition of both child and forced labour and the elimination of discrimination within the labour environment (ILO, 1977:4). Moreover, it is recognized the need to equally handle multinational and national corporations operating within the national borders of a particular state and to build up a cooperation not only between governments and transnational business entities but also with national employers and workers' organizations (ILO, 1977:5). Then, by focusing particularly on the section concerning employment, it is possible to appreciate a reference to women's rights. Indeed, the principle stating equality of opportunity and treatment should prompt both states and multinational corporations to refrain from a set of behaviours producing a detrimental impact on women and on society more generally. On the one hand, states are specifically asked to devise policies aimed at granting equality of opportunity and treatment within the workplace, to ensure equality in remuneration for both men and women on the basis of equal performance, and to avoid encouraging multinational corporations to apply discriminatory standards within the workplace on any grounds including gender, race, colour, religion, political opinion, social extraction and origin within the workplace. On the other hand, multinational corporations should comply with the principle of non-discrimination within their operations (ILO, 1977:8).

Therefore, the ILO Tripartite Declaration basically consists in a reaffirmation of human rights standards already existing at international level which may result unattractive for many countries as recommendations are not only addressed to governments but also to employers and employers' organizations (Cernic, 2010:210). However, this is not the only reason why the Declaration is not so globally widespread:

the implementation procedure is inherently weak as the work carried out by the monitoring body, namely the Subcommittee on Multinational Enterprises, does not entail any complaints mechanisms against either corporations or governments responsible of having infringed the principles set forth within it. Briefly, although the ILO Tripartite Declaration was originally supposed to testify the emergence of international legally binding obligations for multinational corporations in the field of employment and occupation, its scope and the effectiveness are undermined by its inability to concretely enforce corporate responsibility for human rights within the workplace. Consequently, due to the lack of an implementation procedure entailing a mandate both to investigate corporate violations and to hold large business entities operating abroad responsible for them, the Declaration can be merely interpreted as a crucial interpretative tool, a useful source of recommendations in addition to legal obligations deriving directly and primarily from national legislations (Cernic, 2010:215).

The OECD Guidelines for Multinational Enterprises were adopted in 1976 within the framework of the Declaration on International Investment and Multinational Enterprises by the Organization for Economic Cooperation and Development (OECD), which is composed by 18 European states in addition to Canada and the United States and whose main aim consists in ensuring and improving the economic and social living conditions of people all over the world within a global market system regulated by democratic institutions (FIDH, 2016:385). They represent one of most prominent codes of conduct which is essentially the outcome of a compromise between two different proposals clashing with each other: while the coalition of the countries of the South emphasized the need for the creation of a code entailing binding obligations for corporations, the most developed countries, where the greater part of parent companies were located, advocated for the development of a code providing legal obligations for the host states aiming at protecting foreign direct investment (Amao, 2011:35). Their actual purposes were achieving homogeneity among the OECD state policies, improving the linkage between transnational business entities operating within the national borders and the community living there, and ensuring a fruitful environment for foreign direct investment which should be sustainable at the same time. In summary, according to Cernic (2010:185), the Guidelines are considered since the time of their adoption up until today:

"recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards for good practice consistent with applicable laws. Observance is voluntary and not legally enforceable."(OECD, 2008:12)

This characteristic essentially mirrors the real interest of the business community at that time: the development of a voluntary document which was not supposed to substitute international or national legal standards, but to establish principles and standards of behaviour in order to prevent human rights violations perpetrated by multinational corporations which in any case cannot be enforced through legal instruments (Cernic, 2010:185). Therefore, states are still recognized as the only international actors which are subject to the legally binding obligations to ensure and to promote the correct implementation of the principles and standards set out in the Guidelines, including on the part of non-state actors (Cernic, 2010:189).

The OECD Guidelines cover the most significant and crucial realms of corporate responsibility as they include sections specifically dealing with human rights, labour rights, environmental protection, competition, taxation and so forth (FIDH, 2016:387). They were originally divided into eight chapters, but for the purpose of our study we will consider only few sections. Starting from 'Concepts and Principles' (chapter I), it is worth recalling that the Guidelines originally did not provide for a precise definition of multinational corporations, but they simply claim that they are applicable to 'all the entities within the multinational enterprise', suggesting that both the parent company and its subsidiaries or affiliates are included and have to observe the provisions of the OECD Guidelines (Cernic, 2010:186). Moving to 'General Policies' (chapter II), it is stated that corporations should engage in the respect of human rights during their activities and operations in foreign countries, considering states' obligations and commitments deriving from international law as the responsibility to respect, protect and fulfil human rights lies primary on these actors (OECD, 2008:14). Moreover, multinational corporations are encouraged to cooperate with national governments in order to ensure an adequate level of protection and promotion, as it is explained in the Commentary to the OECD Guidelines (OECD, 2008:40). In contrast, chapter 4 deals with labour rights which have to be implemented according to the applicable legislation, allowing for different levels of regulations: national, subnational and supranational (OECD, 2008:43). As the ILO is the international organization entitled to establish labour standards, the Guidelines have to favour the promotion of the principles included in two ILO Conventions, namely the 1998 Declaration on Fundamental Principles and Rights at Work, and in the Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy, in spite of being a non-binding instrument (OECD, 2008:44). Therefore, a traditional non-discrimination clause in the field of employment and occupation, which had been

previously introduced by the ILO Convention No. 111, is what effectively asserts the relevance of women's rights: it forbids discriminatory practices with regard to the selection process, remuneration, promotion, training and retirement on different grounds, including gender-based discrimination (OECD, 2008:45). Briefly, protection of women's rights has not been given particular attention within the OECD Guidelines in which drafters decided to focus mainly on human rights protection in general as it has been recognized as crucial in the attempt to regulate multinational corporations' behaviour.

If we were to assess whether the actual implementation of the Guidelines has been effective in order to improve corporate behaviour in foreign direct investments within developing countries, both limitations and merits of the document itself should be taken into consideration. On the one hand, it represents a milestone in the attempt to regulate multinational corporations' practices and to enhance the respect for human rights through corporate responsibility. Indeed, it was the only international standard adopted by state governments whose scope of action is not limited to the adhering countries, but it also extends to corporations headquartered in those countries and operating in non-OECD countries (Cernic, 2010:204). Moreover, it also obliges states to set up National Contact Points[35] in the attempt to boost the corporate respect for the human rights principles set forth in the Guidelines at domestic level. On the other hand, due to the voluntary nature of the document which represents an inherent flaw, the Guidelines' principles and standards cannot be directly enforced, and if NCPs were to play the role of enforcement bodies establishing sanctions against violations of the Guidelines' principles, the implementation procedure should be modified in order to regulate multinational corporations' behaviour more effectively and in a legally binding way (Cernic, 2010:203).

Therefore, the Guidelines represent a 'soft law' instrument which, however, could become the main platform to start developing 'hard law' and binding mechanisms entailing mandatory obligations for corporations, independently from where they operate, either in their home or in a host country (Cernic, 2010:189). To achieve that purpose, the OECD Guidelines were revised several times starting from 2000 when multinational corporations are asked to conform to the human rights obligations that both the Universal

[35] Their tasks consist in guaranteeing the application of the Guidelines within the domestic territory, solving problems
arising during the implementation process through the 'specific instances' procedure and supporting civil society in the understanding of the Guidelines. See International Federation for Human Rights. (2016). *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Resource Mechanisms.*

Declaration on Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work entail; to follow the Guidelines also within non-OECD countries where corporations belonging to an OECD member state operate; to apply the principles included in the Guidelines when carrying out foreign direct investment; finally, to comply with the standards that have been specifically developed for multinational corporations in the field of labour rights (Amao, 2011:35). In 2011, another crucial revision was adopted, introducing three new elements. First, the introduction of an entirely new chapter on human rights (chapter IV) as a consequence of the adoption of the UN Guiding Principles and of the related 'Protect, Respect and Remedy' framework, stating that while states remain the only actors subject to the obligation to protect human rights, the respect for human rights became "the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations and does not diminish those obligations", independently from where they operate (OECD, 2011:32). Secondly, multinational corporations are required to apply the due diligence principle which has to be proved through a statement of policy and which consists in in avoiding, preventing and providing remedy to the direct or indirect adverse or harmful impact on specific categories of individuals which result to be more vulnerable, such as women, if related to the principles covered by the Guidelines, and in encouraging their business partners and stakeholders to observe human rights as well (FIDH, 2016:388). This necessarily involves an assessment of risks that, however, is not limited to the identification and management of threats to the enterprises but it extends to those threats from which individuals within the country where they are located may suffer (OECD, 2011:34). Finally, implementation procedures were improved as we will outline in the chapter concerning multinational corporations' accountability mechanisms. Briefly, all the revised versions of the Guidelines definitely represent valuable efforts to improve their effectiveness but, in the end, the document as a whole lack an essential feature: a legally binding nature (Amao, 2011:36).

In conclusion, both the ILO Tripartite Declaration and the OECD Guidelines represents voluntary and non-binding documents providing for monitoring bodies that are neither judicial nor quasi-judicial organs (Kinley & Tadaki, 2004:950). In order to regulate more forcefully multinational corporations' conduct, it is necessary to look for other international instruments which are capable of establishing legally binding obligations for multinational corporations and entailing an effective enforcement system. Starting from this assumption, in the following chapter we will examine how the United

Nations Framework cope with the raising concerns emerging out of the interaction between business and human rights.

4.2.2 The United Nations' framework for corporate responsibility and women's rights

As we have briefly introduced in the first paragraph of chapter 3, in the aftermath of the Second World War concerns regarding the connection between business and human rights came under the spotlight at the international community level. Consequently, a number of initiatives started to emerge within the UN framework with the purpose of regulating the conduct of multinational corporations and of addressing the increasing scope for human rights violations perpetrated by transnational business entities (Cernic, 2010:221).

The first of these attempts could be registered between the 1970s and the 1980s when in order to investigate whether multinational corporations have a positive or negative impact in fostering economic development, the ECOSOC established the Group of Eminent Persons in 1973 which through its recommendations created a permanent programme carried out by the United Nations Centre on Transnational Corporations (UNCTC) and its permanent Commission. Becoming operational in 1974, the UNCTC was set up in order to attain three main purposes: deepening the knowledge about how the activities of multinational corporations affect the political, economic social environment of developing countries; ensuring that multinational corporations participate sustainably in the process of economic growth by getting rid of the harmful and negative effects; and strengthening the host countries' bargaining power in negotiating business deals with those entities (Amao, 2011:32). However, the most important contribution of the UNCTC was the elaboration of a code of conduct capable of regulating transnational corporations' behaviour (Bilchitz & Deva, 2013:5). The works for the preparation of a Draft Code of Conduct on Transnational Corporations[36] started in 1976 while the first version was adopted in 1983. The purpose of the code was two-fold: on the one hand, it established the rights multinational corporations enjoy with regard to the treatment within the host states, including protection for the engagement in direct investment; on the other hand, it sought to determine the obligations to which transnational business entities were subject, stating the need to comply with domestic legislation and with national economic

[36] See Commission on Transnational Corporations. Report on the Special Session (7-18 March and 9-21 May 1983). Official Records of the Economic and Social Council. Supplement No.7. (E/1983/17/Rev. 1), Annex II. Online at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891

policies, as well as the prohibition to interfere in the host country's political sphere (Amao, 2011:33). However, the success of the Draft was threatened by diverging interests animating developed and developing countries: while the former wanted to avoid any kind of discrimination towards transnational corporations engaged in foreign direct investment within the host country, the latter aimed at reaching a greater level of compliance with the national legal standards in force on the part of multinational corporations, on the one hand, and at establishing a new international economic order, on the other (FIDH, 2016: 5). For this reason, it was revised two times, in 1988 and in 1990 respectively; while in the original draft, fundamental freedoms and international human rights standards were not mentioned, they were introduced in the latest revision, establishing that multinational corporations have to respect them in their operations transnationally without incurring in discriminatory practices (Amao, 2011:33). However, the initial proposal for an instrument regulating corporate conduct end up being a failure mainly due to the changing international context that dominated the late 1980s. Indeed, the mounting debt crisis that hit developing countries caused the abandonment of the idea of a code of conduct, in favour of a compromise allowing them to benefit from development assistance programs and debt forgiveness. Therefore, the interest in avoiding the detrimental impact of multinational corporations progressively decreased and almost vanished as a consequence of the emergence of neoliberal ideology and the phenomenon of globalization, leading to the closure of the programme at the UNCTC in 1993 and putting an end to the attempt to devise a draft code of conduct aimed at enhancing corporate control at international level (Amao, 2011:33).

Nevertheless, the discussion concerning how to improve corporate responsibility was relaunched in the 1990s as economic globalization triggered renewed concerns with regard to the harmful impacts of multinational corporations not only in the field human rights but also in those of the environment and labour rights (FIDH, 2016:6). Particularly, two events were crucial in fostering the new climate towards the pressing issue of corporate responsibility. In 1992, the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro and commonly known as The Earth Summit[37] generated an unprecedented commitment to bring about economic development in a sustainable manner based on the protection of the environment and on the positive impact of multinational corporations thanks to cooperative relationships between states

[37] The outcomes of the summit were *Agenda 21. The United Nations Programme of Action from Rio*, the *Rio Declaration on Environment and Development,* the *Statement of Forest Principles,* the *United Nations Framework Convention on Climate Change* and the *United Nations Convention on Biological Diversity.*

and civil society (Marrella, 2007:291). Thereafter, in the 1999 Davos World Economic Forum the proposal by the UN Secretary General Kofi Annan for the adoption of the 'Global Compact for the 21st Century' emerged for the first time (Marrella, 2009:245).

4.2.2.1 How the UN Global Compact incorporates women's rights

The UN Global Compact was officially launched in 2000 as a voluntary initiative attempting to regulate corporate conduct and to foster increased human rights protection. The ten principles enshrined within the document concerning the issues of human rights, labour, the environment and corruption are an explicit reference to fundamental freedoms and basic human rights principles included in the Universal Declaration of Human Rights, in the UNCED Rio Declaration (UN General Assemnly, 1992), in the 1995 World Summit for Social Development (UN, 1995) and in the UN Convention against Corruption (UN General Assembly, 2003). The main purpose of this UN initiative was encouraging transnational business entities to follow the ten principles, with the expectation that this attitude would generate good practices involving the respect, protection and fulfilment of human rights but also partnerships and cooperation with both local governments and communities without exploiting their superior bargaining power (Amao, 2011:38).

With regard to human rights in general, the UN Global Compact establishes two principles. First, Principle 1 puts forward the expectation according to which all business entities are required to respect and support human rights, two actions that has to be seen as complementary rather than substitutes of each other. The expectation to respect human rights exists independently from states' obligations and, therefore, it has to be applied in every location where they operate, either in a weak governance area or in a more stable country. In order to achieve that purpose, multinational corporations have to engage in a due diligence process, involving the recognition, prevention and alleviation of the negative impacts they had occasioned either directly or indirectly through the development of a management approach focused on human rights issues. The latter requires several concrete actions to be implemented: taking into consideration the potential and future effects of their activities, integrating human rights concerns within the enterprises' policies, addressing alleged violations, setting up monitoring and auditing processes through the supply of reports on performance, and finally establishing or participating in the attribution of the effective remedies. In contrast, the expectation to support human rights extends further by stating the need to encourage their protection,

meaning that business entities have to demonstrate their positive contribution in the promotion of the respect of human rights. This can be practically achieved through the employment of several means ranging from core business activities supportive of UN's values, goals and concerns going through strategic social investment and philanthropy, advocacy or public policy engagement up until building up partnerships and realizing collective actions both in the workplace and within the local community where they operate.[38] Secondly, Principle 2 states that business entity should avoid being involved in human rights violations perpetrated by any actor, being it a government, an individual or another company. However, complicity may be identified in two different instances: on the one hand, an act or an omission carried out either by the company itself or by an individual representing the company that leads to a human rights abuse; on the other, the awareness on the part of the company of such an act or omission occurring. Avoiding complicity has become crucial in an integrated world as while globalization paved the way for the expansion of multinational corporations' operations in previously unreachable countries, the advances in information and communication technology have prevented business entities from concealing their misconduct in the field of human rights. Consequently, the rise of civil society organizations and of global social movements replaced the state in the task of highlighting and addressing corporate human rights abuses and of requiring greater transparency and responsibility on the part of private actors.[39]

In addition, the Global Compact also made specific references to women's rights in Principle 6 according to which business agents should create a non-discriminatory environment in employment and occupation. This means that less favourable treatment should be avoided on any grounds in both gaining access to employment and in the treatment within the workplace and, consequently, that all employees are endowed with equal opportunities on the basis of their capabilities. Conversely, discrimination would entail not only an infringement of fundamental freedoms and human rights of individuals but also an obstacle to the display of their full potential.[40] Therefore, business entities are expected at least to respect women's rights by including in their management approach policies protecting women against discrimination and sexual harassment within the workplace. Advancing gender equality and women empowerment is essential for multinational corporations, as we will see later on in this chapter.

[38] See https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1
[39] See https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2
[40] See https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-6

If we were to assess the impact of the UNCG in the interrelated fields of business and human rights, its success as an international mechanism governing and sanctioning multinational corporations' conduct is highly uncertain (Amao, 2011:38). There are mainly two reasons for reaching that conclusion. On the one hand, it could not be identified as a legal standard because it represents a voluntary initiative that corporations may decide to take up through a statement of support. On the other hand, it has no enforcement mechanism as the only requirement to which the signatories have to adhere to is the submission of a periodic report in which the actions carried out to advance in the complete incorporation of the principles within their operations must be included, although they could not be expelled as a consequence of a violations of the principles set forth in the Global Compact (Cernic, 2010:229). Both factors have an influence in multinational corporations' behaviour which in spite of adhering to the initiative are aware they are not fully and legally accountable for direct violations or omissions. Therefore, the legacy of the UN Global Compact merely consists in strengthening the moral purpose of business, engaging companies in the promotion of the UN goals, especially in those areas concerning both business and human rights. Obviously, the UN Global Compact have not achieved the ultimate objective of effectively regulating business conduct in relation to human rights, but it could be considered a pivotal point from which to start elaborating a hard law instrument (Amao, 2011:40).

4.2.2.2 The United Nations' 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises' and their implementation

Up until that moment, the 'Norms on Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises' (ECOSOC, 2003) constituted the first attempt to build up a legally binding instrument setting up mandatory standards for corporate responsibility concerning human rights (Ruggie, 2013:97). Indeed, according to Weissbrodt and Kruger:

> *"The Norms represent a landmark step in holding businesses accountable for their human rights abuses and constitute a succinct, but comprehensive, restatement of the international legal principles applicable to businesses." (Weissbrodt & Kruger, 2003:901)*

The Norms encompass a set of human rights which the drafters consider as crucial in the area of business, incorporating the principle of non-discrimination and equal treatment, the security of the persons, labour standards, national sovereignty, consumer protection, and finally environmental protection. First and foremost, the Preamble defines

the framework for the application of the Norms with regard to the previous corporate areas: both the legitimacy and the binding character of the Norms originated from the international legal standards setting out in different treaties and conventions which are frequently and directly mentioned within the text (Amao, 2011:40). Therefore, transnational corporations should adopt due diligence with regard to all the provisions of the Norms, a principle allowing them to avoid being either directly or indirectly involved in human rights abuses, while they should not take advantage from the perpetration of violations they have not caused but of which they were aware (ECOSOC, 2003). Indeed, within the section 'General Obligations', it is recognized that despite states still hold primary responsibility for human rights protection under international law, transnational corporations are subject to the obligation to ensure the respect of human rights involved in both international and national legal standards and their promotion through their global influence, their protection and fulfilment avoiding complicity in abuses and failure to act "within their respective spheres of activity and influence" (ECOSOC, 2003) However, it must be highlighted that the sphere-of-influence concept may result quite problematic as the limits within which the rights set forth in the Norms entail obligations for corporations are not clearly specified (Ruggie, 2013:101). For instance, it is not certain whether business entities would be accountable for alleged violations they directly commit, or responsibility extends along the whole supply chains, including subsidiaries and affiliates (Deva, 2004:4).

Among those rights, the UN Norms place an obligation on transnational corporations to respect the principle of equality and non-discrimination[41] that has already been provided in many other international and national legal instruments as well as in international human rights treaties (ECOSOC, 2003). According to the Commentary, transnational corporations should unquestionably declare that discrimination is not accepted within the labour environment, and they should incorporate the principle of non-discrimination not only theoretically in all corporate policies but also practically in their implementation. To the traditional obligation to eradicate discriminatory practices on the grounds of race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability or age, those based on health status, marital status, capacity to bear children, pregnancy and sexual orientation were added (Deva, 2004:5). Consequently, within the labour environment episodes involving physical, sexual, psychological or verbal form of abuse, intimidation or degrading

[41] Within the section Right to equal opportunity and non-discriminatory treatment (B).

treatment, unfair access to legal procedures should be completely eradicated[42] (ECOSOC, 2003). Moreover, as women are recognized among the most vulnerable subjects in relation to business activities and to the discriminatory practices described above, special attention has to be devoted to ensuring they always enjoy gender equality as well as all the other fundamental human rights, especially within the workplace (Deva, 2004:5). Other categories that resulted to be potentially unprotected against the harmful impacts of business operations are indigenous people and communities which are entitled to a respectful, decent and equal treatment according to the Norms[43]. Furthermore, with regard to labour standards, one fundamental principle should be analysed too. In addition to provisions advocating for a decent working environment, the prohibition of forced and child labour, the right to freedom of association and collective bargaining, the principle of equal pay for work of equal value should be granted. In compliance with national law, transnational corporations are required to provide workers with a just, decent and regularly supplied remuneration in order ensure the recipient an adequate standard of living, while employers should in any case comply with their contractual obligations in respect of wages without limiting the freedom of workers to receive their salary as it is set forth in international legal standards as well as in international human rights law (Deva, 2004:6).

Briefly, the UN Norms brought about a fundamental change within the debate on the international scale concerning how to hold corporations responsible for human rights abuses (Backer, 2005:162). They are the first of the initiatives concerning business and human rights that can be qualified with a 'non-voluntary' character and that seem to pose no obstacles to establishing directly binding obligations for transnational corporations without merely representing an aspirational document putting forward theoretical standards (Ruggie, 2013:105). Indeed, the Sub-Commission also engaged in the task of developing adequate implementation mechanisms[44], including both direct and indirect techniques. On the one hand, corporations have to incorporate within their legal structure and along the whole supply chain, codes of conduct including rule of operations and the human rights culture which would obviously encompass the principles set forth in the Norms (Amao, 2011:42); moreover, transnational corporations' activities and operations are monitored through the UN human rights treaties bodies which are the main responsible for the implementation of the Norms (Deva, 2004: 10). On the other hand,

[42] Within the section Respect for national sovereignty and human rights (E).
[43] Within the section General Obligations (A).
[44] Within the section General Provision of Implementation (H).

although it is not expressed in legally binding terms, states should ensure that Norms are adequately applied within their national borders, including on the part of individuals or non-state actors; additionally, a reparation provision establishes that a prompt, effective and adequate remedy should be provided to those affected by the violations of the Norms committed by transnational corporations, which may include restitution, compensation or rehabilitation for the harm caused to any individual or property. The latter is particularly ground-breaking as it allows individuals as wells as communities to ask for remedy for corporate violations at their expenses (Deva, 2004:11).

Consequently, the UN Norms could have represented a sensational potential advancement; however, while NGOs welcomed it favourably, their adoption raised some issues for both governments and corporations as had the document become part of either treaty law or customary international law, it would have entailed binding obligations for companies although they did not sign it. Therefore, the UN Human Rights Commissioner clarified the doubtful situation specifying that the UN Norms "as a draft proposal, has no legal standing and that the Sub-Commission should not perform any monitoring function in this regard" (Cernic, 2010:224). Indeed, the Commission on Human Rights was the sole UN body endowed with the power to adopt a draft, but as the latter has not been actually demanded by the Commission to the Sub-Commission, the 'Norms on Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises' lack any legal standing in the end (Ruggie, 2013:98). Moreover, a problem of enforcement laid ahead as it could not be expected from the UN system to engage in the implementation effort alone; for this reason, multiple monitoring and verification mechanisms have been put in place by the Norms which in the end effectively hinder their concrete application (Deva, 2004:12).

In conclusion, although not voluntary the UN Norms cannot be identified as an international binding treaty (Weissbrodt & Kruger, 2003:913). They can be certainly considered an improvement compared to earlier attempts to regulate corporate behaviour at transnational level, but due to some residual flaws they still represent an "imperfect step, albeit in the right direction" (Deva, 2004:14). Greater inclusion into corporations' policies and practices, adjustments to the implementation mechanisms and wider acceptance by the international community may pave the way for the Norms to become a basis for the development of a legally binding document and to play a more significant role as an instrument for enhancing corporate responsibility in the following decades (Weissbrodt & Kruger, 2003:915).

4.2.2.3 The UN Guiding Principles on Business and Human Rights: Implementing the 'Protect, Respect and Remedy Framework'

As early as in 2002, the UN High Commissioner on Human Rights, Mary Robinson[45], recognized that business and human rights were two undiscernible issues in a globalised world and, consequently, it was necessary to make transnational business actors more active in human rights protection within their activities and operations (Ulrich, 2007:39).

As a consequence of the adoption of the Norms, a wave of criticism spread within the academic debate and among the most convinced detractor there was John Ruggie. Therefore, after the Norms ended up in a failure, in 2005 the latter was appointed as the Special Representative of the Secretary-General (SRSG) on the Issue of Transnational Corporations and Other Business Enterprises by the UN Commissioner on Human Rights, Kofi Annan (Cernic, 2010:226). His main task was to elaborate a new supranational framework with the ultimate purpose to regulate multinational corporations' conduct through the establishment of social responsibility standards entailing legally binding obligations for transnational business entities as well as for stakeholders (Backer, 2010:112). He started with the elaboration of two reports submitted to the UN Human Rights Council respectively in 2006 and 2007 which mainly served as a basis for the 2008 report providing for the largely known 'Protect, Respect and Remedy Framework' (HRC, 2008). It specifically arose from the impelling need on the part of a homogeneous groups of stakeholders to develop a policy platform capable of definitively tackling the governance gaps between business and human rights that globalization have contributed to deepen (HRC, 2008:4).

The Framework is mainly based on three fundamental pillars, each of them distinct but complementary for the achievement of the purpose of the Special Representative's mandate: the state duty to protect human rights, the corporate responsibility to respect human rights, and the adequate access to remedy (Ruggie, 2013:140). First, the starting point of the Framework was the recognition that states are subject to legal obligations deriving from international human rights standards involved in different treaties, conventions and customary international law (Ruggie, 2013:142). Secondly, as we have previously acknowledged in order to operate multinational corporations have to comply with the national legal standards of both the home and the host state; however, with regard

[45] See M. Robinson. (2002). Ethics, Human rights and Globalization. Second Global ethic lecture, The Global Ethic Foundation, University of Tubingen, Germany.

to the latter, the weakness of the government or the lack of ratification of international conventions concerning human rights have hampered their ability to effectively cope with multinational corporations' activities and to face abuses (Ruggie, 2013:150). For this reason, the development of an independent standard of corporate responsibility to respect human rights as it is included within the Framework was extremely needed. However, John Ruggie specified that the corporate responsibility to respect should not be interpreted from a legal perspective as it exists independently from the presence of a legal definition and from the ability of a government to enforce it. In contrast, by identifying it as a "widely recognized and relatively well institutionalized social norm" which mainly consists in "avoiding the infringement of the rights of others and addressing the adverse impacts that may occur" (Ruggie, 2013:8), the SRSG suggested that at that moment it has almost reached a universal recognition, binding multinational corporations in their operations, as a result (Ruggie, 2013: 153), and that sooner or later it may become incorporated into law (Ruggie, 2013:156). Indeed, the willingness on the part of multinational corporations to adhere to social compliance mechanisms as a consequence of the pressure exercised by civil society organizations, social movements and socially responsible investors is testified by the increase CSR initiatives have experienced in the last decades (Ruggie, 2013:155), as we will further analyse in the following chapters. While the substance of this obligation mainly entails the duties that correspond to multinational corporations according to international human rights standards, they can be enforced in case of violations committed either directly by a transnational business entity within the scope of their operations or indirectly by a different actor which is somehow connected to the company (Ruggie, 2013:164). Consequently, corporations have the possibility to dismiss accusations of alleged human rights violations provided that they are able to gather adequate information and to demonstrate they have not caused or contributed to generate detrimental effects in terms of human rights of individuals or of the community (Ruggie, 2013:162). Finally, both states' obligation to protect and corporate responsibility to respect have the obligation to provide an adequate access to remedy for individuals and communities that result adversely affected by multinational corporations' conduct through grievance mechanisms (Ruggie, 2013:166). The latter may be distinguished in three different types: judicial mechanisms which, however, represent the most arduous route to take; state-based non-judicial mechanisms which are recognized as the most significant in order for companies to be held responsible and for victims to obtain a compensation; non state-based judicial mechanisms which refers to

the ability of business entities to supply grievance mechanisms for themselves provided that a third-party is engaged in mediation, offsetting the extended power of corporations (Backer, 2010:129).

The 'Protect, Respect and Remedy Framework' was received positively both by the Human Rights Council, which renewed the mandate to the Special Representative of the Secretary-General for other three years, and by the business community and governments, as the fact it did not entail legally binding obligations allows them to accept more favourably the responsibility to respect connected to the existing international human rights standards (Ruggie, 2013:164). The increased willingness to operationalize the principles included in the Framework in order to face challenges related to business and human rights by translating it into a practical guidance that both states and multinational corporations has to follow led to the development of the so-called 'Guiding Principles on Business and Human Rights' (OHCHR, 2011) which were endorsed by the Human Rights Council in 2011 (Bilchitz & Deva, 2013:1).

Particularly, it is worth highlighting that when the first draft of the UN Guiding principles was released a group of gender experts that gathered as a consequence of the 'Realizing Rights: The Ethical Globalization Initiative'[46] released its proposal about how gender issues could be more effectively incorporated within the final document. Indeed, according to the 2008 mandate, the SRSG was supposed to foster the incorporation of a gender perspective within his agenda which was recognized to be crucial in order to promote women's empowerment and which, in turn, requires the eradication of discrimination on the grounds of gender, and of other detrimental impacts. However, a gender perspective does not aim at focusing exclusively on women overlooking men, but it rather consists in recognizing those laws, policies and regulations which explicitly and implicitly address differently the conditions of men and women (OHCHR, 2009:2). This could be achieved practically by considering how the issues the SRSG dealt with affect men and women at state, community and individual level, addressing those entailing plain differences based on gender.

Therefore, we will examine how the gender perspective have been incorporated within the UN Guiding Principles and applied to the first two pillars, focusing more extensively

[46] Realizing Rights was founded in 2002 by Mary Robinson, former United Nations High Commissioner for Human Rights (1997 - 2002); the purpose of its initiative is "put human rights standards at the heart of global governance and policy-making and to ensure that the needs of the poorest and most vulnerable are addressed on the global stage." See http://www.who.int/workforcealliance/members_partners/member_list/realizingrights/en/

on the corporate responsibility to respect. First and foremost, the 'General Principles' established that discrimination should not be involved within their implementation and that special consideration has to be devoted to those actors which found themselves "at risk of becoming vulnerable and marginalized" (OHCHR, 2011:1). Then, by analysing how gender has been incorporated within the states' obligation to protect human rights, the SRSG acknowledged that domestic and international laws and policies did not actually contribute to effectively eliminate discrimination and inequalities which are still pervasive worldwide. As multinational corporations have been recently recognized as the most critical threat to the effective protection of women's human rights, the CEDAW imposed on states the obligation to ensure that both public and private actors do not perpetrate human rights abuses against women, either directly or indirectly (Bilchitz & Deva, 2013:206). This positive obligation conferred on states is reflected in the concept of due diligence[47] which affirmed that states have to prevent, prosecute and punish all entities involved in women's rights violations, including multinational corporations. It could be recognized as a standard of performance and not of result as it does not lay down specific measures that states have necessarily to implement but, in the end, the purpose may be effectively achieved in one way or another (Bilchitz & Deva, 2013:206). However, governance gaps in host states' ability to apply due diligence in relation to corporate practices especially in developing countries consistently reduce women's protection against corporate abuses (Bilchitz & Deva, 2013:208). For this reason, Guiding Principle 2 suggest that in order to become more effective in preventing human rights violations committed abroad by multinational corporations headquartered within their national territories, the home state could establish expectations about the corporate conduct at transnational level through domestic law with extraterritorial jurisdiction or through other international instruments, such as the OECD Guidelines (OHCHR, 2011:4). In addition, Guiding Principle 3 established that states also have to provide a practical guidance to multinational enterprises operating within their national territory in order to clarify which are the expected standards, best practices and issues deserving special consideration such as gender, vulnerability and marginalization that indigenous people, women, minorities, children, disabled people and migrants may suffer (OHCHR, 2011:5). Guiding Principle 7 perfectly reflect the call of the SRSG for special attention that vulnerable categories within communities deserve worldwide; indeed, it requires states

[47] It was developed for the first time in *Velasquez-Rodriguez v. Honduras*, (1989), 28 I.L.M. 291.

to support multinational corporations in avoiding women's rights violations, especially concerning gender-based or sexual violence (OHCHR, 2011:9).

Moving to the non-binding section of the UNGPs, namely the responsibility to respect human rights on the part of multinational corporations, the concept of due diligence concerning human rights came again into play (Bilchitz & Deva, 2013:213). Business entities should take into consideration gender-related aspects both within their management approach and their operations beyond the attempt to foster their protection against the risks they might incur in their activities (Backer, 2010:128). According to Guiding Principles 17 and 18, multinational corporations have to assess "actual and potential human rights impacts" generated either directly or indirectly within the scope of their operations (OHCHR, 2011:17); this involves preventing and reducing potential consequences, on the one hand, and tackling detrimental effects which have already taken place by providing an effective remedy itself or in cooperation with other entities, on the other hand (OHCHR, 2011:24). In order to ensure an adequate standard of protection for women's rights, companies can rely on the three-tiered approach which had been previously elaborated by the UN Special Rapporteur on violence against women and which involves the state, the communal and the individual level (Bilchitz & Deva, 2013:213). At the state tier, multinational corporations should assess the potential impact of their activities and avoid improving the scope for gender inequalities. For instance, as we observed in the previous chapter, one of the factors conducive to women's rights violations is informal labour. Obviously, business entities are not required to completely eradicate the discriminatory practices within that sector, but they should consider that carrying out their transnational activities in a foreign jurisdiction characterized by a high rate of informal labour may lead to a growing persistence of both inequality and discrimination (Bilchitz & Deva, 2013:213). Secondly, the communal tier envisages the examination on the part of multinational corporations of the scope and impact of their activities within local communities; notably, in order to evaluate the challenges that they have to face in the field of women's rights, key stakeholders have to be involved by consulting and understanding their concerns as it is crucial for increasing their engagement towards human rights. In case this is not possible, multinational corporations have to turn to reliable experts, organizations fighting for women's rights or female members of civil society (OHCHR, 2011:20). Finally, the last tier involves the need for corporations to evaluate whether their conduct contribute to generate, foster, strengthen inequalities and discrimination on the grounds of gender at individual level (Bilchitz &

Deva, 2013:214). In addition to carefully understand the scope of their activities, the need for "integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed" may lead multinational corporations to elaborate a risk-management approach whose main purpose is to demonstrate they have undertaken all the necessary steps to prevent human rights abuses to occur (OHCHR, 2011:19). Indeed, according to Guiding Principle 20 states should encourage companies to assess their performance through an internal reporting process, necessarily including gender-disaggregated data (OHCHR, 2011:23).

In conclusion, throughout this chapter we have analysed a set of codes embodying the so-called 'corporate social responsibility from above' as they all share a variety of common features: they have been developed within intergovernmental organizations with the purpose of regulating multinational corporations' conduct but having no legally binding effect on multinational corporations capable of avoiding human rights' violations in the name of profit and value. Therefore, they can be described as non-mandatory documents establishing standards of conduct for multinational corporations that are allowed to choose whether taking them on or not (Marrella, 2009:247).

Within the context of the debate concerning the relationship between business and human rights, both the 'Protect, Respect and Remedy Framework' and the UN Guiding Principles are landmark achievements. Particularly, the UN Guiding Principles qualify as an attempt to solve the dichotomy between the mandatory and voluntary nature of the documents that existed up until that moment (Ruggie, 2013:187). They can be described as a normative platform resting on three distinct and complementary principles whose ultimate outcome consists in laying down the foundations for embracing within the international human right regime an additional actor to states and individuals, namely multinational corporations (Ruggie, 2013:187). On the one hand, they established binding obligations for states that have to foster increased human protection within their national territories and, at the same time, they are entitled to ensure remediation for victims that have suffered human rights abuses. On the other hand, in spite of being non-legally binding, the corporate responsibility to respect human rights has moved beyond constituting a mere social expectation as it rests on the principle of risk-based due diligence that has to be necessarily included within the corporations' management structure as well as in the contracts concluded with suppliers and service providers, turning transnational corporations into regulators (Ruggie, 2013:188). Consequently, the competition among different voluntary codes of conduct attempting to regulate business

entities in the area of human rights have been translated into a clarification of the specific human rights corporations are supposed to respect within their activities and how these expectations can be concretely fulfilled. This has been possible thanks to the widespread adoption of the second pillar on the part of standard-setting bodies which may potentially create the basis for a convergence at international level on the related fields of business and human rights and a significant prospect for future changes (Ruggie, 2013:188). In the next chapters, the contribution of corporate codes of conduct, constituting the 'corporate responsibility from below', to this fundamental shift will be analysed, but only after having examined the different approach the European Union has taken towards corporate responsibility.

4.2.3 The European Regional Framework for corporate responsibility and women's rights

On a regional level, the EU has reacted slowly to the mounting concerns with regard to the transnational business operations of multinational corporations which substantially increased the scope for human rights violations.

Although the old continent has a long tradition in what could be defined as socially responsible investments, few voluntary initiatives[48] testifying the attempt to regulate the corporate conduct emerged before the 1990s (MacLeod, 2005:541). More significant attempts appeared in the last decade of the XX century, starting from Jacques Delors' initiative to build up a European Network, namely CSR Europe, dealing with corporate social responsibility issues in order not only to ensure the maximisation of both profits and value on the part of transnational business entities but also to foster sustainable economic development and human rights protection within their activities. Other examples are represented by the Cotonou Agreement with the African, Caribbean and Pacific nations and by two Communications, namely *the Communication on the E.U. role in promoting human rights and democratization in third countries* (Commission of the European Communities, 2001), and second, the *Communication on Promoting Core Labour Standards and Improving Social Governance in the context of Globalization* (Commission of the European Communities, 2001). In spite of entailing an explicit purpose to improve human rights protection and to clarify the EU's attitude towards the

[48] Among the early attempts to foster a responsible business conduct, it is worth mentioning the European Employment Strategy, E.U.-Ecolabels, and the Eco-Management and Audit Scheme (EMAS).

issue of corporate responsibility, they actually imposed legal obligations on states rather than directly on multinational corporations (MacLeod, 2005:542).

Therefore, the real turning point for the development of the concept of 'corporate social responsibility' within the European context could be traced back to the publication of the 'Green Paper on Corporate Social Responsibility' (Commission of the European Communities, 2001). While a reflection on corporate responsibility is embedded within the effort to turn the European Union into the most competitive and knowledge-based economy worldwide, the explicit purpose of the Green Paper was two-fold (MacLeod, 2005:544): on the one hand, boosting corporate social responsibility standards not only at European but also at international level; on the other hand, establishing and strengthening the partnerships with crucial actors to complete the task (Commission of the European Communities, 2001:3). In the first part of the document, a definition of what corporate social responsibility consists in is provided: "a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment" (Commission of the European Communities, 2001:4). As the debate around corporate social responsibility in the EU arose as a consequence of growing concerns regarding the social impact of foreign direct investment on the part of multinational corporations, the need for greater transparency about operations in both the economic and social fields and the potential damages of their activity to the environment forcefully emerged. Consequently, the Green Paper adopted a triple-bottom line approach which aimed at representing the interests of different groups of stakeholders and employers affected by corporate conduct (Commission of the European Communities, 2001:4).

However, some fundamental shortcomings, which also represented the main source of criticism towards the Green Paper within the debate on the issue of socially responsible behaviour of multinational corporations, must be highlighted. First, the voluntary nature of the Green Paper was clearly emphasized, reducing the document to a 'soft law' instrument (MacLeod, 2005:544). This specific character of the document was harshly put into question by the representatives of trade unions and civil society, and by NGOs who were moved by ethical concerns in the attempt to ensure the protection of human rights and to foster sustainable development and, therefore, argue that ensuring labour as well as human rights was imperative in order to build up minimum standards for the regulation of corporate conduct and to tackle their abuses (MacLeod, 2005:545). In contrast, the Green Paper has been generally welcomed as a positive contribution to the debate by European multinational corporations that accepted and endorsed both the

definition and the non-binding nature of the Green Paper as, in order to adopt corporate social responsibility standards, a necessary precondition was profit maximization and the improvement of their economic performance on a global scale (MacLeod, 2005:545). Furthermore, references to women's rights are not so abundant within the Green Paper which mainly focuses on labour rights. Therefore, in order to fully assess the impact of multinational corporations' conduct it is necessary to analyse the two dimensions characterizing corporate social responsibility (Commission of the European Communities, 2001:8): while the internal dimension deals with working conditions, adaptations to change and the sustainable management of environment and natural resources in order to boost economic and social growth, the external dimension cope with potential impact on the different stakeholder groups and with human rights. With regard to the latter, the Green Paper stated that corporate social responsibility is inextricably linked to human rights which have necessarily to be taken into consideration within the activities and operations not only of the parent companies but also of the subsidiaries and affiliates along the whole supply chain. In spite of mentioning two soft law instruments such as the ILO Declaration on Principles and Fundamental Rights of Work, and to the OECD Guidelines for Multinational Corporations, other crucial international human rights law instruments have been omitted (Commission of the European Communities, 2001:14). As a result, it is not clear which rights are specifically protected by the Green Paper and relevant for multinational corporations, as the document only specifies that the "impact of a company's activities on the human rights of its workers and local communities extends beyond issues of labour rights" (Commission of the European Communities, 2001:15). Finally, the lack of complaint mechanisms and procedures ensuring an adequate remedy leads companies to escape from accountability in case of non-compliance with the principles included within the document (MacLeod, 2005:550).

Consequently, taking as a point of departure the Green Paper, the Commission issued in 2002 a Communication entitled *Corporate Social Responsibility: A business contribution to Sustainable Development* (Commission of the European Communities, 2002) in which it basically reaffirmed the main arguments set forth within the 2001 document and further explained the strategy adopted by the EU in order to effectively implement the concept of corporate social responsibility (Commission of the European Communities, 2002:3). It established that the latter has to be interpreted as "a concept whereby companies integrate social and environmental concerns in their business operations and interactions with stakeholders on a voluntary basis" (Commission of the

European Communities, 2002:5). Then, it proceeds by laying down the main characteristics the concept is endowed with: in addition to the recognition of the lack of a legal character and to the triple-bottom line approach, it is stated that corporate social responsibility should not be merely part of the core activities of multinational corporations, but it deals with the manner in which the activities are inherently managed (Commission of the European Communities, 2002:5).

Finally, the Commission is recognized to play a ground-breaking role in further elaborate the concept and the scope of corporate social responsibility as in 2011 it published *A renewed EU strategy 2011-2014 for Corporate Social Responsibility* (European Commission, 2011). Within this communication, a new definition of CSR is put forward: since that moment the concept has to be interpreted as "the responsibility of enterprises for their impacts on society" (European Commission, 2011:5). Therefore, in order to comply with this standard, corporations have not only to respect the applicable legislation in the territory where they operate, but they also have to engage in promoting social, environmental, ethical, human rights and consumer interests in order to reach two objectives. On the one hand, they have to enhance the community's standards of living, the quality of life as well as of the labour environment which would lead to the maximization of shared value for the society in which their operations take place. On the other hand, they have to recognize, prevent and reduce the potential detrimental impacts generated as a result of their activities through the adoption of a risk-based management approach, involving due diligence. By observing these stated purposes, it is clear that European framework on CSR has substantially extended and became multidimensional thanks to the incorporation on the part of the Commission of a wider set of human rights, including gender equality and non-discrimination in relation to labour standards, as well as of existing international human rights instruments, with specific references to the UN Guiding Principles on Business and Human Rights (European Commission, 2011:7).

In conclusion, it is possible to state that in a globalized world where the scope for multinational corporations' activities has spread parallelly with their growing power and influence, a regional framework for regulating corporate conduct is deemed to be less effective than an international one to protect human rights and, specifically, women's rights.

4.3 Voluntary Commitments on CSR: the normative and the legal impact of Corporate Codes of Conduct on women's rights

While up until now we have examined intergovernmental and governmental codes of conduct, we now move out from the domain of 'corporate social responsibility from above' which is considered a benchmark for the intensification of non-binding initiatives, involving private actions carried out directly by multinational corporations and contributing to further regulate corporate behaviour in the human rights field (Kinley & Tadaki, 2004:952). Therefore, we enter in the realm called 'corporate social responsibility from below' which is commonly described as the entirety of codes of conduct that are elaborated within the business community either collectively or unilaterally (Marrella, 2007:294).

With regard to collective codes of conduct, we refer to the case in which multinational corporations decide to conform to norms, rules of corporate social responsibility that have been directly shaped by business associations to which corporations belong (Marrella, 2009:250). This means that multinational corporations adhere to objective standards applying without distinction to all the members of the business association in question and dealing with issues such as labour conditions, health and safety, equality and discrimination, compensation. Consequently, the existence of this kind of soft-law initiatives may be fruitful for two reasons: on the one hand, in the case they are adopted by the governing bodies of the business associations, they acquire legal strength for all their members, becoming binding for them; on the other hand, by cooperating with civil society they can contribute to increase the scope for human rights protection, respect and fulfilment (Marrella, 2009:251).

In contrast, 'unilateral codes of conduct' refers to a set of norms of corporate social responsibility that are adopted directly by business enterprises (Marrella, 2007:294). The first appearance of unilateral codes of conduct could be traced back to 1997 with the adoption of the Sullivan Principles,[49] a private initiative that aimed at regulating multinational corporations engaged in foreign direct investment in apartheid South Africa and, particularly, at allowing them to avoid compliance with national legal standards (Marrella, 2007:294). The original principles were later translated in the Global Sullivan Principles for Corporate Social Responsibility in order to motivate business to take into

[49] GSPs were announced for the first time in November 1999 at a special meeting of the United Nations called by then Secretary-General Kofi Annan and are the outcome of a three-year collaboration between Rev. Sullivan and a group of international business leaders. See Gwendolyn Y.A. (2010).

consideration the political, economic and social consequences they triggered in their transnational operations. According to this initiative, companies that aspire to adopt them have to gather adequate information which would be later assessed by auditors with regard to their compliance with fundamental human rights such as the equality and non-discrimination principles, decent working conditions, the provision of an adequate standard of living and the contribution to sustainable development (Marrella, 2007:294). Although its widespread endorsement and implementation, since the 1990s a broader set of private initiatives emerged within which we could distinguish different types of NGOs Guidelines: instruments merely providing guidance for how to implement CSR through the employment of reporting standards; self-assessment standards; mechanisms which are a combination of the two (Bantekas, 2004:321). Examples of the former are certification programmes aiming at monitoring multinational corporation's compliance to corporate social responsibility codes of conduct in the field of human rights (Marrella, 2007:299). Among them, we could find the SA 8000[50], the Worldwide Responsible Accredited Production (WRAP)[51], and the US Apparel Industry Partnership's Workplace Code of Conduct[52] (Kinley & Tadaki, 2004:954). In contrast the most common self-assessment standard is identified in the Global Reporting Initiative (GRI) establishing economic, social and environmental standards regularly updated through the GRI Sustainability Reporting Guidelines (Bantekas, 2004:322).

At the same time, multinational corporations started to develop codes of conducts on their own. They mainly constitute a policy statement in which the business entity affirms what their core business activities specifically are and what their contribution in terms of human rights, employment, social and environmental impact concretely is (Marrella, 2007:295). Unilateral codes of conduct vary widely not only with regard to the issues included but also with regard to the deepness with which principles are enunciated. In order to better understand the efforts on the part of multilateral corporations to regulate themselves, we can mention the corporate codes of conduct elaborated by high-profile business brands, such as Nike, Avon and the Royal Dutch Shell (Kinley & Tadaki, 2004:954) by focusing specifically on how they have managed to incorporate women's rights. First, within the Nike's Code of Conduct, the enterprise's commitment to respect human rights throughout the whole value chain is manifested through the endorsement of

[50] It defines the requirements for social responsibility in the field of employment and provides a Guidance Document for implementation. See http://www.inpa.it/certificazioni/SA8000%202014_ITA_finale.pdf
[51] It aims at promoting humane, safe, ethical and lawful manufacturing through education and certification.
[52] It sets out the standards for ensuring decent and humane conditions within the workplace.

the Universal Declaration of Human Rights' principles according to which "all human rights are born free and equal in dignity"[53], and through the provision of the minimum standards that both sports factories and facilities have to apply in order to ensure workers' rights. Particularly, with regard to women's rights Nike aims at protecting both men and women against the threat of discrimination, ensuring fair and equal opportunities in the hiring process, compensation, promotion or conduct on the grounds of gender as well as of any other status which is included in the national legal framework. Moreover, it engages in ensuring a healthy and secure working environment, which includes safety in case of pregnancy, childbirth and nursing, prohibition to carry out forced and discriminatory pregnancy test and use of contraception, and finally the supply of maternity benefits. Finally, it claims that employers and especially women's workers should be treated with respect and dignity, preventing any kind of harassment and abuse on women as they are considered more vulnerable subjects. Secondly, Avon which is engaged in promoting and selling women's beauty products is also committed to meet corporate social responsibility's goals recognizing this responsibility to be central to the successful performance of the company itself. Therefore, the company elaborated a Code of Conduct[54] that is addressed to all suppliers producing goods or services for the company and that set forth the minimum standards that suppliers have to comply with during their operations, in spite of acknowledging that different legal frameworks as well as cultural systems exist worldwide. Among them, the non-discrimination principle states that employment should be granted on the basis of skills rather than on discriminatory factors, such as gender that will prevent women from enjoying equal opportunities. The company is, therefore, engaged in educating and in mobilizing public opinion on issues of crucial importance for women through specific campaigns[55], for instance on breast cancer, education and the fight to end violence against women. Thirdly, we mention a code of conduct elaborated by a multinational corporation involved in the extractive industry. Royal Dutch Shell initially stated in its Code of Conduct[56] that its ultimate purpose consists in avoiding producing harmful impacts within societies by imposing three obligations on all companies, contractors or joint ventures operating within its control: comply with the national legal standards of the host country, intervene when

[53] https://sustainability.nike.com/human-rights
[54] http://www.avoncompany.com/aboutavon/corporategovernance/docs/code-of-conduct.pdf
[55] http://www.avoncompany.com/corporate-responsibility/womens-causes/
[56] https://www.shell.it/about-us/i-nostri-valori/_jcr_content/par/textimage_dd16.stream/1519787681925/7244ccb63d094acac56f9ee1b8305aaf0a728a605803121504ef4bceb12fec27/codeofconduct-english-2015.pdf

recognizing dangerous or violations of core business principles, respect the neighbours. For this reason, "conducting activities in a way that respects human rights is imperative to Shell and supports our license to operate" (Shell's Code of Conduct). Notably, concerning women's rights, the business enterprise affirms not to tolerate harassment and to grant equal opportunities to everyone, despising discrimination on any ground within the workplace.

Moreover, some leading multinational corporations have also decided to develop websites in order to publish their human rights policy providing information and reports about their commitment towards corporate social responsibility obligations and how to implement them (Marrella, 2007:295). For instance, while in its statement the global mining multinational corporation Rio Tinto endorsed the principles set forth in the Universal Declaration of Human Rights and ensured that they will be applied and respected throughout the whole supply chain, Barclays in its human rights report went even further by claiming that their operations will be carried out in compliance not only of the 1948 Universal Declaration but also of the ILO Conventions and Treaties (Zerk, 2006:43).

Traditionally, multinational corporations have argued that responsibility for human rights lies on states and on international bodies such as the UN (Kinley & Tadaki, 2004:945), and that they cannot be held responsible for human rights violations committed in foreign countries by suppliers operating there (Spar, 1998:1). However, this tendency started to progressively change and nowadays it is almost impossible to find a large business entity that has not adopted a code of conduct declaring at least a minimum adherence to human rights principles. This has mainly occurred due to the increasing pressure that civil society, trade unions and other local organizations but especially NGOs have exercised on multinational corporations by exposing and documenting cases of alleged corporate abuses to the public opinion worldwide thanks to advancements in the field of information and communication technology, by devising codes of conduct and guidelines on reporting mechanisms, by lobbying governments and international organizations, and by calling up public protests or consumers boycotts (Zerk, 2006:95). This logic is commonly referred to as the 'spotlight phenomenon': it certainly does not mean that multinational corporations have abandoned their primary purpose, namely maximization of profit and value, but that the growing public concerns around their activities and the pressing media attention have changed their approach to business activities carried out in developing countries (Spar, 1998:2). Indeed, while transnational

business entities can benefit from the advantages of low-cost labour and inputs from suppliers, they also have to bear the costs of negative brand image and reputation that may lead consumers to change their patterns as a consequence of the acknowledged exposure of an enterprise to human rights abuses. Consequently, the larger part of the business community has understood that corporate social responsibility should in one way or another be reconciled with human rights: structurally changing both the policies and actions for including an assessment of their actual impact on societies may potentially bring about a number of competitive advantages (Kinley & Tadaki, 2004:945). Corporate social responsibility allows large business entities to establish higher prices for goods due to the respect of 'fair trade' standards, to avoid boycott campaigns by activists due to their enhanced brand image and reputation, to improve relationship with stakeholders, to create a more fruitful and productive labour environment, to boost business management motivation, to have a more straightforward access to fund for investments, and positive impact in the host countries while increasing the business profits and values (Marrella, 2007:298). Therefore, the completion of the spotlight phenomenon is reached thanks to the proliferation of corporate codes of conduct worldwide: multinational corporations cannot anymore hide human rights abuses as they will not be sanctioned by the national legal system of the country in which they operate but rather by the market and public opinion. For instance, Starbucks Coffee, which was deemed as one of the most responsible and progressive firms in the US was heavily attacked by activists and consequently forced to revise its code of conduct incorporating specific actions that had to be carried out in countries supplying coffee beans, such as Guatemala (Spar, 1998:3). Then, the same Shell's code of conduct we analysed before was the outcome of a revision; its Statement of Business Principle at the end of 1990 was modified as a consequence of the death of the writer and activist Saro-Wiwa who was engaged in explicit contestations of the activities of international oil companies in the Niger Delta. The episode triggered a scandal as the international public opinion substantially accused Shell for not having intervened in the case; consequently, in the revised code Shell committed to acting more forcefully for the respect of human rights consistently with its engagement to foster sustainable development, which represented a landmark recognition for the company (Zerk, 2006:24). For this reason, in the past few years, a variety of initiatives have been devised encouraging cooperation between multinationals, NGOS, trade unions and other civil society organizations engaged in human rights issues. For instance, the corporate

support to this kind of partnerships have been evident in the codes of conduct of many multinationals, such as Nike and Rio Tinto (Zerk, 2006:99).

Multinational corporations were not allowed anymore to be indifferent towards the issue of human rights protection as the global context in which they operate have radically evolved: the bottom-line interests rather than the ethical values of corporate managers need to be prioritized (Spar, 1998:2). Therefore, the crucial motive behind the decision of multinational corporations to incorporate corporate social responsibility standards within their policy statements lies in a reduced 'enterprise global risk' which, consequently caused the widespread endorsement of international human rights conventions, particularly of the Universal Declaration of Human Rights (Marrella, 2007:299). However, the non-binding nature and the voluntary character of the codes cast enormous doubts on their actual effectiveness in positively influencing corporate behaviour and in avoiding, preventing and reducing human rights violations by multinational corporations since the appearance of the first wave in the 1970s (Marrella, 2007:297). On the one hand, multinational corporations still merely consider human rights as moral rather than legal obligations: they carefully refrain from recognizing these principles as legally binding on them by forcefully insist that corporate social responsibility has to remain a voluntary initiative (Zerk, 2006:73). On the other hand, the underlying issue with regard to corporate codes of conduct lies in the lack of enforcement mechanisms which does not allow to verify whether multinational corporations have concretely abided to the codes of conduct or not. In order to find an answer, it is necessary to analyse both the normative and legal impact of the corporate codes of conduct.

First, the voluntary character of corporate codes of conduct does not necessarily mean that they cannot entail any legal value, but it rather implies they exclusively produce indirect legal effects which mainly originate from contract law (Marrella, 2009:300). Contractual agreements among two different partners rests on a set of good faith commitments, unilateral statements which may indirectly acquire legalizing effects in the case they create without fault a legitimate and serious expectations in the counterpart (Marrella, 2009:301). Consequently, if one of the two contracting parties fails to respect its previous commitments, the other may conclude the contract and even ask for compensation for the damages their distrustful behaviour has caused. Alternatively, a business partner may claim a code of conduct to be incorporated within a contractual agreement; in this case, a 'soft law' regulation is turned into legally enforceable provisions though by an indirect means whose infringements potentially lead to the

termination of the contract (Marrella, 2009:302). Consequently, provided that human rights standards are encompassed within a contractual arrangement between two business entities by the means of one of the two preceding cases, they actually become legally binding obligations requiring compliance on the part of multinational corporations although they operate within the boundaries of a state which is not subject to international human rights law as not signatory of human rights treaties (Marrella, 2009:303).

Secondly, corporate codes of conduct have a "norm-making capacity that can both affect corporate behaviour and form a basis for future regulation" (Kinley & Tadaki, 2004:958). Indeed, the widespread adoption of codes of conduct on the part of multinational corporations on a global scale may lead to the establishment of new legal obligations for these business entities. According to a bottom-up approach to international law, the proliferation of informal social norms adopted by multinational corporations within their market practice through the means of codes of conduct may invite state and interstate institutions to back up these standards on domestic legal regimes. If they are extensively implemented in different legal system, the pressure will grow up until reaching the international level (Kinley & Tadaki, 2004:959).

In conclusion, although it is well excluded that the attempt to regulate the conduct of multinational corporations through the codes of conduct does not represent a "second human rights revolution" entailing that human rights responsibility primarily rests on states, the scope and the effects of these instruments should not be undermined (Kinley & Tadaki, 2004:960). Indeed, they have played a crucial role in fostering the debate on corporate social responsibility, particularly with regard to women's rights as we will further analyse in the following chapters.

4.4 CSR, the 'business case for gender equality' and the concept of gender mainstreaming

Recently, it has been recognized that improving women's life through the enhancement of human rights protection is crucial to foster sustainable development, an active civil society and good governance as "gender inequality […] reduces a country's ability to compete in this increasingly globalized economic environment" (ILO, 2015:6). However, women's rights violations still persist in many countries of the Global South, which entails the lack of a real and concrete corporate interest in advancing women's rights, independently from the business performance of the corporation itself (Coleman, 2004:1). According to the McKinsey Quarterly survey in 2009, few corporations involved

in transnational business activities in developing countries considered women as crucial actors in order to boost economic development. Only 19% of the survey respondents actually claimed to have incorporated in their agenda policies or programs supporting women's rights either directly or indirectly (Mc Kinsey, 2010:11).

As we previously analysed not only multinational corporations, but also regional and international organizations are involved in the task of regulate corporate conduct through the elaboration of CSR standards. What these two separate attempts share is the lack of consistent incorporation of issues such as gender equality and women's empowerment, although the UN recognized it as a "human and economic development priority" (Thompson, 2008:88). While poverty, environment and child labour have been at the centre-stage of the corporate interests in the last few years, women's concerns and rights are not specifically and directly addressed by CSR standards, which inevitably constitutes a significant burden for women in terms of the enjoyment of their basic rights and fundamental freedoms (Thompson, 2008:87). For this reason, there is an imperative need to introduce more forcefully CSR standards enhancing women's rights and in particular gender equality and women's empowerment within the multinational corporations' agenda (Thompson, 2008:87). However, while private organizations consider the protection of women's rights as a valuable principle per se, for many multinational corporations the adoption of a 'business case' is needed in order to include commitments to gender equality and women's empowerment within their overarching goals (McKinsey, 2010:13). Therefore, according to Thompson (2008), the 'business case' for gender equality and women's empowerment mainly rests on three different considerations.

First, the realization of gender equality represents a "compelling moral claim" as the persistence of unequal and gendered structures within societies actually prevents women from the full and equal enjoyment of a vast array of opportunities (Thompson, 2008:88). The foundations for the moral claim sustaining the business case for gender equality could be in turn found out in feminist thought which states that in order for CSR to fully account for women's rights, it is necessary to refrain from focusing exclusively on the male standard characterising international human rights law as well as multinational corporations' labour environment[57] in order to take into account the different and unique experience women could bring about (Thompson, 2008:89). Consequently, a precondition to achieve gender equality lies in the acknowledgement of human dignity,

[57] As we previously exposed in chapter 2 and 3 respectively.

rights, responsibility and capabilities of both men and women, without considering men as the primary model (Thompson, 2008:90). Therefore, in order for business activities to generate benefits for both men and women, it is imperative to eradicate the institutional structure of multinational corporations to which male orientation and bias is inherent (Thompson, 2008:88).

Secondly, we have to recall that institutions, social structures and cultural practices are not absolutely neutral in terms of gender; in contrast, they are responsible to perpetuate the gender bias, producing advantages for men while having detrimental impacts on women (Thompson, 20008:88). A gendered culture arises from the gender differentiation revolving around the physical and biological distinct features existing between men and women which then became "the foundation of socially-constructed gender differences that place male and maleness at the normative centre as the standard against which women and womanliness is compared" (Thompson, 2008:91). As feminist theories about gender have pointed out, a gendered culture based on differentiation ends up producing several but equally adverse phenomena for women (Thompson, 2000:92). First of all, devaluation which is interpreted as the habit of assigning women a reduced value compared to men, could be appreciated in the persistence of gender pay gaps or of the irregular contracts, perilous working conditions and the lack of social security, all placing women at the bottom of the employment hierarchy. Then, the pervasiveness of a paradigm based on male dominance concretely prevents women from reaching full human equality and a complete enjoyment of their rights, which could be detected for instance in a restricted share of women occupying leadership and top management positions. Indeed, according to Catharine MacKinnon[58], female subordination is not only identified as unjust and unethical, but it is also interpreted as a socially-constructed practice which could be potentially wiped out and retaught in a different way, inclusive of a gender equality perspective (Thompson, 2008:92). Finally, both the organizational and normative structure of international order actually foster the phenomenon of marginalization of women from the decision-making and power realms (Charlesworth & Chinkin, 1991:621). On the one hand, at both national and international level governmental roles are tendentially masculine while lower and more insignificant positions are assigned to women who, consequently, result to be almost invisible in many international organizations, such as the United Nations or the European Union (Charlesworth &

[58] See MacKinnon, C.A. 1989. *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press.

Chinkin, 1991:624). With regard to the former, women have been for a long time underrepresented in terms of appointment and participation to UN bodies although article 8 of the Charter United Nation as early as in 1945 already stated that "the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs" (Charlesworth & Chinkin, 1991: 622). Although the target to reach equality has been progressively approached, women's unsatisfactory inclusion within the UN has consequently strengthened the perception according to which human concerns do not include both men's and women's perspective, experience and suffering, but they tend to be identified exclusively with the male standard relegating women to a limited and restricted consideration (Charlesworth & Chinkin, 1991: 625). Parallelly, with regard to the latter, although the largest progress in the gender equality realm has been registered in the decision-making area[59], the achievement of full equality for women within this domain still faces significant barriers also in the EU and in its member states. For instance, while in the European Parliament women's participation only reach the 36.1%, this burden is even more evident looking at the gender imbalances in decision-making within the single EU member states (EU Commission, 2018:25). On the other hand, the normative dimension of international law has also failed to properly incorporate women's rights, mainly due to the different dichotomies produced by the existence of a public and private divide. While women are almost excluded from participation in the public realm, they also suffer discriminatory practices within the private realm which substantially escape from the regulation of international human rights law applying only to the public sphere. For instance, torture, trafficking of women and violence against women are all examples of exploitation occurring in the private realm which are not grounded on the differences existing between men and women but rather on deep-seated gendered conceptions of male superiority and dominance (Charlesworth & Chinkin, 1991:630).

Thirdly, the moral claim to achieve gender equality at international legal level should be coupled with the adoption of moral obligations on the part of multinational corporations which may consist either in the inclusion of a gender perspective within their CSR agenda or in the enforcement of transnational business initiatives that will be examined later on (Thompson, 2008:88). Consequently, focusing on the former aspect, gender equality should represent the principle guiding both internal and external business

[59] As it is reported by *The Gender Equality Index 2017: Measuring Gender Equality in the European Union 2005-2015* published by EIGE.

activities, entailing also a moral responsibility to positively contribute to the development of new structures, regulations and practices oriented at enhancing women's equal treatment and advancement (Thompson, 2008:96). Provided that to support their families either through an employment by a business entity or through the setting up of their own business, women should be equally entitled to be engaged at the fullest of their capabilities within a labour environment, to increase their wealth and property through investments which helps them securing their future, and to take care of their families while maintaining an active social participation (Thompson, 2008:97), as it is enshrined in all international human rights treaties and conventions. Therefore, how multinational corporations can effectively tackle the persistence of women's rights violations through the adoption of a 'business case' for gender equality and women's empowerment?

According to the triple-bottom line model for CSR, in order to devise adequate and effective corporate social responsibility standards, multinational corporations have to take into consideration three different aspects: compliance with the legal system in force in the country where they operate, the business case involving their brand image and reputation as conceptualised by stakeholders, and finally social regulation which is a product of the soft rules of governments, of the pressure arising from civil society, and of the membership to business associations or the adherence to specific CSR initiatives (Grosser & Moon, 2005:328). Therefore, multinational corporations are identified as moral agents thanks to their commitments to comply with social norms independently from whether the latter are aligned or not to their corporate interests. At the same time, the moralization process that corporations underwent paved the way for the creation of the so called 'business case' for gender equality and women's empowerment as in many instances the respect and implementation of corporate social responsibility standards with regard to women's rights is also conducive to an increase in financial gains, providing a justification for the corporate drive to profitability. This concretely allows multinational corporations to establish a win-win relationship between the need to foster gender equality, on the one hand, and economic development, on the other: the building up of an underlying narrative of gender equality and women's empowerment has to be interpreted not only as complementary to the maximization of corporate profitability but also as an indispensable component (Calkin, 2016:164).

Briefly, the rationale laying behind the 'business case' is that multinational corporations are prompted to comply with social and environmental norms as well as with human rights and, consequently, to contribute positively to the lives of social

communities in which they operate since through the adoption of corporate social responsibility standards their financial performance and their brand reputation equally improve (Hart, 2009:586). Moreover, since a multinational corporation operating transnationally is subject to a wide array of potential risks connected with consumers' concerns with regard to working conditions, human rights and the potential threats to the environment, the incorporation of commitments in terms of women's rights through the adoption of a gender mainstreaming strategy may actually redress part of these risks and, consequently, enhance the corporations' overall reputation and brand, allowing the latter to gain access more easily to new markets spread across the globe, to establish enduring relationships with local providers, and to ensure the long-term duration of contracts for their operations. Indeed, according to above-mentioned McKinsey's survey, among the 19% of respondents who had already incorporated gender issues within their agenda, investing in women is recognized as a concrete strategic and philanthropic priority which results to be profitable: while for the 34% it turned up in a profit increase, the 38% are confident in a surge in financial returns as a consequence of their commitments (McKinsey, 2010:11). Thus, the adoption of a gender-sensitive approach is expected to bring about several advantages for multinational corporations: as result of women's empowerment, the number of female customers may potentially increase, expanding the target markets for the selling of their products; a greater percentage of skilled women will populate the labour market improving corporate chances to hire and promote; finally, engaging in efforts to raise women's living standards could pay off in terms of reputation and brand image (McKinsey, 2010:14). Moreover, more than three quarters of the respondents have recognized that a concrete engagement in women's empowerment effectively allows multinational corporations not only to generate a positive impact of social norms, to enjoy good reputation and to build up an ethical brand image among the international public opinion, but it is also crucial in sustaining the financial performance of a company (McKinsey, 2010:16).

Therefore, corporate social responsibility should not only be referred to as 'the business case': while business entities have exclusively considered their commitments to respect and implement women's rights on the basis of obligations deriving from the national legal system or on the basis of market imperatives influencing corporate behaviour, as a consequence of the emergence of new drivers in global governance, this commitment has expanded to incorporate a gender mainstreaming process (Grosser &Moon, 2006:537). First, the widespread pressure on multinational corporations as a

result of the adoption of different CSR benchmarks have prompted these business entities to improve their workplace practices. For instance, the Calvert Group, a high socially responsible investment fund established in the US, issued the first Code of Conduct for Corporations which focused exclusively on women's rights in cooperation with UNIFEM as well as business and non-governmental organizations, namely the Calvert Women's Principles for investors. They specifically identified multinational corporations as the ideal "vehicles for addressing global inequalities and advancing the global empowerment for women"[60] (Grosser & Moon, 2006:538). Protecting key women's rights within the workplace, they build on a strong business case for gender equality stating that shareholders and investors may play a crucial role in preventing local communities in developing countries from being adversely affected by globalization and by the activity of powerful corporations. Moreover, as a consequence of the deterioration of nation-state power, both business entities and NGOs have been empowered with the responsibility to contribute to human rights protection within local communities where they operate. One of the initiatives they have devised was the elaboration of corporate codes of conduct which, however, revealed not so effective as they are mainly used by large multinational corporations and their voluntary character prevents the creation of legal accountability mechanisms (Grosser & Moon, 2005:541).

In summary, the ultimate objective of the gender mainstreaming process is to achieve gender equality in both the internal and external dimension through "the elaboration of new standards for both men and women, that is, the transformation of gender relations" (Grosser & Moon, 2005:533). While from a political standpoint, women have to be included within the decision-making process internal to the corporate boards and potential barriers to that participation should be eliminated, the business entity has also to incorporate women's human rights within the corporate agenda. However, gender mainstreaming strategy goes even further to include the assessment of the potential implications of corporate actions on the lives of both men and women, particularly whether they generate discrimination, and eventually how it can be addressed to eliminate the potential or concrete detrimental effects, through the use of gender disaggregated data, gender equality training and the elaboration of equality indicators (Grosser & Moon, 2005:328). Briefly, gender mainstreaming effectively supports multinational corporations in the achievement of their corporate social responsibility goals through the

[60] See Calvert (An Ameritas Acacia Company). 2004. The Calvert Women's Principles: A Global Code of Conduct for Corporations. Bethesda, MD: Calvert Group.

employment of different reporting instruments. For instance, the most renowned reporting system is the Global Reporting Initiative (GRI, 2015) which aims at establishing principles, standard disclosures and guidelines for implementation directed to those business entities who are engaged in the assessment of their economic, social or environmental performance (GRI, 2015:5). References to women's rights could be found in the categories and aspects involved in the standard disclosures; in addition to human rights, women's rights are mentioned in the section regarding Labour Practices and Decent Work, specifically in the Diversity and Equal Opportunity and in the Equal Remuneration for Women and Men indicators. The former requires multinational corporations to provide information about how equal opportunities have been granted within the corporate policies and programs, whether these are in the end effectively implemented, and the composition of the management and corporate boards on the basis of several indicators of diversity. Conversely, the latter monitors the remuneration of women compared to men, considering factors such as the working category and the location of operations (GRI, 2015:69). However, in spite of the great influence the GRI enjoyed worldwide, the provision of data with regard to gender aspects, such as career development, equal pay, working conditions, is not so widespread in the agenda, policies and programmes of multinational corporations. Therefore, although the GRI paved the way for a major engagement on the part of multinational corporations in assessing and reporting performance adopting a gender-sensitive approach, concrete progress still lays ahead as "while more and more companies file their CSR reports each year, the lack of transparency into workplace gender equality remains" (Rita & Agota, 2014:82).

In conclusion, although multinational corporations struggled to resist to the concerns and protests of the international civil society with regard to the intertwined issues of globalization, the expanded reach and power of transnational business entities and human rights, they have started to incorporate corporate social responsibility standards in their agenda in order to improve their public image and reputation. Through the adoption of voluntary codes of conduct, multinational corporations have gained advantage from their commitments to human rights in general and women's rights in particular as the scope for increased profits substantially expanded (Calkin, 2016:168). As the McKinsey's survey recognised "supporting women's economic empowerment is good business and good practice for the private sector" and, therefore, "unlocking the economic potential of half the world's population is nothing short of sound strategy" (McKinsey, 2010:31).

At this point, however, a question arises: is this enough in order to shatter the global glass ceiling and ensuring multinational corporations' adherence to women's rights or more forceful regulation is needed? In the subsequent section, we will examine what has to still be done in order to achieve that objective.

4.5 Breaking the global glass ceiling: the main areas of action

In the last paragraphs, we have mentioned how intergovernmental, governmental and corporate social responsibility instruments have strived to regulate multinational corporations' conduct in relation to human rights and especially to women's rights. As much of work has still to be done, which are the most common and persistent violations that multinationals perpetrated, preventing the enjoyment on the part of women of human rights and fundamental freedoms? What can multinational corporations do in order to redress them?

4.5.1 Gender gaps within the workplace

First, it is necessary to point out that the ILO has always been concerned with the eradication of discrimination against women and with ensuring gender equality in the workplace. As we already outlined in the previous chapter, it has elaborated a set of conventions in this respect among which the ILO Declaration on Fundamental Principles and Rights at Work (ILO, 1998); moreover, in 2003 the organization published the fourth Global Report under the follow-up to the Declaration entitled 'Time for equality at Work' (ILO, 2003) which represents one of most comprehensive studies in the field of discrimination generally. In addition to identifying and absolutely condemning the different forms of discrimination within the working environment, the document recognized that eradicating discrimination is crucial not only for the individuals but also for the community as a whole under the social, economic and political perspective, and that it also constitutes an essential strategic component to reduce poverty and foster economic development (ILO, 2003:1). While since the end of the Second World War some of the most glaring forms of discrimination have been eliminated, other still persist and new ones have arisen, manifesting themselves even in a more subtle and invisible manner (ILO, 2003:2). This is particularly actual for gender-based discrimination that requires specific and tailored action in order to be tackled as while progress have been made from the complete ignorance towards the issues, women are still the most widely

discriminated group in terms of "labour force participation rates, unemployment rates, remuneration, and the jobs performed by most women and by most men" (ILO, 2003:4).

First, according to a study conducted in cooperation with the Women's Forum for the Economy and Society, McKinsey reported the persistence of the gender gap at the top levels within companies, as women are actually prevented from achieving top-management positions, like the Chief Executive Officer (CEO), the company's president or decision-making roles within the board (McKinsey, 2007:4). For instance, the World Economic Forum's Gender Corporate Gap report (WEF, 2010) estimated that women's appointment as CEOs is reduced to less than 5% in the largest business enterprises within the OECD framework while a 2013 survey carried out by Catalyst (2013) revealed that the presence of women in boardrooms in 40 countries all around the world reached the 20% exclusively in Nordic European countries such as Finland, Norway and Sweden (ILO, 2015:2). Therefore, the so called 'glass ceiling' still entails unequal opportunities in terms of career advancement for women and men due to the persistence of hierarchical models (ILO, 2015:2). However, as many studies acknowledged that women's presence in top management positions has an effect on a corporation's performance, it has to be investigated whether its bottom line is negatively affected by the persistence of the glass ceiling (ILO, 2015:6).

The most visible obstacles to women's career path and success can be reduced to two main areas: the stereotyped and traditional conceptions with regard to women's roles and capacities within societies, and the management structures of corporations inherently preventing women's advancement (ILO, 2015:89). Therefore, one of the main factors influencing women to take on management or decision-making roles deals with the 'double burden' syndrome: provided that women have both work and family responsibilities, it has to be judged whether this traditional societal model is compatible with duties deriving from leadership, such as complete availability and geographical mobility at all times (McKinsey, 2007:7). For instance, according to the *2018 Report on equality between women and men in the EU*[61], women are still perceived as primarily involved in the caring activities of both children and the elderly as well as in the domestic chores, which caused the persistence of a high gender gap in relation to women's presence in the employment sector, and especially within the highest corporate ranks (EU Commission, 2018:12). Moreover, women also tend to be less assertive in valuing their

[61] It was elaborated by the European Commission with the purpose of tracking the progress in a number of initiatives launched the previous year in five core areas related to gender equality, recognized as "one of the fundamental values of the EU". See https://www.eubusiness.com/topics/social/equality-18/

talents and performance, which may prevent them to gain recognition and to make rapidly their way to the top. Finally, 'opting out', meaning the women's decision to interrupt or to take a break in their career, constitutes another element explaining the reduced share of women in corporate executive bodies (McKinsey, 2007:9). However, it is crucial for multinational corporations to address inequality with regard to women's presence in corporate boards and at top management levels as this will bring about substantial advantages: employing women means benefiting from the enormous talent they have acquired by excelling in education and, therefore, it represents a tool multinational corporations have at their disposal to enhance their corporate performance both in organizational and financial terms; additionally, considering that the consumer market is increasingly dominated by women, their inclusion in top management positions will allow multinational corporations to be closer to employees, shareholders and customers (McKinsey, 2015:11). Consequently, in order to benefit from this consistent advantages, devising and implementing deep and structural changes within the labour market through shifts in labour organization, culture and working time flexibility become crucial in the attempt to achieve complete equality between women and men in terms of participation within the labour market and to promote a family model in which both men and women are considered as potential wage earners (EU Commission, 2018:15). For instance, according to the ILO Company Survey published in 2013, multinational corporations could be directly involved in the task (ILO, 2015:100). In particular, the modification of existing rigid structures could foster the adoption of several measures aimed at fostering women's presence into top management functions: while ensuring women's access to all company operations and functions, providing management training and skill development programs, assigning visible and challenging tasks to women, establishing equal promotion rates for men and women, providing internal mentoring, networking, and sponsorship programs specifically tailored to women represent the most widespread, top level management support for a gender equality strategy and the need to make corporate culture more inclusive of both women and men are also crucial (ILO, 2015:100). In summary, promoting gender equality within high level decision-making roles consistently supports the business attempt to increase their corporate competitiveness in the international market (ILO, 2015:9).

Secondly, with regard to entrepreneurship, the disproportionate growth of women entrepreneurs in developing countries forces some reflections. For instance, the World Economic Forum interpreted this phenomenon as "the way forward", the new engine for

economic development fostering women's empowerment and bringing about prosperity (Vossenberg, 2013:1). Entrepreneurship has always been interpreted as a demanding career path to embark on, requiring both talents and skills; additionally, it entails increased hardships for women in developing countries who do not only suffer from scarcity of financial resources at their disposal, but gender gaps still persists with regard to remuneration as well as the scope for development of the activity itself. The latter can be appreciated in different realms: a higher number of men are engaged in entrepreneurial activity compared to women whose differentials can fluctuate according to varying locations or be linked to the GDP per capita; women's motives to decide to start up a business mainly consists in pure survival, emerging out of necessity rather than out of opportunity, which also explains why they are more concentrated in the informal working sector compared to men, especially in developing countries; women tends to focus on certain industry niches which are mostly the consumer sector and the retail business while they are almost absent from other sectors; finally, the characteristics of women's businesses are completely different in relation to men as although they are both free to start a business, the former tend to be smaller, with fewer staff and less likely to expand over time (Vossenberg, 2013:2). Moreover, several factors could be mentioned in order to have a deeper understanding of the gender differentials in entrepreneurial activity: difficulty in accessing and controlling capital, lack of high-level training and adequate information, the combination of work and family responsibilities, women's safety and protection threatened by the exposure to gender-based violence, stereotyped conceptions assuming entrepreneurship to be traditionally a male activity, legal frameworks not satisfactorily supporting women entrepreneurs (Vossenberg, 2013:4).

In order to close the gender gap for women in entrepreneurship, it is necessary to take into consideration this multi-layered framework and, consequently, to elaborate adequate CSR policies, standards and programmes specifically tailored to address the main sources of this inequality (Vossenberg, 2013:14). For instance, the ILO is one of the organizations which is most involved in the task thanks to the Women Entrepreneurship Development (WED) programme. While at the forefront of ILO's activities there is the promotion of gender equality, the WED actually strives to increase the scope for qualitative opportunities for women's entrepreneurship and to provide better support to women engaged in this activity through adequate tools and services at institutional level (Vossenberg, 2013:15). Particularly, it provides assistance to women through training, networking and financing as empowering women and ensuring equal opportunities

compared to men represents the only means to bring about changes in developing countries (Vossenberg, 2013:16). Microfinance could represent a valid tool for boosting development while providing increased and equal opportunities for women's entrepreneurs for starting up their business. Originally devised by Yunus, microfinancing could improve women's social status by strengthening their role within the family, by facilitating their political participation, and by protecting them through the threat of domestic violence due to their increase financial weight within the household (Coleman, 2004:6).

Finally, another widespread form of inequality concerning women is unequal pay which mainly consists in a form of discrimination occurring when the basis for the unequal treatment with regard to wages is determined by personal characteristics of the employee, specifically including gender (ILO, 2003:47) The principle according to which both women and men have to receive equal remuneration for work of equal value has been recognized by the ILO since its creation and included in its constitutional document; however, it has also been set forth by subsequent ILO Conventions, among which the Equal Remuneration Convention recognised as the first international instrument protecting this right and the Discrimination (Employment and Occupation) Convention, and later by international human rights instruments, like the CEDAW in article 11(d). However, concrete differences in pay between men and women still affect many countries, independently from their development status (Oelaz et al.,2013:2). This is assessed thanks to the gender pay gap, an indicator measuring "the difference between male and female actual earnings as a percentage of male earnings which actually amounts to the 22.9 %, meaning that on a global scale women's salary is deemed to be 77.1 % less compared to men although significant variations could be observed depending on the sector, type of employment, country and over time (Oelaz et al.,2013:12). For instance, despite European member states are classified among the most developed countries in the world, the pay gap between wages perceived by women and men amounts to 16% across the European economy as a whole while it is possible to appreciate great differences looking specifically at these trends in each of the EU member state (EU Commission, 2018:17).

The extensive gender pay gap worldwide could be explained by mentioning different factors among which gender differences in education, training, working experiences, women's occupational segregation, the type of work, the peculiar features of the enterprise and pay discrimination, on which we will specifically focus (Oelaz et

al.,2013:16). Due to the traditional and stereotypical breadwinner model establishing that women do not need a living wage as they are secondary earners compared to man within the household, their time and talents have been generally undervalued within the workplace actually hampering the full potential for development of society as a whole. Other determinants of gender-based discrimination could be identified in women's lower human capital, in the increased cost of their career trajectory which can be interrupted to enjoy the maternity leave, and in the lower flexibility with regard to working hours and mobility (ILO, 2003:49). Consequently, promoting equal pay becomes crucial in order to prevent the appearance of pay discrimination, but it also triggers a variety of benefits within the household and for business entities as well. On the one hand, gender equality in remuneration allows to avoid an arbitrary domestic division of labour between men and women, to improve women's financial independence making them less vulnerable to poverty and enabling them to reach a decent standard of living for themselves and their children, to enhance the prospects for their pensions, to decrease the scope of child labour, and to minimize the pressure to carry out different works or working too much hours to survive (Oelaz et al.,2013:4). On the other hand, independently from its size or from where it is located, thanks to a more consistent pay policy the enterprise can more easily engage in fair recruitment process, ensure an equal working environment, increase the brand image of the company and its reputation, improve labour relations, decrease the legal costs and the chances of incurring in sanctions (Oelaz et al.,2013:6). Although several decades have passed since the adoption of the ILO Convention No. 100 on equal remuneration, the policy debate dealing with elaborating the adequate strategies to close the gender pay gap is still actually widespread due to difficulties tracing back to the obstacles in eliminating gender segregation in informal work, to ineffective and limited legislations protecting this rights, to the different forms in which inequality in remuneration manifest itself, and finally to the low standards of regulation and transparency of multinational corporations (UN Women, 2011:2).

In conclusion, eliminating the gender pay gap in the workplace is essential: if multinational corporations manage to set up a framework enabling women to benefit from equality in remuneration, the positive impacts will spread to families improving their economic situation and producing benefits for employers, as a fair and equal working environment create room for increasing profits, as well as for society as a consequence of enhanced social justice and productivity (Oelaz et al.,2013:6). Fostering equal pay means focusing on three different areas: increasing salaries by ensuring a minimum wage,

adequately valuing women's work ad skills, and broadening employment opportunities (UN Women, 2011:3).

4.5.2 The fight against gender-based violence

Violence against women still represents one of the most extensive and pressing issues worldwide: on the one hand, it may occur in a number of varying contexts and, on the other, it exploits the technological advancements as well as critical situations in which victims result to be more vulnerable, such as humanitarian crisis or armed conflicts (De Vido, 2016:95). Moreover, it does not only cause enormous suffering, but it also tends to strengthen inequalities between men and women, to reduce female productivity when occurring in the workplace, and to hamper economic development. In order to understand the extent of the phenomenon, it is enough reporting the World Health Organization's (WHO) estimates according to which at least one in three women have suffered from physical or sexual abuse in their lifetime, or those elaborated by the European Union Agency for Fundamental Rights[62] according to which the 33% of the women affected by the survey were victims of physical or sexual violence from the age of 15 while the 8% suffered an episode of violence recently (De Vido, 2016: 15).

While immediately after the Second World War, violence against women was considered exclusively in relation to the private sphere within which the state was allowed to intervene in the most severe cases, in the last few decades feminist theories, on the one hand, and international law, on the other, paved the way for the recognition of violence against women as an issue of public concern (De Vido, 2016:83). Indeed, the first UN Special Rapporteur on violence against women[63] identified three distinct institutions as the main sites in which violence against women may take place: the family, the society and the state (Charlesworth & Chinkin, 2000:12).

The earliest considerations in this sense could be traced back to the 1970s when sexual abuses started to be considered by feminist scholars as a reflection of the gendered construction of society dominated by the normative standard of masculinity. By investigating the origins of the phenomenon and its structural nature, feminism significantly contributed to 'piercing the veil' with regard to violence against women which from that moment was deemed worthy of consideration and attention at both

[62] 42.000 women were interviewed in the 28 EU member states in order to provide those data.
[63] Human Rights Council. (1994). *Preliminary Report submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms Radhika Coomaraswamy*. UN Doc. E/CN.4/1995/42.

national and international level (De Vido, 2016:84). In particular, Catharine MacKinnon stated that sexual harassment[64] consists in the "unwanted imposition of sexual requirement in the context of a relationship of unequal power" (Uggen & Blackstone, 2001:66). On the basis of this assumption, both sexual harassment and sexual assault[65] could not be considered gender neutral (MacKinnon, 1991:10), but rather they are the expression of power arrangements within which men strive to perpetuate their dominance over women (Uggen & Blackstone, 2001:67).

In contrast, in international law violence against women has not always been included in the broad realm of human rights standards (Chinkin, 1995:23) as both the International Bill of Human Rights and the UN Convention on the Elimination of All Forms of Discrimination, in spite of being the first legal instruments to specifically put forward women's rights, have been silent about this phenomenon (De Vido, 2016:95), which actually prevents it from being recognized as a globally widespread problem. This blindness could be explained by mentioning several different reasons: violence against women was not always reported, posing several challenges to the collection of significant data concerning the extension of this phenomenon; traditional and deep-seated conceptions about how gender issues are framed within societies explains the perpetuation of forms of subordination and oppression of women by men; the male-oriented nature of international law is at the roots of the failure to forcefully condemn violence against women as it tends not to incorporate women's experiences but rather to ensure men's protection (Chinkin, 1995:24).

After the Committee on the Elimination of Discrimination against Women explicitly recognised that the failure to incorporate violence against women within the Convention actually threatened women's full and complete enjoyment of human rights principles set forth in the document (Chinkin,1995:25), the CEDAW Committee engaged more forcefully in the issue through the elaboration and the adoption of General Recommendation No.19 (UN General Assembly, 1992), in which it is specified that violence against women is a form of discrimination which consistently prevents the enjoyment of basic human rights and fundamental freedoms on the part of women. Indeed, within the document, it is identified as "violence directed against a woman because she is a woman or that affects women disproportionately" (UN General

[64] See MacKinnon, C. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination.* New Haven: Yale University Press.

[65] It is defined as a specific form of discrimination which can be included within sexual harassment, as the two concepts overlap. See MacKinnon, 1991:10.

Assembly, 1992:1), meaning that womanhood entails being vulnerable to different forms violence (Charlesworth & Chinkin, 2000:12). Consequently, all the acts involving "physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty" fall under the scope of this definition: traditional and stereotyped construction of societal role which may threaten women's physical and mental integrity due to men's protection or control; their subjection to men treating them as sexual objects rather than as individuals; exploitation in the form trafficking or prostitution; episodes of violence against women within the workplace such as sexual harassment; life in rural communities where women are traditionally subject to subordination compared to men, which may involve increased risks for gender-based violence as well as for sexual exploitation when they approach the working environment; finally, forcing women to abort or to sterilization, which seriously hampers women's physical and mental health (UN General Assembly, 1992:6). Therefore, General Recommendation No. 19 established specific recommendations for states not only to address gender-based violence, but also to understand its underlying causes and prevent subsequent episodes from occurring. Notably, it is worth emphasizing that "traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices" and are recognized as root causes of this phenomenon as they "may justify gender-based violence as a form of protection or control of women" (UN General Assembly, 1992:11).

Furthermore, several advances in the protection of women against violence were registered in 1993. The Declaration and Program of Action elaborated at the Vienna's World Conference on Human Rights actually promoted the integration of human rights of women in the international mainstream architecture of human rights bodies (Chinkin, 1995:26). This subsequently led to the adoption of the Declaration on the Elimination of Violence Against Women (UN General Assembly, 1993) which constituted the first international human rights instrument to overtly denounce violence against women as intolerable (De Vido, 2016:28). In particular, it identified violence against women as:

> *"any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." (UN General Assembly, 1993)*

Such a definition encompasses a set of acts including physical, sexual and psychological violence occurring within the family, the community or perpetrated by a state, harmful traditional practices, violence related to exploitation and trafficking of

women or forced prostitution. Briefly, violence against women is considered a violation of basic human rights and fundamental freedoms[66] grounded on gender as well as a reflection of the persistence of inequality in power relations between men and women[67] (OHCHR, 2014:74). Therefore, the right of women to freedom from violence has not been tailored on the basis of male experience and it does not aim at achieving equality between the sexes, which obviously represents a consistent advancement compared to the CEDAW (Chinkin, 1995:26).

Subsequently, the Beijing Platform for Action, the outcome of the Fourth World Conference on Women in 1995, could be considered as a landmark document since it provided a precise definition and description of violence against women in general and, in particular, of actions that could be ascribed to that phenomenon, of its root causes, and of the strategies that need to be implemented in order to definitively tackle it (De Vido, 2016:90). First of all, while its definition recalled the one set out in the Declaration on the Elimination of Violence Against Women, the list of violations of human rights of women that could be encompassed within the realm of violence against women was expanded compared to those that had been previously defined in the 1993, including "situations of armed conflicts, particular murder, systematic rape, sexual slavery and forced pregnancy" (UN, 1995). Moreover, it added that violence against women "led to domination over and discrimination against women by men and to the prevention of women's full advancement" (UN, 1995). Finally, in spite of consituting a non-binding instrument, the Beijing Platform for Action put forward the three strategic objectives that States as well as other actors, including multinational corporations have necessarily to include in a gender mainstreaming perspective, considering how policies would affect both men and women: devising and implementing adequate measure to prevent and eradicate violence against women; examining how violence against women originated, which consequences it entails for society, and whether preventive measures are effective to reach the stated objectives; bringing trafficking in women and prostitution to an end, supporting the victims of these abuses (UN, 1995).

Nevertheless, the issue of violence against women generated concerns not only within the international human rights system but also within the different regional human rights

[66] In the Preamble, it is affirmed that "violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms." (UN General Assembly, 1993).

[67] It is further specified that violence against women is one of the root causes of domination over and discrimination against women preventing their full advancement and constraining them into a subordinate position compared to men within societies (UN General Assembly, 1993).

systems, such as the American, the African and the European ones which elaborated distinct conventions according to the specific traits and reflections on violence against women characterizing each system.

First, in 1994 the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (OAS, 1994), also known as the Belém do Parà Convention (OHCHR, 2004:8). In the Preamble, the latter pointed out that violence against women does not only constitute a breach of human dignity, but it also represents a "manifestation of the historically unequal power relations between women and men" (OAS, 1994). After defining the meaning of violence against women as an act producing physical, sexual and psychological harm in article 1, the Convention claim in article 2 that women have the right to be protected from violence independently from the place where it occurs which may be the household, the workplace, health facilities or any other place, and from whom perpetrates it, being it an individual or a state parties (OAS, 1994). Therefore, as it is enshrined in article 3, women enjoy the right to be "free from violence in both the public and private sphere" (OAS, 1994), which is introduced for the first time in a legally binding convention concerning human rights (De Vido, 2016:45). In turn, the latter ensures the women's right to benefit from the elimination of all forms of discrimination and from the eradication of all stereotypes and social and cultural customs based on unequal relationships and subordination between men and women, as it is spelled out in article 6 (OAS, 1994). Finally, since violence against women is recognized as a powerful obstacle to the enjoyment of political, economic, social and cultural rights, every woman is entitled to resort to any international or regional human rights instrument which is able to recognise, protect and fulfil their rights (OAS, 1994). Then, in the following articles, the obligations of States Parties to the Convention and the mechanisms of protection adopted by the Inter-American system to ensure the implementation of the Convention are specified and carefully explained. Particularly, article 7 entails an obligation on the part of states to prevent, punish and eradicate violence against women by undertaking the necessary and appropriate measures without delay (OAS, 1994).

Secondly, in 2003 a supplement protocol was adopted offering an innovative mechanism to foster and deepen the protection of women's rights within the African human rights system, namely the Protocol to the African Charter on Human and People's Rights on Women's Rights in Africa (OAU, 2003), also known as the 'Maputo Protocol' (FIDH, 2016:139). After defining the meaning of 'discrimination against women' in

article 1, in article 2 the Protocol set forth the obligation for State Parties to undertake all kinds of measures needed in order to eliminate discrimination against women in both law and practice, and to adopt a gender perspective within policymaking process; moreover, they should engage in changing cultural habits and customs that contribute to perpetrate stereotyped and unequal roles of men and women within societies. In article 3, the right of dignity is affirmed, entailing the protection of their human and legal rights, the right to a free personal development, and protection from violence (OAU, 2003).

Thirdly, within the European framework, women's rights protection is enshrined in instruments elaborated by both the Council of Europe and the European Union, as we mentioned in chapter 2. However, violence against women which is interpreted as "the result of an imbalance of power between women and men and is leading to serious discrimination against the female sex both within society and within the family" [68], has been at the core of the Council of Europe's activities since the last decade of the twentieth century[69], leading to the adoption of the Convention on preventing and combating violence against women and domestic violence (CoE, 2011), commonly known as the Istanbul Convention (De Vido, 2016:99). It is considered highly innovative as it is the first international instrument to determine "legally binding standards" for states with the purpose "to prevent violence against women and domestic violence, protect its victims and punish perpetrators" (EU Commission, 2018:39). In the Preamble, a wide array of objectives the Convention aspires to achieve are set forth, including tackling all forms of violence against women by preventing episodes of violence through the implementation of a set of obligations at state level and through a coordinated effort to understand the root causes of that phenomenon; by protecting, supporting victims through the prosecution of the perpetrator; and by realizing the principles of equality and non-discrimination as well as of empowerment of women (CoE, 2011). Moreover, the Preamble not only recalled both the 1993 Declaration on the Elimination of Violence Against Women and the 1994 Belém do Parà Convention in affirming that violence against women is the result of historically unequal relations of power between men and women, but it also recognised the "structural nature of violence against women as gender-

[68] See Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence.

[69] A number of resolutions have been adopted by the Parliamentary Assembly of the CoE to raise awareness among the member states on the need to devise and implement adequate measure to prevent and tackle episodes of violence against women. For instance, it is worth reporting the 2009 interim report elaborated by the Committee for Preventing and Combating Violence against Women. See De Vido, (2016).

based violence" (CoE, 2011). Since the sociologist Galtung[70] affirmed that structural violence referred to those forms of violence which are institutionalized in social structures leading to the exploitation and marginalization of individuals excluded from the latter, the social domination and subordination of men over women are identified as the main determinant of violence against women (De Vido, 2016:42). Indeed, violence against women is not described within the Convention as merely stemming from the individual relationship existing between the perpetrator and the victim, but rather as a phenomenon deeply engrained in cultural and social structures fostering the perpetuation and reproduction of dynamics in which violence, power and domination[71] are deeply intertwined (De Vido, 2016:42). Therefore, violence against women is 'structural' because it is the expression of unbalanced power relations in which both the masculine and the feminine gender have their fixed, socially constructed and patriarchal roles that, by corresponding to deeply seated and accepted practices within societies, end up being perceived as 'natural' (De Vido, 2016:43). Indeed, it is recognised that:

"violence against women is a human right concern precisely because of the structural discrimination against, and subordination of women that is both its cause and consequence." (De Vido, 2016:37)

In addition to defining violence against women as "all acts of gender-based violence" that result in or may cause harmful impacts on women, article 3 also explained clearly and precisely what gender specifically is: "socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men" (CoE, 2011). Therefore, the Istanbul Convention is the first among existing international human rights instruments to address women's rights and to identify in the attribution of stereotyped and patriarchal roles to women within society the most significant precondition for violence against women to take place (De Vido, 2016: 31). Consequently, the latter was further described as "violence that is directed against a woman because she is a woman or that affects women disproportionately" (CoE, 2011). As it is specified in the Explanatory report to the Convention[72], "certain roles and stereotypes reproduce unwanted and harmful practices and contribute to make violence against women unacceptable", which allows us to conclude that gender is at the roots of

[70] See Galtung, J. (1969). *Violence, Peace and Peace Research*. Journal of Peace Research. Vol. 6, No. 3, pp. 167-191.
[71] The relationship between these three variables was firstly introduced by Hanna Arendt (1970) who explained that violence is a function of power and it manifests itself in the domination of human beings over each other, which may also include that of men over women.
[72] Council of Europe. 2011. Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence.

all the violations constituting a form of violence against women set forth in the Convention (De Vido, 2016:32). Furthermore, with regard to domestic violence, while in 2003[73] it was defined as occurring within the private sphere "generally between individuals who are related through blood or intimacy" and recognized as one of the less visible forms of violence against women, the Istanbul Convention provided a more complete and satisfactory definition. Indeed, since in article 3, domestic violence is defined as one of the multiple forms in which violence against women may manifest itself (De Vido, 2016:37) the public/private divide which prevented States to intervene within the private sphere has been officially dismantled. As a result, this entails a new obligation for states deriving from both international human rights law and customary international law to adopt and implement the due diligence principle in order to prevent and address domestic violence (De Vido, 2016:44). Consequently, in order to ensure the effectiveness of the Convention within the state parties, a monitoring mechanism has been put in place which is based on the activities and operations of the Group of Experts on action against violence against women and domestic violence, commonly referred to as GREVIO (De Vido, 2016:179).

In conclusion, the Istanbul Convention could be considered as the most valuable outcome of the attempts registered at both international and regional level to fight violence against women, constituting the starting point for the potential development of a specific international convention on this issue (De Vido, 2016:29). Indeed, according to the Special Rapporteur on violence against women[74], the regional conventions on violence against women revealed themselves limited in scope and, in turn, she shed light on the existence of a normative and accountability gap in international human rights law that could be tackled exclusively with the elaboration of a comprehensive and legally binding instrument at international level (De Vido, 2016:186). As the draft proposal for an international convention on violence against women attached to the report of the Special Rapporteur published in 2015[75] testified, this progress is deemed imperative not only within the UN framework but also by civil society and NGOs. However, its adoption may result difficult due to the appearance of divergences among states which do not deal with the recognition of the extension and severity of the phenomenon, but they rather

[73] See UN General Assembly. 2003. Elimination of Domestic Violence Against Women. A/RES/58/147.
[74] See Human Rights Council. 2014. Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo. A/HRC/26/38, pr. 68.
[75]See HRC. (2015). *Addendum to the Human Rights Council Thematic Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*. A/HRC/29/27

revolve around the concept of gender and the incorporation of crimes and violations (De Vido, 2016:191).

Finally, in 2017, General Recommendation No. 35 (CEDAW, 2017) was adopted in the attempt to update the previous recommendation No. 19 and to provide additional guidelines in order to fully eradicate gender-based violence against women which, despite advances, is still pervasive in many countries of the world and committed by a broad set of actors, including not only states but also non-state actors (CEDAW, 2017:3). In addition to recognize that as it is evident from *opinion juris* and state practice, the "prohibition of gender-based violence against women has evolved into a principle of customary international law" (CEDAW, 2017:2) on the basis of UN political documents and regional treaties, the General Recommendation No. 35 involves several steps forwards. First, the term 'violence against women'[76] has been replaced by 'gender-based violence' which highlights that the specific cause at the roots of this discriminatory practice is gender and that the nature of this abuse is social rather than individual (De Vido, 2018:2). Being a potential source of persistent inequality between men and women, General Recommendation No. 35 calls for comprehensive responses aimed at eliminating the subordinate position to which women are condemned as a result of stereotyped societal roles (CEDAW, 2017:10). Second, thanks to the incorporation of the jurisprudence of regional courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, and the quasi- jurisprudence of UN bodies, it has been affirmed that torture or cruel, inhuman or degrading treatment may be, under certain instances such as in cases of rape or domestic violence, considered as a form of gender-based violence against women (De Vido, 2018:7). On the one hand, the Inter-American Court of Human Rights recognized that in case 'institutional' violence, meaning that women have been abused within the scope of the activities of the military or police services in the context of internal conflict or instability characterizing a country (De Vido, 2016:53), is recognized, these violations could be ascribed to the international crime of torture on the part of the State[77], especially if victims were a marginalized and discriminated group such as indigenous women (De Vido, 2016:77). On the other hand,

[76] The definition of VAW is well established at both international and regional level. It is identified in those acts or omissions that "may result in death, physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty, occurring in all spaces and spheres of human interaction, whether public or private". See CEDAW Committee, General Recommendation No. 35, cit., paras. 14 and 20.

[77] Obviously, this was established according to how the prohibition of torture was shaped in the American human rights law and, therefore, in the American Convention on Human Rights (1969) and in the Inter-American Convention to prevent and Punish Torture (1985).

the European Court of Human Rights also examined cases of sexual assault and rape as violence against women on the grounds of article 3 on the prohibition of torture and of article 8 on the rights to respect for private and family life of the ECHR (De Vido, 2016:77). However, some difficulties arise in relation to the 'institutional' violence perpetrated by non-state actors, which would be more evident in the practical case of gender-based violence we will analyse later on. On the one hand, within the quasi-jurisprudence of the UN Committee on the Elimination of All Forms of Discrimination Against Women, concerns on the part of feminist scholars with regard to the possibility to apply article 1 of the Convention against Torture (UN General Assembly, 1987) to non-state actors were only partially addressed by establishing that torture against non-state actors is recognized only if the acts could be consistently connected to a public official with its consent, acquiescence or instigation (McCorquodale & La Forgia, 2011:206). Consequently, while the due diligence principle could be employed in order to hold the State accountable for its failure to prevent and address women's rights violations committed by non-state actors, such as multinational corporations (McCorquodale & La Forgia, 2011:207), non-state actors could not be hold directly accountable for the violations they perpetrated according to the UN quasi-jurisprudence, which represents a powerful obstacle for women to seek justice and an appropriate remedy for the violations of their human rights , as we will examine in chapter 5. On the other hand, in spite of including within the framework of article 3 cases of sexual assault and violence against women involving also non-state actors, the European Convention on Human Rights failed to adopt an appropriate gender perspective (De Vido, 2016:77) which, in contrast, it is possible to find in the Istanbul Convention where the due diligence obligations are mainly identified in the Prevention, Protection, Prosecution and Policy actions whose main purpose consists in adequately coping with the issue of violence against women (De Vido, 2016:151).

Nevertheless, all these instruments are characterized by an inherent flaw in relation to the protection of violence against women from non-state actors, namely the lack of direct responsibility and accountability, as they are essentially directed to States as the primary actors recognized as subject of international law.

Coming back to General Recommendation No. 35, it is parallelly recognized that gender-based violence should also embrace violations of women's sexual and reproductive health (CEDAW, 2017:18). Moreover, with regard to the general obligations to which states parties are subject under the updated recommendation, they equally apply

to all the provisions set forth in the CEDAW, as it is set out in article 1. Finally, states have the obligation to respect, protect and fulfil the elimination of gender-based violence as they are responsible in case of violations of this commitment or of omissions perpetrated not only by its organs or agents but also by non-state actors (CEDAW, 2017:24). Indeed, states have the positive obligation to take all the necessary measures to prevent acts of gender-based violence against women, otherwise they risk being exposed to a failure in implementing the due diligence process (De Vido, 2018:12).

At this point, it is necessary to point out which are the areas in which multinational corporations result to be mostly exposed to commit women's rights violations and particularly acts of gender-based violence. First, with regard to the gender-based violence within the working environment, the ILO specified that for non-state actors such as multinational corporations eliminating gender-based violence against women within their activities and operations is crucial as it will enable these business entities to avoid both direct and indirect costs: while the former refers to financial drawbacks as a result of victim's absenteeism, illnesses, accidents or even deaths, the latter consists in decreased motivation and quality of work which will have directly impact on productivity as well as on profitability (ILO, 2016:2). Moreover, gender-based violence against women can additionally contribute to spread a negative brand image and reputation among the international public opinion, entailing increased difficulties for the companies in recruiting and retaining workers (Cruz & Klinger, 2011:13). Furthermore, it is worth recalling that gender-based violence has to be eradicated eliminated within 'the world of work', a term that the ILO interpreted as encompassing working performances taking place within both the public and the private sector, the formal or informal economy and involving work-related contexts such as "commuting, work-related social events, public spaces, teleworking and, in some contexts, the home" (ILO, 2016:2). This will retain a fundamental importance in the analysis of our case study on gender-based violence developed in chapter 5. Briefly, although it is recognized that instruments regulating labour standards at national, regional and international level have been already elaborated, governance gaps can still be appreciated in the realm of gender-based violence and harassment in the world of work (ILO, 2016:9), requiring the development of a new instrument, including a more precise understanding of the different forms of violence as each of them may require different solutions and guidelines on how to prevent and address potential violations, providing compensation mechanisms for victims (ILO, 2016:3).

Secondly, the scope for corporate women's rights violations are reported to be particularly high in relation to the maintenance of security close to the areas in which multinational corporations operate, especially in the case of the extractive industry (OECD, 2002.10). This general tendency is mainly related to two relevant factors: on the one hand, the need to protect their investment in a specific location, which involves the safeguard of both assets and labour force; on the other hand, difficulties emerge in dealing with local or indigenous communities in circumstances such as displacements or resettlements (OECD, 2002:11). Within this context many multinational corporations have been involved in human and women's rights violations, especially through the employment of private security forces directly licensed by them but operating in close cooperation with state's military and police forces, as it occurred in the case of gender-based violence concerning a Canadian multinational corporation belonging to the mining sector, which will be analysed in detail in chapter 5.

In conclusion, as neither the 'business case' for gender equality and women's empowerment nor the incorporation of gender mainstreaming within business entities' corporate social responsibility agenda seemed not to have completely shatter the global glass ceiling with regard to women' rights, how could CSR play a role in further fostering gender equality and women's empowerment? This is what we will analyse in the following section.

4.6 Transnational business initiatives to promote empowerment and gender inequality

The recent and impelling need to adopt corporate social responsibility standards on the part of transnational business entities has been increasingly associated to women, as the most vulnerable subjects of globalization but, at the same time, as the most crucial actors for development. Consequently, a number of transnational business initiative (TBIs) have emerged with the precise purpose of protecting women's rights while enhancing empowerment and gender equality (Calkin, 2016:159).

As we have already outlined in previous chapters, the ILO is the international organization which is mostly engaged in improving women's living standards and in recognizing, promoting the respect of their rights and fundamental freedoms (ILO, 2014:1). Ahead of the ILO's 100th anniversary several initiatives were adopted in 2014 with the precise purpose of supporting the organization in the fulfilment of its mandate in the future, among which the 'Women at Work' initiative' (ILO, 2018). As the subtitle

'The Push for Equality' suggests, a new momentum seems to have come about for the ILO: since systemic and structural obstacles to the achievement of gender equality within the workplace have not been completely eliminated throughout the past century and discriminatory practices against women are still widespread and multifaceted, new strategies were needed in order to tackle the mismatch between the efforts and the results obtained (ILO, 2018:2). The Women at Work initiative has been elaborated by the ILO resting on five principles favouring a higher compliance with women's rights at work (ILO, 2018:17). First, in order to ensure decent work, more efficient and affordable care facilities should be put in place and women should be given the opportunity to combine work and non-work responsibilities in their time, establishing an equal share with men (ILO, 2018:18). Secondly, another barrier to the advancement of women within the working environment is represented by the undervaluation of their work; while the principle of equal pay for work of equal value is recognized in all international human rights instruments, looking at the contribution of women's work to the economy and society, gender pay gaps between men and women still exist and represent a severe form of discrimination hampering the concrete achievement of equal working conditions for both men and women (ILO, 2018:19). Therefore, the ILO specifically attempted to meet this challenge through the elaboration of 'Equal Pay – An introductory guide' and 'Promoting equity: Gender-neutral job evaluation for equal pay. A step-by-step guide'. These trends will be further analysed also in the 2018 ILO 'Global Wage Report' which will also open a debate with regard to the possible strategies that could be adopted to improve its compliance at economic and social level through a set of policy recommendations to the Equity Pay International Coalition (EPIC), created especially by the Women at Work initiative (ILO, 2018:12). Thirdly, as women have started to raise their voices by mobilizing against the deprivation of their rights within the workplace, especially against harassment and gender-based violence by organizing protests such as Ni Una Menos campaign or Time's Up campaign. Consequently, two kinds of responsibilities could be derived for the ILO: ensuring that women are adequately represented and that they have the opportunity to raise their concerns freely both externally, in the workplace, and internally, within the organization itself (ILO, 2018:20). Finally, the ILO declared its engagement in addressing harassment and abuses against women in the workplace by elaborating new standards (ILO, 2018:21). In conclusion, further recognizing that discriminatory practices against women are not absolutely

tolerated by the ILO means substantially advancing towards the achievement of complete gender equality within the workplace.

Another international organization involved in the task of advancing women's rights is the World Bank which up until few decades ago was not absolutely concerned with gender issues within its agenda that was oriented at tackling poverty worldwide. This institutional attitude changed for mainly two reasons: first, gender inequalities within the workplace in terms of power and resources as well as of rights and freedoms seriously undermine the potential for economic development and poverty reduction, leading to worse standards of living; secondly, greater attention to those aspects stemmed from international human rights standards with a powerful gender dimension, namely the UN Millennium Declaration, the Beijing Platform for Action, and the CEDAW (World, Bank, 2002:1).Consequently, the World Bank became very influential in promoting women's rights: in its Operational Policy 4.20 adopted in 2001 where it declared its main purposes were "to reduce gender disparities and enhance women's participation in the economic development of their countries by integrating gender considerations in its country assistance program" (World Bank, 2002: 14). In order to effectively implement it, a Gender Mainstreaming Strategy was elaborated and then it was further strengthened thanks to the adoption of 2007-2011 Gender Action Plan (GAP), also known as 'Gender Equality as Smart Economics' (World Bank, 2006). It specifically aimed at improving gender equality and women's empowerment in different areas crucial to development through the adoption of the so-called 'business case' for gender equality and women's empowerment (Calkin, 2016:160). Within this framework, the World Bank Private Sector Leader Forum was inaugurated at the World Economic Forum taking place in Davos in 2009, whose ultimate objectives lied in promoting best practices through solid partnerships between the World Bank and twenty-one of the world's largest and most important multinational corporations worldwide to increase women's opportunity, on the one hand, and in supporting the Gender Action Plan by boosting women's status and their economic opportunities for equality and empowerment as part of corporations' commitment to CSR standards, on the other (Calkin, 2016:161). For instance, the collaboration established at the World Economic Forum in 2008 between the Nike Foundation and the World Bank was an example of the public-private partnerships that consistently helped the World Bank to respect its commitments to gender. As the main responsible for the implementation of Nike's CSR standards and programs, the former launched 'The Girl Effect Campaign' which consisted in an online space where viral

videos are created not only to foster donations or the purchase of merchandise but also to advocate for the "unique potential of adolescent girls to end poverty for themselves, their communities, their countries, their world" (Calkin, 2016:161). Alongside this initiative, the World Bank elaborated the Adolescent Girl Initiative which provided reports for both policymakers and development donors whose data and findings were employed and referred to by the Girl Effect website as a legitimate basis to support their claims and their campaign as well (Calkin, 2016:162).

Furthermore, the year in which the Ministerial Declaration was adopted marked a watershed for women's rights, as it also coincided with the establishment of UN Women, a body entitled to promote gender equality and women's empowerment replacing the already existing UNIFEM. The thematic focus revolved around 'Implementing the internationally agreed goals and commitments with regard to gender equality and empowerment of women' (ECOSOC, 2010), claiming that:

"gender equality, the empowerment of women, women's full enjoyment of human rights and the eradication of poverty are essential to economic and social development, including the achievement of all of the Millennium Development Goals. We also reaffirm the vital role of women as agents of development." (ECOSOC, 2010)

Therefore, the point of departure of the document is the examination of the challenges that still lay ahead and the advancements to be carried out with regard to gender equality, and then it continues by pointing out the potential strategies that could be adopted in order to ensure the effective implementation of international obligations and to speed up action in this area. This practically contributes to highlight the crucial role that gender equality, women's human rights, non-discrimination as three intertwined aspects play in extending the scope for the achievement of the Millennium Development Goals (ECOSOC, 2010:10). The latter refers to the eight commitments to which governments of both developed and developing countries decided to adhere to in order to reach sustainable economic and social development intervening in areas related to poverty and hunger, education, gender equality and empowerment of women, health, environment, and global partnership[78] (UN Women). In particular, MDG-3 explicitly recognized that gender equality has to be ensured in education as well as within economic and political realms since this will enhance their empowerment in society. First of all, all barriers to schooling have to be eliminated; women's political participation and incorporation into leadership positions within government are central in order to improve political accountability

[78] See http://www.unwomen.org/en/news/in-focus/mdg-momentum

towards women's rights and to influence policymaking with their different perspectives; finally, equal economic rights, such as equal pay for equal work, equal access to labour opportunities and equal treatment in recruitment, promotions, leave and unemployment, protection against sexual harassment in the workplace have to be incorporated in national legislations in order to foster women's empowerment (UN Women). However, as of 2010 it was clear that the progress towards the attainment of the Millennium Development Goals has been slow and uneven as discrimination and inequalities still persists in many areas of the world, preventing many women to fully enjoy the rights and freedoms enshrined not only in MDG-3 but also in MDG-5 engaged in ensuring universal access to reproductive health, and in MDG-6 focused on the attempt to reduce severe diseases, such as HIV/AIDS or malaria (UN Women). Consequently, the ECOSOC in its Ministerial Declaration had to address the inherent shortcomings of the Millennium Development Goals with regard to women's empowerment in order to speed up its achievement, emphasizing that since investing in women will boost productivity, efficiency and economic development, MDG-3 has to be interpreted as crucial in order to concretely attain and implement all the other goals (ECOSOC, 2010:2). In conclusion, "integrated, comprehensive multisectoral and gender-responsive approaches" have to be adopted in the effort to improve the progress towards the achievement of the Millennium Development Goals which involve a tight cooperation in all sectors as well as a strong reliance on global partnerships (ECOSOC, 2010:2).

Thereafter, the UN Global Compact has always been considered among the most important initiatives engaged in the attempt to develop corporate social responsibility standards and to regulate multinational corporations' behaviour, although its ten principles originally made no explicit reference to women's rights due to the indifference of the business community towards the issue of gender and to the scepticism of women's organizations with regard to the effectiveness of business initiatives to promote gender equality (Bexell, 2012:393). However, in 2010 on International Women's Day, a partnership initiative arose from the collaboration between the Global Compact and UN Women, namely the Women's Empowerment Principles (UNGC & UN Women, 2010). Adapted from the Calvert Principles[79], the Women's Empowerment Principles constitutes a soft law instrument with no legal force providing guidance on how to empower women in the workplace, in the market place and in the community (Bexell, 2012:393). On the

[79] They were the first code of conduct addressed to multinational corporations and aimed at exclusively protecting women's rights and encouraging empowerment.

day they were launched, the UN Women's Executive Director (2010) explained that, as the subtitle 'Equality Means Business' suggests:

"what is powerful and new today is that the corporate community itself reports that gender equality is good for business. It advances innovation, attracts top talent, raises positive consumer and community recognition and improves profits. The Women's Empowerment Principles build on this business case." (Bexell, 2012:396)

Therefore, the initiative developed by both the UN Global Compact and UN Women emphasized that in order to achieve its seven principles and, therefore, sustainable development worldwide while ensuring gender equality by devising best practices to support all actors, not only business entities but also stakeholders such as governments and civil society, are needed (Bexell, 2012:396). First, gender equality and respect for human rights should be ensured not only within multinational corporations' goals, policies and programs but also in the relationships with stakeholders both internally and externally. Secondly, equal opportunities should be granted to men and women indifferently, avoiding discrimination in both the recruitment and retention process within the workplace as women have to be granted a minimum living wage and equal pay for equal work; in the appointment and participation to managerial, executive positions and to the corporate board of directors; and in the provision of social security services. Thirdly, health and security of female and male workers have to be always safeguarded, devoting particular attention to avoiding any form of violence and preventing sexual harassment within the workplace as both are not tolerated. Furthermore, equal access to education, training and professional opportunities should be the basis for empowering women throughout the whole supply chain of multinational corporations as well as in the marketplace, as it is pointed out in Principles 4 and 5. However, gender equality should not be fostered only within the multinational corporations but also externally thanks to the establishment of cooperative relationships with local communities in which they operate and with advocacy organizations, as Principle 6 spelled out. Finally, transnational business entities have to be transparent and making public their commitments to achieve gender equality, to elaborate benchmarks in order to verify and keep track of progress in both their internal and external actions through reports including necessarily gender makers (UNGC & UN Women, 2010). In conclusion, since over 1.800 business leaders worldwide have joined and adopted the Women's Empowerment Principles, the chances to connect women's rights protection and empowerment with the business prerogatives, namely the maximization of profits and a good brand image and reputation, substantially improved compared to the UN Global Compact's framework (Bexell, 2012:395).

Finally, the 2030 Agenda for Sustainable Development (UN, 2015) was adopted in 2015; it includes 17 Sustainable Development Goals (SDGs) aiming at supporting sustainable development and addressing a wide set of global challenges. Among them, the call for the realization of gender equality and for women's empowerment represents one of the fundamental and cross-cutting features of the 2030 Agenda. In spite of being included in SDG 5, gender equality represents "a crucial contribution to progress across all the goals and targets", since the international community considers it a catalyst not only to improve the living conditions of women and girls worldwide but also to fully achieve all the 17 SDGs (UN Women, 2018:27). Focusing specifically on SDG 5, it is worth highlighting that all its targets build on already existing international human rights instruments (UN Women, 2018:29). Therefore, while it claims that discrimination should be removed within the legal systems (UN Women, 2018: 87), violence against women should be eliminated in both the public and the private sphere as it contributes to cause long-term physical, mental and emotional problems and in some cases death (UN Women, 2018:88). At the same time, harmful practices including child, early and forced marriage and female mutilation have to be eradicated (UN Women, 2018:90). Fourthly, as women's work is mostly concentrated in the informal sector, it is crucial to recognize and value unpaid care and domestic work; otherwise, this would represent an important obstacle to overcome for women to enjoy equal labour rights (UN Women, 2018:93). Finally, equal opportunity should be granted to women with regard to their access to leadership and to decision-making process in political, economic and public life, on the one hand, and with regard to their accesso to economic resources, land and private property, on the other (UN Women, 2018:95). These targets could be specifically achieved by educating women to the use of information and communication technology and by adopting or reinforcing legislation, as these actions will both foster gender equality and women's empowerment. However, other dimensions[80] included in the SDGs sensitively affect women's life and, consequently, has to be addressed in order to increase the chances to realize the 2030 Agenda transformative potential, by breaking the vicious cycle of inequality and marginalization (UN Women, 2018:15) and by incorporating a gender-responsive processes, policies, programs at both state and business level (UN Women, 2018:23).

[80] We refer to women's standards of living (Target 1); health and well-being (Target 2), access and quality of education (Target 4); working conditions (Target 8); community life (Target 11); and access to justice and fair process (Target 16).

Nevertheless, the 2030 Agenda is characterized by accountability problems: due to its non-binding nature, the document lacks mechanisms of enforcement and, consequently neither governments signatories of the commitments nor private businesses who are even not part of the major international human rights agreements can actually bear the responsibility for either progress of failure of the realization of the SDGs (UN Women, 2018:35). Obviously, this seriously risks undermining the effectiveness of the 2030 Agenda as well as the attainment of its principles.

To conclude this long and crucial chapter, some reflections have to be highlighted with regard to the effectiveness of both intergovernmental and corporate codes of conduct, as well as of transnational business initiatives to promote corporate social responsibility in the field of women's rights. As we have already previously outlined, 'corporate social responsibility from above' have adequately contributed to identify which rights have to be respected by multinational corporations, but they have not been so effective in enforcing those rights in a legally binding instrument with the necessary monitoring mechanisms. In contrast, with regard to 'corporate social responsibility from below', although corporate codes of conduct enjoy a great appeal on multinational corporations fostering their compliance with women's rights within their operations, it seems that gender equality and women's empowerment are recognized as valuable principles only to the extent they ensure the maintenance or the increase in the level of corporate profitability (Calkin, 2016:165). Consequently, the introduction of corporate social responsibility standards within the agenda with a gender-sensitive perspective does not concretely aim at generally protecting women's rights, but rather at elaborating policies and programs fostering gender equality and women's empowerment as crucial and powerful instruments to enhance the scope for profit maximization. Therefore, multinational corporations primarily engage in CSR as it allows them "to self-regulate and self-audit while lending credence to the notion that market rationality and market-based interventions are more efficient than regulation" (Calkin, 2016:166). The proliferation of gender-focused TBIs sought to address the flaws of a gender-sensitive approach to CSR, underlying the need for greater transparency and accountability of multinational corporations with regard to women's rights. However, it is still uncertain whether they will actually manage to revolutionize corporate practices, or they will remain non-binding initiatives to foster women's empowerment and gender equality that in the end help the perpetuation of harmful corporate impact and of their authoritative power (Calkin, 2016:169).

5. A CASE OF GENDER-BASE VIOLENCE AGAINST WOMEN BY A MULTINATIONAL CORPORATIONS

Since the multiple efforts to hold multinational corporations accountable for human rights through international 'hard law' mechanisms have failed, international human rights treaties do not entail binding obligations for transnational business entities that, therefore, are only subject to 'indirect' responsibility in that field. Consequently, elaborating effective regulation for multinational corporations and managing litigation in case of corporate abuses is still a prerogative of domestic legal systems, either in the country where the business entity is actually headquartered or in the country where it concretely operates (FIDH, 2016:193). Taking into consideration the tangible difficulties experienced both at international and national level in promoting a socially responsible conduct for multinational corporations operating transnationally, it has to be investigated "to what extent and in which jurisdictions TNCs can be made legally accountable for violations of internationally recognized human rights" (OPBP, 2008:2).

In cases of corporate human rights abuses, two possibilities lay ahead for victims in order to seek redress and justice: the host state courts or the home state courts. Nevertheless, are these instruments actually effective in holding multinational corporations legally accountable for human rights violations, and in ensuring that victims have their claims heard in national fora and that they receive an adequate compensation for the violations they have suffered? This is precisely what we aimed at examining through the analysis of a lawsuit filed to the Superior Court of Ontario in Canada on the basis of allegations of gender-based violence perpetrated by subsidiaries of a Canadian multinational corporations in Guatemala (BHRRC, 2011).

5.1 Arbitration and judicial mechanisms for human rights enforcement

Before focusing on the attempt to build up an effective framework for holding multinational corporations accountable for human rights violations in a foreign country, it is necessary to clearly understand how a multinational corporation actually operates abroad. First, multinational corporations may directly carry out their operations abroad through the establishment of an office in a specific country where it can produce detrimental impacts on individuals or be complicit in violations of their basic rights and fundamental freedoms, either participating in the decision-making process leading to the harmful practice or by being aware of the effects of a particular action without intervening

in order to prevent them. The direct involvement of a corporations in human rights abuses should be dealt with through the host the control, although it is not common for large business entities to be directly involved in foreign direct investments (FIDH, 2016:267). More widespread are the cases entailing an indirect involvement on the part of multinational corporations in harmful practices infringing human rights. Generally, multinational corporations build up subsidiaries in the foreign country where they operate, which are endowed with a separate legal personality from the parent company although the latter maintain a certain degree of control over the former; alternatively, they establish a contract with local partners in the foreign country. However, both in the case of intra-company and contractual relationship, the fact that parent companies have a separate legal personality constitute a substantial barrier to the possibility to charge parent companies for violations committed abroad by subsidiaries or local partners (FIDH, 2016:269). As we will examine in subsequent sections, in order to bypass the doctrine of limited liability allowing multinational corporations to escape legal responsibility for human rights abuses of their subsidiaries, the regulation at the host state level proves to be quite ineffective. Therefore, "piercing the corporate veil"[81] is crucial in order to ensure justice to victims who have suffered human rights abuses; this requires an analysis of the relationship existing between the subsidiary directly causing the harm and the control the parent company exercises over it (FIDH, 2016:270).

5.1.1 Host country control and the respect of national sovereignty

The difficulties in holding multinational corporations accountable for infringements of international human rights law abroad are determined by two different factors. First and foremost, with regard to the regulation and control of non-state actors, it is recognized by several international human rights instruments that national governments hold primary responsibility to ensure human rights violations do not occur within their national borders, adversely affecting the lives of their citizens. However, it must be recognized that the state is only indirectly responsible for human rights violations committed by other actors, including multinational corporations (Kinley & Tadaki, 2004:937), as the Human Rights Council outlined (2009:14):

[81] The corporate veil is applicable to parent companies that hold shares in their subsidiaries, which prevents the former from being held responsible for the acts and omissions of their subsidiaries. Often, this legal separation is not reflected in fact; consequently, to 'lift' or 'pierce' the veil is to treat the corporate group in law as it commonly exists in fact: as a single entity. See Above Ground. (2016).

"States are not held responsible for corporate-related human rights abuses per se but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs. Within these parameters, States have discretion as to how to fulfil their duty."

Therefore, legal complaints against abuses perpetrated by multinational corporations has to be filed against the host state according to international human rights instruments rather than directly against the business entity, which entails more difficulties for victims seeking justice (Marrella, 2009:234). Secondly, legal regulation of corporations, including provisions specifically protecting human rights, has traditionally been dealt with at domestic level, meaning that any business entity has to comply with national law within the national territory of the state in which it operates. Consequently, neither international human rights instruments nor domestic legal systems have been empowered with the necessary authority to effectively regulate, monitor and redress the detrimental impacts of multinational corporations within their extraterritorial operations which is precisely the main feature to recognize them (Kinley & Tadaki, 2004:938).

As a consequence of their decision to embark on foreign direct investments, multinational corporations are aware they have to abide to the national law of the territorial states in which they operate. Although many national legal systems in the world have elaborated laws, policies, and regulations aimed at protecting individuals and more specifically women in the field of employment, discrimination, sexual harassment, health and security, the reduced power of the states compared to that of multinational corporations coupled with the need to attract and maintain foreign direct investment in the long run to boost economic development in the country actually hampers states' efforts to safeguard human rights (OPBP, 2008:3). The establishment of bilateral investment agreements (BITs) in export processing zones or in weak governance zones has produced a 'race to the bottom' with regard to human rights protection as states have proved to be either unwilling or unable to guarantee a decent level of human rights protection which has consistently decreased in those areas thereafter (Marrella, 2009:233). At the same time, the weakness of both political institutions and the national legal system characterized by inadequate legislation, poor infrastructure, threats of corruption, politicization of the judiciary further hampers the possibility for an adequate assessment of corporate responsibility, especially in developing states which are the primary contractors of BITs (FIDH, 2016:193). First, the state may not be endowed with a competent, effective and adequately sophisticated legal system to deal with complex allegations of human rights violations perpetrated by an important multinational

corporation. As it occurred in the case involving the Union Carbide Corporation[82], the activities of the US corporation in India negatively affected the lives of Indian citizens causing both environmental and health consequences due to the Bhopal gas leak, the US Courts dismissed the possibility to carry out the litigation process. Therefore, it took place in a national court which did not ensure a fair process, nor it provided an effective and proportionate remedy to victims due to the lack of resources, competences and efficiency (OPBP, 2008:3). Secondly, the state may prevent citizens to seek justice not only at national level but also to resort to international courts, like it happened in the case of the Papua New Guinea's government which modified the national law in order to displace the recourse to a foreign court for a criminal offence in the case of allegations of environmental damage on the part of the local community against BHP[83] (OPBP, 2008:3). Thirdly, the state may be complicit in human rights abuses of multinational corporations operating within its territories. For instance, in the Kilwa trial in the Democratic Republic of Congo, both the multinational corporation and its agencies were accused of human rights violations as through their logistical support armed forces directly contributed to torture, illegal detention, and summary executions of individuals. Although the high international attention led NGOs and the UN to monitor the course of the litigation, irregularities within the Congolese legal system, such as systemic intimidation and corruption, came out and substantially prevented the victims to obtain justice as the business enterprise was in the end discharged of all the accusations (OPBP, 2008:4).

In conclusion, as the conduct of multinational corporations is regulated by the host state through its national legal system to which any business entities should abide to, and economically by the parent company founded and headquartered within the territory of a foreign state, in many instances the host state control proves ineffective in ensuring homogeneity in both human rights protection and enforcement (Marrella, 2009:234). This paved the way for the creation of a so-called 'accountability gap' which, on the one hand, practically enables multinational corporations to escape form direct responsibility and, on the other, represents a bleak prospect for victims who have to face significant obstacles to bring about their claims and to obtain justice as well as an adequate remedy (OPBP, 2008:5).

[82] Re Union Carbide Corp Gas Plant Disaster at Bhopal 634 F Supp 842 (SDNY 1986).
[83] Business & Human Rights Resource Centre. BHP Lawsuit (re Papua New Guinea), online at: https://www.business-humanrights.org/en/bhp-lawsuit-re-papua-new-guinea in Oxford Pro Bono Publico. (2008), supra note 194, pg. 3.

5.1.2 Home country control and extraterritorial application of domestic law

Traditionally, it is believed that the authority to hold multinational corporations responsible for human rights violations exclusively rests on the host state which has the obligation to protect all the individuals within its national territory. However, international human rights treaties and, particularly, the Committee on Economic, Social and Cultural Rights affirmed that the home countries in which multinational corporations are headquartered should engage in preventing business entities to commit human rights violations abroad (OPBP, 2008:5). As the UN Secretary-General's Special Representative on Business and Human Rights, John Ruggie, stated in his 2009 report:

> *"States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuses abroad by corporations within their jurisdiction." (HRC, 2009:15)*

Therefore, although home states are not subject to a formal obligation, they can choose to hold multinational corporations accountable for human rights abuses committed abroad, which entails an extension of the state's jurisdictional competency limited to those specific actions directly perpetrated by business entities (Marrella, 2009:234). However, it must be judged the extent to which the regulatory lacuna created by host state control can be tackled with the extraterritorial application of the home country's national legislation in case of corporate abuses in a foreign country, as well as the extent to which non-nationals are allowed to take legal action against a multinational corporation in its home country (OPBP, 2008:5).

In order to complete this task, it is necessary first and foremost to examine more deeply the concept of extraterritoriality; it could be defined as a prescriptive or legislative jurisdiction and it "exists where a court applies domestic law or international law to conduct that took place beyond the country's borders and to foreigners" (Amao, 2011:249). Therefore, extraterritoriality expands the traditional concept of state sovereignty and national integrity in order to provide a more effective regulatory environment for preventing and redressing corporate violations in case the host state is either unable or overshadowed by the excessive power of multinational corporations to build it up on its own (HRC, 2009:16). Since the beginning of the twenty-first century, the recourse to legal proceedings in the home countries of multinational corporations on the part of non-nationals who had been victims of corporate human rights violations

experienced a substantial increase, although it involves some potential obstacles (FIDH, 2016:194). While homogeneity may lack in the development of regulatory standards at national level in regulating and adjudicating multinational corporations' conduct, victims may face difficulties with regard to the expertise needed in order to bring a claim against such a business entity in a foreign jurisdictional system, in dealing with substantive and procedural impediments during the course of legal proceedings or more concrete hurdles linked to the legal and other expenses as well as to adequate access to information (OPBP, 2008:6). Particularly, this incremental tendency has specifically involved developed countries such as the US and Canada as well as the EU, which has registered the highest number of parent companies of multinational corporations engaged in foreign direct investments abroad, as we will immediately examine in detail. Consequently, these countries have also elaborated more advanced system to provide non-nationals with the possibility to seek justice and redress by holding multinational corporations accountable for their human rights abuses (FIDH, 2016:194)

Up until nowadays, the most developed and effective national legal mechanism ensuring multinational corporations' accountability for the harmful impact they have generated abroad in terms of human rights is the US Alien Tort Claims Act (ATCA). Indeed, it is recognized as an instrument "filling the prevailing accountability vacuum created by the absence of comprehensive international regulation" with the potential "to act as a catalyst for future reform efforts" (Amao, 2011:251).

Although up until recently had not been actively used or applied to judge any consistent case, the origins of the ATCA could be traced back to 1789 when the Alien Tort Statute was enacted. It was only in 1982, as a consequence of the US Second Circuit Decision in *Filartiga v. Pena-Irala*[84], that the ATCA started to be concretely employed by federal courts: they were conferred jurisdiction on civil actions initiated by a foreigner emerging out of infringements of international law which has not to be interpreted as exclusively limited to the fight against piracy, but rather according to the consistent evolution it has experienced worldwide. Subsequently, the decision in *Kadic v. Karadizic*[85] further expanded the scope of the ATCA establishing that it could be applied also to private actors, including multinational corporations, provided that "their conduct is undertaken under the colour of state authority or violates a norm of international law that is recognized as extending to the conduct of parties", which actually constitutes the

[84] *Filartiga v. Pena-Irala.* 630 F.2d 860.
[85] *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

basis for legal proceedings against these business entities operating globally (Amao, 2011:254). Furthermore, in *Sosa v. Alvarez Machain*[86], the Supreme Court strengthened victims' chances to successfully file lawsuits under the ATCA against multinational corporations infringing international human rights law, either as a direct perpetrator or as an accomplice. Consequently, since that moment a number of worldwide renowned multinational corporations headquartered in the US, such as Chevron Texaco, Coca-Cola, Gap, Chiquita, Nike, as well as in the UK, Australia or Canada started to face claims brought about by individuals seeking justice for corporate human rights violations they had suffered in developing countries (FIDH, 2016:207). These lawsuits could in turn be divided into two distinct categories, namely indirect and direct liability cases (OPBP, 2008:309). On the one hand, indirect liability implies multinational corporations may be held accountable due to their complicity in violations of international human rights law perpetrated by states. The so-called 'corporate complicity' has been instituted for the first time in the case *Doe c. Unocal*[87] (Marrella, 2009:236), and in order to determine such an involvement, two requirements are needed. Notably, it has to be proved that private entities acted "under the colour of law" and "together with state officials or together with state aid", while several tests are at the disposal of federal courts to verify their existence (OPBP, 2008:310). On the other hand, direct liability entails that no direct relationship with the state or its organs is required in order to recognize corporate accountability in human rights violations. The only doubt it might emerge is whether international law or federal law should be taken into consideration during legal proceedings by federal courts operating under the ATCA (OPBP, 2011:311). Finally, the decision in the *Kiobel v. Royal Dutch Petroleum*[88] ruling provided an important contribution to determine more precisely the framework for the application of the ATCA in relation to multinational corporations' human rights violations. The Supreme Court recognized that the connection between human rights violations reported by Nigerian plaintiffs against the UK and Dutch parent companies for their complicity in state abuses and the territory of the US does not constitute a sufficient ground to displace the assumption of extraterritoriality under the ATCA, which requires specific conditions. They are limited to cases in which human rights violations have taken place within the US territorial borders, the defendant is an American national, consistent actions leading to the abuses had occurred on US soil, and

[86] *Sosa v. Alvarez Machain* (03-339) 542 US692 (2004) 331 F.3d 604.
[87] *Doe v. Unocal,* 248 F.3d 915 (9th Cir. 2001).
[88] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148 (2d Cir. 2010).

the multinational corporation's behaviour affects in a considerable and detrimental manner the American national interest (FIDH, 2016:200).

In summary, specific requirements are needed in order to sue multinational corporations in a lawsuit for alleged human rights abuses. First, the victim has to be an alien, meaning a non-US national who is not required to have previously exhausted all the available national remedies, which tends to be quite common in case of lawsuits against multinational corporations (FIDH, 2016:211). Secondly, the tort must constitute an infringement of international law upon which a US court has been conferred jurisdiction, such as in case of a violation of direct obligations deriving from international human rights treaties the US is bound to, which is quite rare, or a violation of customary international law grounded on definable, universal and obligatory norms, as it is established in *Sosa v. Alvarez Machain*; in some specific cases the *ius cogens* also ensures the US jurisdiction over the case (FIDH, 2016:212). Therefore, due to the restrictions posed by both the *Sosa*'s and the *Kiobel*'s requirements, the US courts have always paid careful attention to the issue of jurisdiction as plaintiffs must prove that the multinational corporation's affiliations in a foreign country are "so constant and pervasive as to render it essentially at home in the forum state"[89], which in turn has substantially reduced the number of cases reaching the ruling phase (FIDH, 2016:214). Indeed, US courts' jurisdiction is accepted in two distinct instances: when the business entity perpetrating the abuses is headquartered in the US or when the enterprise, either US or foreign, carries out consistent operations on the US soil (FIDH, 2016:214). Finally, the statute of limitations prevents victims from filing a lawsuit after a certain period starting from the date of the occurrence of the alleged violation, although a plaintiff could easily bring about specific reasons for which the limitation was suspended obtaining a delay of that period (FIDH, 2016:219).

In conclusion, the ATCA certainly generated positive consequences for the regulation of corporate conduct abroad; however, it must be highlighted that it constitutes a unilateral measure aimed at ensuring the extraterritorial application of the US law. Consequently, the legal accountability of multinational corporations established through a lawsuit under the ATCA does not ensure the extraterritorial application of international human rights standards as they do not incorporate this principle, but it is limited to their enforcement through national legal norms. Therefore, the ATCA actually prevents the application of a double standard in relation to alleged human rights violations in which

[89]Daimler AG v. Bauman, 134 S.Ct. 746 (2014) in International Federation for Human Rights. (2016).

two actors are involved, one of them being a multinational corporation (FIDH, 2016:220). Moreover, another significant obstacle has threatened the recognition of US courts' jurisdiction under the ATCA: the *forum non conveniens* provide US courts with discretion to decide on the basis of the specific circumstances characterizing each case, considering whether the national forum is the best suited to carry out legal proceedings or other forums are judged to be more appropriate in order for victims to obtain justice and be provided with an adequate and effective remedy (Kinely & Tadaki, 2004:943). This doctrine has assumed a crucial relevance as multinational corporations frequently rely on *forum non conveniens* in order to hinder from legal liability in the US under the ATCA for alleged human rights violations committed abroad, on the one hand, and to shield parent companies from responsibility for abuses perpetrated by their transnational subsidiaries or affiliates, on the other (FIDH, 2016:220). Provided that as we have previously outlined, corporate abuses often take place in developing countries whose national legislative and judicial system are not effective in holding multinational corporations accountable for their violations and in ensuring redress to victims which are mainly foreigners, *forum non conveniens* may lead to the ultimate and definitive rejection of the hearing on the part of a US Courts (FIDH, 2016:222). This is precisely what happened in the *Bhopal* case[90] in which both citizens and the Indian government filed a lawsuit to the US Court in the hope they could hear and judge under the ATCA their claims against the US Union Carbide Corporations which had caused more than 2000 deaths and thousands of injuries as a consequence of a toxic gas leak within the country (Marrella, 2009:237). However, Indian plaintiffs' request was dismissed on the grounds of *forum non conveniens* doctrine, as another appropriate forum was identified to carry out the litigation process, namely the Indian court, which may entail severe consequences for victims as it was previously outlined.

In addition to the ATCA, the European Union seems to provide a similar framework to enforce multinational corporations' legal liability in relation to human rights violations perpetrated in third world countries. Business entities domiciled in the EU and involved in transnational operations abroad may be subject to litigation under the ATCA as it occurred in the *Wiwa v. Royal Dutch Petroleum Co*[91]. and in the *Wiwa v. Shell Petroleum Development Company* cases which, in the end, were dismissed on the grounds of the *forum non conveniens*. However, a specific instrument was devised within the EU

[90] Business & Human Rights Resource Centre. Union Carbide/Dow lawsuit (re Bhopal), online at: https://www.business-humanrights.org/en/union-carbidedow-lawsuit-re-bhopal

[91] Wiwa v Royal Dutch Petroleum 226 F 3d 88 (2d Cir 2000).

framework in order to cope with civil liability of multinational corporations committed outside EU borders, namely the Regulation 44/2001 (European Council, 2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Amao, 2011:260). It specifically allowed a national court of an EU member state to recognize the extraterritorial jurisdiction on the basis of several requirements which have necessarily to be respected (FIDH, 2016:249). First and foremost, the multinational corporation involved in human rights abuses must be headquartered in an EU member states although it is irrelevant whether the applicant is an EU national or a foreigner, which represent a substantial difference compared to the ATCA. Secondly, once jurisdiction has been recognized, victims have three possibility to sue the business entity responsible for causing harmful impacts: since the domicile of a multinational corporation is described as "its registered office, central administration or principal place for business" (FIDH, 2016:250), a lawsuit could primarily be filed in the EU member state's court where the company is headquartered; then, legal proceedings may take place in the court of the country where abuses actually occur; finally, a legal action can be presented against a parent company domiciled in a EU member state in a court of another member state where an agency, a branch or other affiliates are located. The main obstacle to the application of the Regulation 44/210 is the same that has been previously identified for the ATCA, namely *forum non conveniens*. As the appropriate alternative forum may be located in a third world country, this poses severe challenges to the legal accountability of multinational corporations as well as the provision of remedies to victims (FIDH, 2016:254). In summary, Regulation 44/2001 provides judicial mechanisms for EU member states' court to regulate and address multinational corporations' conduct in third world countries in order to prompt enhanced corporate responsibility to respect human rights within the scope of their transnational operations, much in line with the ATCA (Amao, 2011:273).

In conclusion, although both the ATCA and the EU Regulation 44/2001 are considered significant attempt to ensure the multinational corporations' legal accountability, it emerges more and more clearly that inherent shortcomings due to the possibility to resort to the *forum non conveniens* doctrine with the purpose of escaping from extraterritorial application of national law seem to call more forcefully for an international convention capable of effectively regulating corporate conduct worldwide, on the one hand, and for the creation of an international tribunal capable of directly enforcing international human

rights law against corporations operating transnationally and causing detrimental impacts for local communities (Marrella, 2009:238).

5.1.3 Additional mechanisms to assess multinational corporations' violations of human rights

In addition to legal accountability mechanisms, other instruments have been created in the attempt to regulate multinational corporations' conduct within their operations abroad. Particularly, we will take into consideration mediation mechanisms, including the OECD Guidelines for Multinational Enterprises, the National Human Rights Institutions (NHRIs), the Ombudsmen, on the one hand; and the role that different financial institutions played in order to achieve that objective, on the other.

First, while in the previous chapter we have analysed the content of the OECD Guidelines for Multinational Enterprises, they also provided for enforcement mechanisms in order to ensure their correct implementation by holding multinational corporations accountable for human rights principles incorporated within the document (FIDH, 2016:399). First of all, adhering states are obliged to establish a National Contact Point (NCP) whose main tasks consist in ensuring the application of the Guidelines within the domestic territory; dealing with problems arising during the implementation process through the 'specific instances' procedure, which since the 2000 revision allows individuals to file complaints directly against multinational corporations infringing one of the provisions; and supporting civil society in the understanding of the Guidelines (FIDH, 2016:399). However, an important limitation affects the complete effectiveness of the NCPs in making corporations responsible for human rights abuses: they are not fully independent organs and they issue decisions which do not legally bound corporations and do not involve sanctions. Secondly, in addition to the NCPs, it is worth mentioning two other bodies: the Investment Committee which was built up in 2004 in order to clarify the interpretation of the Guidelines achieving the complete harmonization among the different adhering countries, to examine the implementation procedure reaching the greatest level of effectiveness, and to submit reports to the OECD Council on the Guidelines; and the Working Party on Responsible Business Conduct which is an intergovernmental and a subsidiary body to the Investment Committee created in 2013 in order to help and complement the work of the Commission (FIDH, 2016: 401). Although the 2011 revision substantially improved the implementation procedures by establishing that National Contact Points should behave impartially, predictably and equitably and by

elaborating practical rules handling complaints through the mechanism of mediation, multinational corporations are not still legally bound to respect and promote human rights principles involved within the Guidelines (Amao, 2011:36).

Thereafter, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), which was established in 1993, played a crucial role in the intertwined fields of business and human rights. In 2009, it set up the Working Group on the issue of Business and Human Rights whose mission mainly consists in supporting National Human Rights Institutions (NHRI), national dependent public bodies which can assume different forms: human rights commissions, human rights ombudsmen, consultative and advisory bodies and other several kinds of institutions (FIDH, 2016:430). They are established by states in compliance with the 1993 Paris Principles and their main task lies in the promotion and protection of human rights in the core area of business for which it has been empowered of both building and strategic development capacities (FIDH, 2016: 425). Specifically, in case of corporate human rights abuses they provide victims with the possibility to resort to the complaints mechanism of the NHRI either within the territory where they have concretely occurred or in the home country of the multinational corporations perpetrating them, although rules of procedure may vary from country to country. However, it must be pointed out that the NHRIs' scope of action has actually been limited to monitoring the activities of business entities within the national territory, investigating and asserting human rights violations without having the necessary power to tackle and address them. Consequently, the mediation role has substantially undermined its effectiveness (FIDH, 2016:426). For instance, looking at one of the cases that has been filed to the NHRIs: while after carrying out concrete investigations the National Human Rights Commission of Thailand (NHRCT) managed to prove human rights violations committed by the Thai sugar company, a Coca-Cola supplier, in Cambodia and to force the latter to withdraw from the plantations it illegally occupied, the local villagers' living conditions did not substantially improved and they received no compensation for the detrimental impacts they have suffered (FIDH, 2016:428).

Finally, among the different mediations mechanism to which victims of alleged human rights abuses can resort to there are also Ombudsmen which are generally defined as "an independent and objective investigator of complaints filed by individuals against government agencies and other organizations from both public and private sectors", which in some countries can be categorized as National Human Rights Institutions

(FIDH, 2016:432). The purposes and the mechanisms governing them are similar to those of NHRI with one main difference: ombudsmen can be appointed not only by states but also by a local or municipal government, by a company or by an NGO. Therefore, they are also empowered to handle complaints against non-state actors, including multinational corporations, and in most cases, they are specifically set up in some industry sector, such as the Canada's Corporate Social Responsibility (CSR) Counsellor for the Extractive Sector. However, the effectiveness of the Ombudsmen as a mediation mechanism is called into question by doubts concerning the impartiality of these bodies in ensuring adequate human rights protection to victims (FIDH, 2016:432).

Secondly, with regard to the role of International Financial Institutions in the quest for adequate human rights protection against corporate abuses, it is worthwhile highlighting that if specific conditions are satisfied they can function as accountability mechanisms for victims of these abuses as they actually supply financial support to multinational corporations involved (FIDH, 2016:437). Although the interest on the part of these institutions in human rights issues is relatively recent and their social environmental policies have been frequently and harshly criticized due to the lack of incorporation of a human rights language capable of offering solid, effective and broad protection, they have recently started to elaborate complaints mechanisms. They mainly absolve two main functions: the 'dispute resolution' or 'problem-solving' function and the 'compliance' function, monitoring the adherence to the institutions' policy (FIDH, 2016:439). Therefore, in spite of their inability to provide both reparations and remedies to victims, they represent useful and forceful mechanisms in order to hold corporations accountable for their alleged human rights violations. For instance, if we take into consideration one of the most renowned and important financial institutions worldwide, namely the World Bank, it established two different complaints mechanisms aimed at embracing all the activities carried out by the different associations incorporated within it: the World Bank Inspection Panel and the Compliance Advisor Ombudsmen (FIDH, 2016:440). While the former is engaged in addressing complaints filed by all those entities who have suffered harmful impacts in terms of human rights directly generated by the activities of the World Bank itself without, however, providing any remedy to victims (FIDH, 2016:440), the latter deals with the activities of the private sectors and carries out three main functions, namely dispute resolutions, the assessment of compliance and advice to the World Bank in the field of environmental and social issues (FIDH, 2016:449).

Finally, investment tribunals can also contribute to foster multinational corporations' accountability in the field of the human rights. The International Centre for the Settlement of Investment Disputes (ICSID) was originally created to provide both effective protection to investors abroad and a forum in which they can enforce their rights in case of arbitrary decisions of states damaging their economic activities within their territories (FIDH, 2016:457). While this has obviously triggered a widespread criticism as it prevents states not only from enacting and implementing public policies without taking into considerations investors' interests, but the tendency to support investors in litigation also means overlooking human rights law and reducing the scope for multinational corporations' responsibility towards human rights (FIDH, 2016:457). In the face of these inherent shortcomings, the ICSID which traditionally constituted a forum for state-investor litigation modified its rules of procedure in 2006 in order to allow third parties, including NGOs to participate in the hearings provided that both parties to the disputes agreed. Moreover, the adoption of the new UNCITRAL Transparency Rules coming into effect in 2014 further improved the effectiveness of this dispute mechanism by publishing documents such as the applicant's and the defendant's statement and the tribunal's decision, and by allowing open hearings (FIDH, 2016:458). For instance, the Australian-Canadian mining company Oceanagold filed a lawsuit against El Salvador to the ICSID in 2009 after the state denied the concession for the company's mining project on the ground that the latter did not comply with national regulations and that concerns emerged with regard to its social and environmental impact on local communities.[92] Different submissions of NGOs were accepted by the arbitration tribunal emphasizing the need to foster democracy, public participation as well as the respect of basic human rights and fundamental freedoms; however, the case is still pending as the ICSID has not delivered its final decision yet (FIDH, 2016:461).

In conclusion, multinational corporations have managed to foster profit and economic value maximization at the expense of human rights protection for a long time. However, as concerns have been raised in the last few decades concerning their transnational activities, it is crucial not only to put an end to corporate human rights abuses worldwide, but also to build up a framework in order to enhance corporate accountability for those violations (Kinley & Tadaki, 2004:1023). Consequently, this will also enable victims to effectively obtain justice as well as an adequate remedy for the harm they have suffered,

[92] Pac Rim v. El Salvador, ICSID case N°. ARB/09/12.

either in the home state where multinational corporations are domiciled or in the host state where the abuses actually occurred (OPBP, 2011:8).

5.2 Case study: Choc v. Hudbay Minerals Inc.

In the previous chapters, we have examined how both the US and the European framework have engaged in the attempt to foster multinational corporations' accountability thanks to the application of domestic law with extraterritorial reach through the ATCA and through the Regulation 44/2001 respectively. Now, we move to analyse how Canada and its national legal system regulate the activities of multinational corporations abroad in relations to human rights. This would be crucial in order to better understand our case study, as it specifically deals with the activities of a Canadian multinational corporation and its subsidiaries involved in the mining industry and operating in Guatemala.

5.2.1 Human rights abuses in the activities of Canadian mining companies in Latin America

The mining industry is one of the most widespread sectors in Canada which is actually considered one of the world's leading mining economy and a global centre for investment in mines. Canada is reported to have the highest concentration of mining companies compared to any other country in the world; particularly, it is estimated that the assets owned by more than 1000 multinational corporations headquartered in Canada carrying out activities in over 100 countries amount to over $192 billion, half of them being concentrated in Latin America and in the Caribbean (Ismai et al., 2012:1). Indeed, up to the 41% of mining companies operating in those territories are Canadian multinational corporations (JCAP, 2016:5).

However, in the last few years, Canadian mining companies have come under the spotlight because of their continuous alleged violations of human rights and the lack of adequate regulation and monitoring of their activities at state level (JCAP, 2016:5). This obviously led to a forceful reaction on the part of both international community and civil society: while UN Nations bodies and the Inter-American Commission on Human Rights both called on Canada to improve multinational corporations' accountability at domestic level through a specific policy action aimed at the adoption of preventive measures for alleged human rights violations, more than a hundred of NGOs asked the Canadian Prime

Minister to elaborate a more effective mechanism for holding multinational corporations responsible for their conduct (JCAP, 2016:5). According to the report submitted in 2014 by the Working Group on Mining and Human Rights in Latin America to the Inter-American Commission of Human Rights (Working Group, 2014), 22 mining projects in 9 countries of the area involving Canadian multinational corporations adopted business practices explicitly in breach of basic human rights and fundamental freedoms which included "the denial of participation, consultation and prior, free and informed consent of the affected communities, soil and water contamination, breach of labour rights, and acts of violence perpetrated by private security guards managed and supervised by mining companies" (WILPF, 2018:5). In all these cases, although the Canadian government is reported to be aware of human rights violations perpetrated by mining companies in their transnational operations, not only did it not take the necessary steps in order to tackle multinational corporations' conduct, but it also kept supporting them political legally and financially. Not only the conduct of the state is overtly in breach of the due diligence obligation according to which states could be held accountable for its failure to prevent and address women's rights violations committed by non-state actors, but this clearly opened the way for Canadian multinational corporations to exploit low legal regulation in Latin American developing countries without complying with both human rights and environmental legal standards in force in the host countries while escaping legal liability in their home country (WILPF, 2018:5).

Particularly, within this framework women are reported to be more heavily affected by the detrimental socio-economic and environmental impacts of multinational corporations' activities in the mining sector (WILPF, 2018:6), resulting in a reduced protection of women's rights within those areas and in increased difficulties in accessing justice and obtaining an adequate and effective remedy. First and foremost, among the most common violations of human rights women suffer as a result of Canadian mining companies' operations, the pollution and lack of availability of water resources significantly affect their living standards. The control and exploitation on the part of multinational corporations may produce scarcity, drought or the contamination of water sources around the areas devoted to Canadian mining projects, which obliges indigenous women to travel distant places to have access to water (WILPF, 2018:7). As the Special Rapporteur on the human right to safe drinking water and sanitations highlights (HRC, 2014), the environmental impact of multinational corporations operating in the mining sector indirectly affect women's chances to benefit from other fundamental human rights,

especially in the field of employment and education. Moreover, contamination of water resources may also entail violations of the human right to health as mining activities in the long term may threaten women's and the local communities' health conditions (HRC, 2014). For instance, in 2010 the Inter- American Commission on Human Rights filed a request to the Guatemalan government for the suspension of the mining activities carried out in the Marlin Mine in Guatemala by Montana Exploradora company[93], a subsidiary of the Canadian giant Goldcorp Inc. Not only had the mining project started without a prior consultation of Maya communities living in the area, which represents a clear breach of international law, but it also led to the drought of water sources while metals were found in the water threatening the health conditions of those communities (WILPF, 2018:8). Secondly, from an economic perspective, work possibilities for women fall short in Indigenous communities characterized by the presence of a mining project or they are mainly limited to the activities of cooking and cleaning which, however, entail poor working conditions, pay and gender discrimination, and low social security standards (WILPF:2018:8). Thirdly, women are frequently exposed to gender-based violence in the forms of physical and sexual assaults which mainly relate to two distinct cases. On the one hand, women are victims of violence perpetrated by private security corps as Canadian mining companies traditionally outsourced these activities in the countries where they operate as the human rights protection is generally lower (WILPF, 2018:9), as we will analyse in detail in our case study *Caal v. Hudbay Minerals Inc* (BHRRC, 2011). On the other hand, women may also qualify as human rights defenders in the demonstrations and protests organized against mining projects which, however, dangerously exposed them to threats of violence and criminalization. For instance, in Dominican Republic during repeated protests against the Canadian mining company Barrick for having fired workers without paying the benefits established by the national legal system and for having contaminated water resources during their activities around the Pueblo Viejo Mine, 50 people were killed, 6 were detained and 3 were killed (JCAP, 2016:18). Although the country has elaborated the 'Voices at risk: Canada's guidelines on supporting human rights defenders' (Government of Canada, 2016) establishing that Canadian companies carrying out operations at transnational level "are expected and encouraged to operate lawfully, transparently and in consultation with host governments and local communities and to conduct their activities in a socially and environmentally

[93] EXP.EIOSM.01- 2010/DESC (February 2010). See also Human and Environmental Impact: The Marlín Mine in Guatemala by the Interamerican Association for Environmental Defense.

responsible manner", in case of mining company's alleged human rights violations Canada's CSR Counsellor could only provide for an "advisory and intervention role" which clearly constitutes a breach of UNGPs, particularly of the due diligence principle set out in both Principle 2 and 18 (WILPF, 2018:9). Finally, with regard to access to justice, women face almost insurmountable difficulties in presenting lawsuits and obtaining adequate and effective legal remedies in their own countries due to the financial interests at stake concerning the promotion and maintenance of foreign direct investment to boost economic development and to the institutional weakness and operational inefficiencies characterizing the legal system of Latin American countries (WILPF, 2018:10). Consequently, in order to improve the access to justice for victims in Canada where multinational corporations are domiciled, the country has adopted a *Feminist International Assistance Policy* (Government of Canada, 2018) which includes some crucial recommendations concerning gender equality: strengthening the capacity of the Canadian legal system to regulate corporate conduct abroad assessing their engagement in the fields of gender, human rights and environment before carrying out investments in foreign countries; facilitating the access to justice for women victims of corporate human rights abuses in foreign countries through the adoption of policies including a gender-sensitive perspective; and to safeguard the activities carried out by human rights defenders by avoiding and preventing harmful impacts on the part of Canadian companies (WILPF, 2018:11).

Consequently, these reported violations of women's rights actually constitute serious breach of the Convention on the Elimination of All Forms of Discrimination Against Women.[94] First and foremost, provided that article 2 of the Convention calls State Parties to ensure the enjoyment of basic human rights and fundamental freedoms to women without distinctions, gender-based violence is identified as a form of discrimination on the grounds of sex[95], which State Parties to the Convention have the obligation to eliminate not only within the activities of individual or state organs but also within business enterprises' operations, as it is established in article 3 of the Convention. Therefore, adequate women's rights protection should be achieved not only within the national territory but also within the state's jurisdiction while ensuring the access to the national judicial system and other institutions for victims who seek remedies for the torts

[94] Women's International League for Peace and Freedom. (2018), supra note 228, pg. 9
[95] While violence against women was almost absent in the original version, the issues was specifically addressed by *General Recommendation No. 19 of the CEDAW Committee on Violence Against Women*, (1992).

they have suffered. Moreover, special attention has to be devoted to the rights of rural women, including indigenous women constituting the plaintiffs in *Caal v. Hudbay Minerals Inc.* as we will later analyse, as the article 14 and more recently General Recommendation No. 34 (CEDAW, 2016) set out. In particular, with regard to the extraterritorial regulation of non-state actors, including Canadian multination corporations involved in the mining industry and operating transnationally, the latter stated that:

"States Parties should uphold extraterritorial obligations with respect to rural women, inter alia, by: not interfering, directly or indirectly, with the enjoyment of their rights; taking regulatory measures to prevent any actor under their jurisdiction, including private individuals, companies and public entities, from infringing or abusing the rights of rural women outside their territory (...) Appropriate and effective remedies should be available to affected rural women when a party State has violated its extraterritorial obligations." (CEDAW, 2016:13)

In summary, provided that multinational corporations' activities in the mining sector have given rise to a great number of human rights violations which also severely concern women, it is necessary to investigate whether the Canadian government undertake adequate measures in order to comply with its obligation to respect, protect and fulfil human rights, and especially whether it ensures direct legal accountability for business entities infringing human rights abroad. This is exactly what we will focus on in the next chapter.

5.2.2 The Corporate Social Responsibility landscape in Canada: the failure to bring multinational corporations' activities to court

In order to effectively understand the context within which the case study took place, it is necessary to examine how the Canadian legal system has actually incorporated corporate social responsibility standards, especially in relation to extraterritorial human rights abuses perpetrated by multinational corporations.

Canada is a federal jurisdiction in which the only province retaining civil law jurisdiction is Quebec, while the other regions are merely empowered with common law jurisdiction. For instance, with regard to human right protection, while at national level the Canadian Charter of Rights and Freedoms was adopted applying exclusively to Canadian nationals and to government or public bodies, two regions have consequently elaborated their own human rights regulations entailing obligations for both public and private actors, including multinational corporations, namely the Quebec and the Ontario State (OPBP, 2011:36). Within this framework, which are the possibilities provided by

the Canadian legal system to promote human rights through the adoption of corporate social responsibility standards by multinational corporations operating abroad? Which is the scope for enforcing the extraterritoriality principle in order to ensure legal accountability of multinational corporations for abuses committed within their operations in the host state? This is precisely what we will try to investigate in this chapter.

Canada is subject to both direct and indirect obligations aimed at regulating multinational corporations' activities and at avoiding human rights violations within the scope of their operations. Concerning direct regulation, Canada has adopted a set of international treaties entailing legally binding obligations for the protection of individuals and their enjoyment of basic human rights and fundamental freedoms within its territory: the Universal Declaration of Human Rights and its two International Covenants, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[96], and the CEDAW[97] (Pena, 2014:2). As far as indirect regulation is concerned, instruments of social responsibility from below has to be taken into consideration not only to strengthen human rights protection worldwide but also to boost the understanding, the implementation and development of international law, in spite of their non-binding character (Pena, 2014:3). For instance, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles and the Voluntary Principles on Security and Human Rights are crucial for Canada in order to avoid liability for human rights abuses committed by multinational corporations headquartered within its territory. Due to their voluntary character these soft law instruments do not entail a legal obligation for countries to regulate the extraterritorial operations of these business entities, but they are not prohibited to engage in that task (Pena, 2014:4).

As a consequence of the emergence of globalization and the enormous power and influence multinational corporations retain on an international scale, it was recognized that Canadian law was not so developed in the field of corporate social responsibility, especially with regard to the extraterritorial application of national law in case of alleged corporate human rights abuses in the host states (OPBP, 2011:36). Consequently, foreign nationals may encounter some difficulties in starting a lawsuit against multinational corporations in a Canadian judicial forum for violations committed abroad. Particularly,

[96] Commonly known as UNCAT, Canada signed it on 23th August 1985 and ratified it on 24th June 1987. See https://www.canada.ca/content/dam/pch/documents/services/canada-united-nations-system/reports-united-nations-treaties/conv_torture_cruel_6_interim-conv_torture_cruel_6_interim-eng.pdf

[97] Canada signed it on 17th July 1980 and ratified it on 10th December 1981. Reports have to be submitted every four years; Canada has actually supplied nine to the Committee.

they may be associated with three different kinds of obstacles dealing respectively with the acceptance of jurisdiction on the part of a Canadian court, the *forum non coveniens* doctrine, and ultimately the duty of care principle (Ismai et al., 2012:15).

First, in order for a Canadian Court to accept jurisdiction over a case, "a real and substantial connection" must exist "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action"[98] (OPBP, 2011:37). For instance, in the case *ACCI vs. Anvil Mining Ltd.*[99] the Canadian Association Against Impunity filed a class action against the multinational corporation headquartered in Australia but holding an office in Canada concerning the human rights violations occurred during the exploration of a mine in the Democratic Republic of Congo (Ismai et al. 2012:17). While the Quebec Superior Court claimed to have jurisdiction on the lawsuit brought about by the Congolese plaintiffs, identifying the Canadian forum as the best suited for the ruling compared to the Australian and the Congolese ones and recognizing a linkage between the jurisdiction and the wrongdoings, in 2012 the Quebec Court of Appeal reversed the former decision on the grounds of the lack of a substantial evidence of an existing connection between the office in Quebec and the corporate abuses (Ismai et al. 2012:19). Consequently, a number of lawsuits against Canadian multinational corporations have been filed to the US courts under the ATCA. For instance, in 2009 the Presbyterian Church of Sudan sued the Canadian multinational corporation Talisman Inc. under the ATCA on the grounds of alleged complicity to the government of Sudan's actions leading to human rights violations, such as genocide, war crimes and crimes against humanity[100]. Although in the end the Court of Appeals for the Second Circuit showed that the plaintiffs failed to prove the intentional corporate support to government's operations, the resort to other international legal mechanisms actually testifies the inadequacy of national law to enforce legal accountability of transnational business entities involved in the mining sector, and to ensure victims the access justice and the enjoyment of an adequate and effective remedy for the human rights abuses they have suffered (OPBP, 2011:36). Finally, the issues of jurisdiction for irresponsible conduct of multinational corporations abroad was addressed again in 2010 by the Ontario Court of Appeal which established that despite the lack of a concrete connection,

[98] As the Canada's Supreme Court established in Morguard Investments v De Savoye [1990] 3 SCR 1077.
[99] Business & Human Rights Resource Centre. Anvil Mining Lawsuit (re DRC).
[100] Presbyterian Church of Sudan v Talisman Energy Inc 224 F Supp 2d 289 (SDNY 2004).

jurisdiction may be recognized in specific cases under the forum of necessity doctrine provided that no other forum is available for the victims of abuses to seek justice and an adequate and effective remedy.[101]

Secondly, another obstacle is represented by the decision on the part of a Canadian Court to adopt the *forum non conveniens* legal doctrine which is codified in the Quebec Civil Code establishing that even though jurisdiction is effectively recognized, the hearing of a case must be refused on the basis of the existence of a more appropriate forum, as we have previously explained (Ismai et al., 2012:18).

Thirdly, the ultimate challenge that victims of alleged human rights abuses perpetrated by a Canadian mining company may face consists in the difficulties to establish the duty of care principle. According to the Canadian legislation, the latter is identified on the basis of the existence of two distinct conditions[102]: on the one hand, the tort should be a foreseeable consequence of the multinational corporations' conduct; on the other hand, the defendant and the claimant should be necessarily linked by a relationship of 'proximity' which entails an obligation on the part of the former to take into consideration the underlying concerns and interests of the latter (Ismai et al., 2012:20). However, as in many instances the activities of extraction and production of mineral resources by Canadian multinational corporations involved in the mining sector are not directly carried out by the parent company, it would be increasingly difficult to impute human rights violations committed by subsidiaries or by private security companies on the parent company. Indeed, as under the Canadian legal system legal persons and their members are interpreted as separate entities, parent companies may exploit this distinction to their advantage in order to hinder from legal liability (OPBP, 2011:37). For instance, these hurdles are explicitly evident in the case *Piedra v. Copper Mesa Mining Corporation*[103] in which a lawsuit was filed against the directors of a Canadian mining company operating in Ecuador, namely Copper Mesa and the Toronto Stock Exchange (TSX). The plaintiffs consistently claimed that while the TSX was responsible for a negligent conduct as it failed to prevent a foreseeable risk about which it was informed about, the directors were liable for creating the basis for such a risk since they did not put in place an adequate monitoring mechanism and implementing corporate policies. However, both the Ontario motions judge and the Ontario Court of Appeal dismissed the claims on the grounds of

[101] It was firstly established in Van Breda v. Village Resorts Ltd., 2010 ONCA 84 and then include and revised in the Civil Code of Quebec.
[102] They are explicitly laid out in Donoghue v Stevenson, [1932] UKHL 100.
[103] Piedra v Copper Mesa Mining Corporation: Statement of Claim, (2009).

the lack of a recognized direct connection between the conduct of the directors of the Canadian mining company and the real human rights abuses the claimants have suffered (Ismai et al, 2012:21).

Consequently, in order to seek to pierce the corporate veil, the parliamentary Standing Committee on Foreign Affairs and International Trade of the House of Commons actually recognized in its 2004 report that the Canadian state of law should be necessarily improved through the establishment of "legal norms […] to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies"[104] (OPBP, 2011:36). Particularly, a multi-stakeholder effort was needed in order to boost the corporate social responsibility standards, policies and programs in relation to multinational corporations belonging to the mining sector and operating in developing countries (Ismai et al, 2012:13). It necessarily involves the acknowledgement of obligations deriving not only from international law and the national law of the host state, but corporate social responsibility as well as international human rights standards must be taken into consideration; moreover, a complete understanding of the economic, political and social environment in the developing country where they operate is needed; finally, a responsible conduct in order to generate a positive social and environmental impact through an adequate assessment of their performance should be adopted (Ismai et al, 2012:13).

Since that moment, both the government and the business sector have engaged in the effort to enhance the scope of legal accountability of Canadian mining companies involved in transnational operations due to mounting concerns related to human rights abuses perpetrated in the host states (Ismai et al., 2012:13). In 2006, as a consequence of the report issued by the Standing Committee on Foreign Affairs and International Trade, the Canadian Government inaugurated a set of National Roundtables dealing with Corporate Social Responsibility and the Canadian Extractive Sector in Developing Countries. The Advisory Group Report to the National Roundtables[105] elaborated a set of recommendations aiming at reaching higher performance standards in the mining sectors' operations in developing countries characterized by weak governance capacity,

[104] Standing Committee on Foreign Affairs and International Trade, Fourteenth Report, 38th Parliament, 1st Session online at: http://publish.uwo.ca/~cyano/UWOTrick/Past_Handouts_files/SCFAIT%20Report.pdf

[105] National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, "Advisory Group Report", (2007),https://miningwatch.ca/sites/default/files/RT_Advisory_Group_Report.pdf

corruption and armed conflict which substantially reduced the scope for human rights protection, through the establishment of adequate reporting, compliance and other mechanisms (Ismai et al., 2012:13). In addition to endorsing the OECD Guidelines for Multinational Enterprises, in order to build up an effective CSR Framework for corporate social responsibility, Canadian mining companies were required to respect international standards thanks to multi-stakeholder dialogue and cooperation; to adopt the reporting principles and obligations set out in the Global Reporting Initiative; to institute an ombudsman in order to deal with advisory tasks and complaints; to set up a Compliance Review Committee in order to monitor the adherence to CSR standards; and finally to establish the Canada Extractive Sector Advisory Group in order to more effectively implement the Canadian CSR framework (Ismai et al., 2012:13).

Up to date, the National Roundtables still represents the most valuable attempt to strengthen the existing corporate accountability framework for Canadian business entities involved in the extractive sector as the 2009 governmental policy *Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector*[106] involves some crucial and inherent shortcomings (Ismai et al., 2012:14). In the attempt to improve the human rights standards within the operations of domestic mining companies abroad, the Canadian government built up the Office of the Extractive Sector Corporate Social Responsibility Counsellor (CSR Counsellor) whose main task consists in receiving and addressing complaints from individuals, mainly non-nationals, affected by detrimental corporate impacts (Pena, 2014:4). Therefore, although that governmental policy provided additional guidelines to support the Canadian CSR Framework, the newly created CSR Counsellor played a quite limited role as it could intervene exclusively when a complaint has been filed provided that the corporation agreed, without having any power to investigate over the reportedly alleged human rights violations and to impose binding obligations on perpetrators, namely multinational corporations (Ismai et al., 2012:14). Moreover, the 2009 Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*[107] was adopted with the precise purpose to establish a more effective accountability mechanism which was supposed to enhance corporate social responsibility standards by providing victims of alleged human rights violations in developing countries with the possibility to file a complaint against

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[106] Foreign Affairs and International Trade Canada, *"Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector"* (March 2009).

[107] Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009.

the Canadian mining company perpetrating the abuses. However, it generated opposite reactions on the part of NGOs and of the business community and in the end, it was rejected by the Parliament: while the former strongly advocated for its adoption, the latter forcefully opposed them by arguing it would have consistently undermined Canadian mining companies' competitiveness in the world market (Ismai et al., 2012:14).

In conclusion, two issues generally arise concerning the scope for multinational corporations' regulation: whether and to what extent Canada as a nation-state retains legal obligations towards non-nationals, and whether a foreign subsidiary has to abide to Canadian national law. While for the former the obligation to effectively manage Canadian multinational corporations' activities transnationally in order to avoid legal liability for the wrongdoings they commit aboard stems from the international human rights treaties Canada has ratified, for the latter it has to be highlighted that the state is empowered to exclusively control the activities of a parent company domiciled within the Canadian jurisdiction, but it exercises no control over its foreign subsidiaries or affiliates (Pena, 2014:5). Consequently, the failure of the government in establishing an adequate legislative system for the enforcement of a CSR Framework created a regulatory vacuum for which Canadian mining companies could still escape from legal accountability for human rights abuses committed abroad (Ismai et al., 2012:15). The increasing number of allegations brought in front of Canadian courts is not coupled with a consistent access to both justice and remedy for victims as the Canadian justice system has accepted jurisdiction only in few cases concerning human rights abuses perpetrated by Canadian companies operating transnationally, including the *Caal v. Hudbay Minerals Inc*, as several UN bodies highlighted (WILPF, 2017:12). For instance, while the UN Human Rights Committee pointed out the lack of effective mechanisms in order to properly monitor the conduct of multinational corporations and of an adequate legal framework allowing to investigate allegations of human rights violations by Canadian multinational corporations[108], the Committee on Economic, Social and Cultural Rights was concerned with the existence of a judicial system which does not actually provide adequate remedies for victims of those abuses[109], as the scope of CSR Counsellor have always been limited, undermining its potential (WILP, 2016:12). Finally, the CEDAW Committee, also elaborated a set of recommendations that are specifically addressed to Canada on the basis

[108] Concluding observations on the sixth periodic report on Canada, CCPR/C/CAN/CO/6, 13 August 2015, paragraph 6.
[109] Concluding observations on the sixth periodic report on Canada, E/C.12/CAN/CO/6, 23 March 2016, para 15-16.

of the concerns emerging from women's rights impacts as a consequence of Canadian mining company's extraterritorial operations. The national government should ensure the elaboration and effective implementation of judicial and administrative system through the establishment of an Extractive Sector Ombudsperson which would be in charge of carrying out following tasks: investigating the compliance towards corporate social responsibility standards; receiving complaints against Canadian companies belonging to the extractive sector and realizing the necessary investigations in order to verify whether abuses have been committed or not; and enabling indigenous communities, especially women, adversely affected by mining projects established in foreign countries to seek justice and to obtain a proper and effective remedy disregarding whether multinational corporations have given or not their consent (WILPF, 2017:13). Consequently, in order for the new judicial and administrative system to be effective, the incorporation of a gender perspective that takes into account how the activities of Canadian mining companies may impact women's rights included in the CEDAW is imperative (WILPF, 2017:10).

5.2.3 The El Estor mining site: the context leading to allegations of human rights violations

Since 2010, the members of indigenous Mayan Q'eqchi' population living in Guatemala filed three related actions against the Canadian mining company Hudbay Minerals Inc. and its wholly own subsidiaries HMI Nickel Inc. and CGN to the Ontario Superior Court of Justice for alleged human rights violations perpetrated by the security personnel of the company in the mining site of El Estor (BHRRC, 2011). Which are the specificities concerning the claims brought about by the Guatemalan plaintiffs? Why is this crucial in fostering a more effective and comprehensive framework to enforce legal liability of Canadian mining companies against human rights committed in developing countries, especially in Latin America? In order to examine these issues more deeply, the point of departure consists in the analysis of the development of Canada's mining industry and its underlying interests in Guatemala, which will help outlining the context leading the plaintiffs to seek justice for the human rights violations they have suffered in a Canadian legal forum.

Traditionally, Canadian multinational corporations belonging to the mining sector and interested in maintaining the competitive advantage in the nickel market on a global scale through foreign direct investments under the form of joint ventures have always adopted

an exploitative approach towards indigenous people living in distant and remote lands which, however, were endowed with an enormous richness of natural resources (Ismai et al., 2017:2). Particularly, at the times of the Guatemalan Civil War (1960-1996), when the Canadian multinational corporation INCO Limited became firstly involved in a mining project in Guatemala in cooperation with a US-based company through the creation of the subsidiary Eximbal, the Guatemalan military forces caused from 3000 to 6000 deaths of indigenous people during forced evictions aimed at building up an open-pit nickel mine in El Estor in Guatemala (Shipton, 2018:2). However, as the area around El Estor was characterized at that time by the activities and clashes of the guerrillas, it became inoperative since 1982 and it maintained that status up until stability was restored. At the end of the Civil War, the Guatemalan government was expected to realize a significant and comprehensive transformation of society in order to bring about an agrarian reform, to boost rural development, to strengthen women's rights, to improve social services, and to enhance democratization. Although the adoption of the Agreement on the Identity and Rights of indigenous Peoples (UN General Assembly & Security Council, 1995) constituted a remarkable advancement protecting political rights of the indigenous community, the approval of Mining Law (Ministry of Energy and Mines,1997) substantially created more favourable conditions for foreign investment in Guatemala as a consequence of the pressure of the World Bank which increased the presence of Canadian mining companies in Guatemala. Since then, those business entities were openly allowed to carry out open-pit mining which up until that moment was prohibited under Guatemalan law without providing indigenous people with a parallel and effective protection (Ismai et al., 2017:7).

As the previous concession of the Guatemalan government to the Canadian mining company INCO was about to expire, the mining site of El Estor, which since that moment came to be known as 'Fenix project', was purchased in 2004 by another Canadian multinational corporation, namely Skye Resources Inc., whose operations within the country were carried out by its Guatemalan subsidiary Compañia Guatemalteca de Niquél (CNG). However, this concession constituted a breach of international law and particularly of the ILO Convention No. 169 as the Guatemalan government had not carried out the necessary "prior consultation procedure with people concerned" (ILO, 2007), as it was forcefully outlined also by the UN Special Rapporteur on the Rights of

Indigenous People (UN General Assembly, 2010)[110]. Moreover, since the mine has been inoperative for more than two decades, indigenous people who previously lived there came and reoccupied the land that originally belonged to them; however, as not everyone setting in the El Estor mine after the end of the Civil War was an original inhabitant, the process was considered as an illegal land occupation (WILPF, 2018:13). Therefore, on 8th and 9th January 2007, police officers and members of the military and private security forces proceeded to "remove squatters who were illegally occupying lands at its Fenix project site" and returned the five districts of the region to the ownership of the CNG; although the mining company ensured that "a peaceful atmosphere" characterized these actions (Skye Resources Inc., 2007), indigenous people's home were actually destroyed and burned (Ismai et al., 2012:10). As a result, while at first the evicted Mayan communities took shelter in the mountains, they subsequently decided to come back to their lands from which they were forced out again on 17th January. However, differently from the previous episodes those evictions were characterized by women's rights abuses carried out not only by police and military forces, but also by the private security personnel of the CGN, the Guatemalan subsidiary of Skye Resources, which caused severe detrimental effects on a group of eleven women (Ismai et al., 2012:11).

In 2008, the El Estor mine changed ownership again as a consequence of the purchase of Skye Resources on the part of Hudbay Minerals. Protests against the activities carried out in the Fenix mining site continued interruptedly leading to a breakout of violence on 29th September 2009 which caused the death of the Mayan community leader, Adolfo Ich Chamón, and injured seven people among which German Chub Choc, who subsequently suffered severe health consequences (Ismai et al.,2012:12).

5.2.4 The lawsuit and the successful endorsement by the Ontario Superior Court

Starting from 2010, three lawsuits were filed to the Canadian Court system against HudBay Minerals Inc. as a consequence of the allegation of human rights abuses in the relation to the above-mentioned facts. However, provided that Canadian legal forum has always refused to accept jurisdiction concerning human rights abuses perpetrates by multinational corporations during their operations abroad, it has to be judged whether the plaintiffs' allegations was acceptable for the Ontario Superior Court of Justice.

[110] In his report submitted to the Human Rights Counsellor, James Anaya addresses deals with the respect of the of the indigenous peoples of Guatemala in relation to extraction and other projects on their territories.

First, in *Angelica Choc v. HudBay Minerals Inc*, the claim was brought about by the widow of Adolfo Ich, the Mayan Q'eqchi' community leader and school teacher, on 24th September 2010 after its violent killing by the mining company's private security forces operating in the district of La Union during the protests against the mining project in September 2009 (ONSC, 2010). Secondly, in *German Chub Choc v. HudBay Minerals Inc* the plaintiff sought justice by filing a lawsuit on 26th October 2011 against Hudbay Minerals Inc. (ONSC, 2011a). Indeed, on the same day Adolfo Ich was killed, German Chub was shoot, while he was watching a soccer game in a field of La Union, by Minor Padilla, the Head of the Security for the Fenix Project without having minimally provoked him, and he remained paralyzed after the injury. In both these allegations the plaintiffs claimed the direct legal accountability of the Canadian mining company, HudBay Minerals Inc., for the negligent conduct it adopted during its operations in Guatemala, a country renowned for high levels of violence and parallel low levels of compliance to national and international legal standards. Thereafter, we move to the analysis of the final lawsuit *Margarita Caal v. HudBay Minerals Inc.* on which we will specifically focus along this chapter. A lawsuit against HudBay Minerals Inc. was filed on 28th March 2011 to the Canadian legal forums on the grounds of allegations of women's rights violations during the forced eviction from their lands in Lote Ocho executed by the police and military forces as well as by the mining company's security personnel in January 2007 (ONSC, 2011b).

The plaintiffs were eleven Mayan Q'eqchi' women living in the indigenous community of Lote Ocho in Guatemala whose survival is still dependent upon basic subsistence means, namely Margarita Caal Caar, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib and Irma Yolanda Choc Quib. They reported that they had been adversely impacted by the forced evictions of 17th January 2007 from their ancestral lands on the part of the mining security personnel and of the police and military forces, and also that they had been victims of episodes of gender-based violence. Indeed, the forced displacement did not only threaten the standards of living of these indigenous communities who had to build up new settlements in different areas and to found out new water sources with pedestrian access, but the brutal gang-rapes women suffered triggered severe physical and psychological harm (ONSC, 2011b). Particularly, Ms. Coc Ich was no longer able to have children, as a result of the injuries; Margarita Caal who was six-months pregnant at the time of the evictions gave birth to a stillborn baby as a

consequence of complications deriving from precarious physical conditions; Yolanda Choc suffered from a miscarriage as a result of the violence of the rape (ONSC, 2011b). Moreover, rape survivors had to face stigma, due to the shame connected to the terrible experience they had gone through, which they managed to alleviate only by sharing their feelings with each other. Finally, the fear linked to the threat of new forced evictions to take place was always there although the decision to bring the case in front of Canadian legal forum is progressively relieving it (WILPF, 2017:15). Consequently, their claims basically lie on the allegations of negligent conduct of Skye Resources which should, therefore, be held responsible for having consistently violated women's rights by failing to effectively monitor the behaviour of the security personnel and to prevent and address its subsequent use of violence during eviction processes (ONSC, 2011b). The abuses suffered by the plaintiffs in *Caal* action could be identified as violations of their women's rights on the basis of two international human rights instruments. On the one hand, the UN Declaration on the Elimination of Violence Against Women (UN General Assembly, 2003) firstly recognized violence against women, including "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women", as a violation of basic human rights and fundamental freedoms of the individual. On the other hand, CEDAW Committee's General Recommendation No. 19 and subsequently General Recommendation No. 35 (CEDAW, 2017) undeniably affirmed that torture or cruel, inhuman or degrading treatment against women can be considered as a form of gender-based violence against women, which is exactly the case of the eleven Mayan Q'eqchi' women who were imprisoned, sexually assaulted and raped on the part of the security personnel of the mining company during the forced eviction from their village in Lote Ocho.

In contrast, the defendants could be primarily identified in HudBay Minerals Inc., a Canadian multinational corporation headquartered in Canada and operating in the mining industry in both the North-American country and in Latin America developing countries, and its subsidiaries HMI Nickel Inc. which, however, was previously known under the label Skye Resources Inc, and CGN (ONSC, 2011b). In 2011, HudBay Minerals Inc. decided to sell the Fenix mine to a Russian company, the Solway Investment Group, suffering a consistent financial loss[111] due to the allegations of human rights abuses concerning the mining project in Guatemala (Ismai et al., 2012:2). In spite of not retaining

[111] Hudbay Minerals Inc. had originally acquired the mine for $446 while it was sold at $176 million, at a loss of $290 million.

anymore the ownership of the Fenix mine, Hudbay Minerals Inc. took on the responsibility of any litigation arising from its activities and those of its subsidiaries during the period of ownership in which it was in charge of the control and the management of the mining project. As a consequence, Hudbay Minerals Inc. may be held directly accountable for the CGN's wrongdoings in both the *Choc* and the *Chub action*. Conversely, Sky Resources which was later renamed into HMI Nickel Inc. was the owner of the Fenix mining project at the time relevant for the *Caal action*. However, by the time the lawsuit started HMI Nickel Inc. has merged into HudBay Minerals, constituting together one single and integrated corporation whose ultimate purpose consisted in directing, managing and controlling the Fenix project, which led Hudbay to directly face the allegations on the part of the eleven Mayan Q'eqchi' women (FIDH, 2016:243). They specifically claimed that despite violations of their women's rights were committed when the Fenix mining project was under the control and supervision of Skye Resources, HudBay Minerals Inc. should be considered fully responsible for legal wrongs and liabilities of its subsidiary in Guatemala (FIDH, 2016:243).

Finally, another party to the three legal disputes was Amnesty International Canada who was allowed to play the role of the intervener in order to advance submissions concerning the issues at stake, particularly with regard to the applicability of international law and standards as well as the scope of the novel and supervisory duty of care (ONSC, 2013), as we will examine later on.

The defendants brought about three preliminary motions in the attempt to rule out the possibility that the three lawsuits could actually be heard in a Canadian legal forum by arguing that this represented a violation of Canadian national law[112]: the absence of a reasonable cause of action for advancing negligence in plaintiffs' claims on the grounds of Rule 21.01 of the Ontario Rules of Civil Procedure; the statute-barred status of the *Caal action* on the basis of the Limitations Act; and finally, the lack of jurisdiction over a Guatemalan corporations in *Choc action*, namely CGN in case the Rule 21 motion is unsuccessful (ONSC, 2013). We will now examine each of these motions specifically in relation to the case *Caal v. HudBay Minerals Inc.* in order to investigate whether they were successfully endorsed by the Ontario Superior Court of Justice.

First and foremost, the defendant's motions relying on Rule 21.01 according to which "a party may move to strike a pleading on the ground that it discloses no reasonable cause of action or defence" (ONSC, 2013), is based on some powerful arguments. While the

[112] Ibid., para 14.

plaintiffs did not recognize the separate legal personality existing between the parent company and its subsidiaries striving to impose direct or vicarious liability[113] on Hudbay Minerals Inc for the wrongdoings of its subsidiaries (Spiro, 2013), the Canadian mining company argued that this was merely an attempt to pierce the corporate veil which, however, was untenable from a legal perspective as it was explained by the UN Secretary General's Special Representative on Business and Human Rights, John Ruggie (2013:22). Moreover, defendants claimed that the plaintiffs attempted to exploit common law to hold the parent company accountable for the failure to adequately supervise and monitor the activities and operations of subsidiaries, and that the pleading for the identification of a duty of care is not satisfactorily substantiated on the grounds of foreseeability, proximity and policy considerations (ONSC, 2013). In response, the plaintiffs argued that neither piercing the corporate veil nor vicarious liability were at the heart of their allegations. On the one hand, the attempt to lift the corporate veil by imposing in addition to direct lability vicarious liability for the "battery, wrongful imprisonment, and wrongful death committed by CGN employees and agents" could be registered exclusively in the *Choc action* (ONSC, 2013). On the other hand, provided that piercing the corporate veil according to the defendants would cause the infringement of the doctrine of separate legal personality existing between the parent company and its subsidiaries, though in most cases this distinction is not substantiated in facts, the Superior Court of Ontario identified three requirements which are needed in order for the plaintiffs to lift the corporate veil: the subsidiary must be entirely controlled by the parent company which exploits it in order to escape from legal liability for harmful conduct; the subsidiary must be recognized as an agent; a statute or a contract must include such a provision (ONSC, 2013). In relation to *Caal Caal v. HudBay Minerals Inc.*, the first condition is only partially satisfied as while the plaintiffs have concretely proved that the subsidiary involved in alleged women's rights abuses is "completely controlled by, subservient to and dependent upon Hudbay Minerals", this is not enough in order to pierce the corporate veil as demonstrating it was used as a "shield for fraudulent and improper conduct" was also needed (ONSC, 2013). In contrast, the plaintiffs successfully managed to plead that the subsidiary was an agent of HudBay Minerals Inc., independently from

[113] It is identified when the activity causing a damage is "sufficiently closely connected to conduct authorized by the employer […] even if unrelated to the employer's desires". Consequently, it would be appropriate for Hudbay to bear vicarious liability whether it had not simply given a general mandate to its subsidiaries that would later take independent decision, but it explicitly empowered them to build up a mining site in a specific location.

the fact that that kind of relationship existed at the time of the wrongdoings. Therefore, the Superior Court of Ontario recognized that the conditions necessary to pierce the corporate veil are actually only partially satisfied; consequently, the plaintiffs could exclusively bring the latter claim to trial provided that they were able to adequately substantiate it through material facts (ONSC, 2013).

Therefore, the allegations put forward by the eleven Mayan Q'eqchi' women actually revolved around the recognition of direct liability for women's rights abuses, such as gender-based violence in the form of sexual assaults and gang-rapes. As it is possible to notice in the Statement of Claim, they allege the direct negligence of the Canadian mining company operating in Guatemala, on the one hand, and the failure to comply with the novel and supervisory duty of care towards the indigenous communities living near the Fenix mining site, on the other (ONSC, 2011).

In order to substantiate their claim of direct negligence on the part of Hudbay Minerals Inc. over its subsidiaries, the Superior Court of Ontario applied the Anns Test[114] in order to established whether HudBay Minerals Inc. failed to prevent corporate women's rights abuses of its subsidiary's security personnel within the Fenix mining project in Guatemala and whether a novel and supervisory duty of care could be recognized (ONSC, 2013). This should be established on the basis of the existence of three conditions (ONSC, 2013): foreseeability, meaning that the damage victims suffered has to constitute a direct consequence of the abuse; proximity between the plaintiffs and the defendants in order to avoid an unjust imposition of the duty of care; policy considerations, meaning that no legitimate policy basis exists in order not to apply or to restrict the duty (FIDH, 2016:244).

In *Caal* lawsuit, the Superior Court of Ontario recognized that the first requirement was successfully achieved since the plaintiffs managed to report adequate facts in order to prove that the employment of violence, including rape, during the forced eviction of the Mayan local communities living in El Estor taking place on 17th January 2007 was foreseeable (ONSC, 2013). Indeed, on the basis of the knowledge retained by HudBay Minerals Inc, the Canadian mining company was well aware of how the security personnel previously conducted forced evictions, extensively using violence, of the unlicensed manner in which they operate, of the lack of adequate training, and of the possession of illegal weapons; moreover, it should have known that forced evictions of

[114] This requirement was originally established by the House of Lords in Anns v. Merton London Borough Council, [1978] A.C. 728.

local and indigenous communities involve a higher level of risk which is worsened by the elevated number of gender-based violence and rape cases registered in Guatemala and by the inability for victims to seek justice and to receive an adequate and effective remedy due to extremely corrupted and inefficient Guatemalan justice system (ONSC, 2013).

Secondly, with regard to proximity, it is defined as "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs" (ONSC, 2013). Particularly, in order to recognize its presence, some essential factors are needed: a close causal connection, the parties' expectation with regard to their reciprocal conduct, and the subjection to assumed or concrete obligations (ONSC, 2013). In the *Caal action* plaintiffs pleaded that since Hudbay Minerals Inc. (previously Skye) had explicitly made public representations testifying the close connection between the Canadian mining company and the Mayan Q'eqchi' community, the corporate willingness to involve stakeholders in order to effectively solve the land disputes clearly emerged. Indeed, HMI Nickel Inc. actually stated its commitment to ensure an adequate level of security at the Fenix mining project through public and explicit statements in which it endorsed a number of corporate social responsibility standards. For instance, HMI's President and CEO reiterated several times Hudbay's engagement in the respect of human rights principles, including those specifically addressed to women, enshrined in Guatemalan law and international standards, such as the International Finance Corporations Performance Standards (World bank Group, 2012) and the Voluntary Principles of Human Rights and Security[115]. The latter include specific provisions concerning the benchmarks for security personnel's conduct: assessing the risks involved within security operations; ensuring that the private company engaged in the task had not been subject to previous allegations of human rights abuses, that they use force in a lawful, cautious and restrained manner in compliance with intergovernmental guidelines and corporate or NGOs standards and in a way proportionate to the threat, and that they do not infringe individual's human rights; establishing a grievance mechanism for the members of local communities affected by the detrimental impact of mining activities on the basis of the obligation to take into consideration and to properly investigate allegations of corporate human rights abuses (ONSC, 2013). Consequently, provided that Hubay Minerals Inc. retained control over

[115] Elaborated in 2000, they constitute the only human rights guidelines regulating corporate conduct in the extractive industry. See http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf

the on-ground operations of its subsidiary Skye Resources Inc., later renamed under the label HMI Nickel Inc, within the area of the Fenix mining project, it is responsible for the conduct of elaborating adequate security policy and of monitoring the activity of private security personnel, especially in occasions such as forced land evictions of Mayan communities from their ancestral lands in Lote Ocho to which the plaintiffs belonged (ONSC, 2013). Indeed, HMI Nickel Inc could merely be identified as a holding, meaning that it does not satisfy the minimal requirements of an independent company: while it owns 98.2% of CGN, the totality of its shares is directly owned by HudBay Minerals Inc., which actually prevents HMI Nickel Inc. to conduct business activity autonomously in all the aspects concerned, and all its directors are also part of the HudBay's board (ONSC, 2011b). Furthermore, although the security personnel were both directly and indirectly controlled by the HMI Nickel Inc. from its offices in Canada, their members were actually hired, trained, directed and supervised by the CGN which in turn was charged to instruct a third-party company (Intergración Total)[116] whose task mainly consisted in the provision of additional security services to police and military forces at the Fenix Mining Project in order to more effectively manage land evictions of Indigenous communities living within the mining site (ONSC, 2011b). In the end, however, HudBay Minerals Inc. actually failed to comply with Guatemalan law as well as to implement international standards concerning women's rights, as the shortcomings inherent in the HMI's regulation of the conduct of both CGN and the third-party company Intergración Total clearly demonstrate (ONSC, 2011b). Not only did it not checked whether the third party company had been previously involved in human rights violations, but the contract between CGN and Integración Total did not include adequate norms to govern the employment of force, sufficient standards for women's rights protection, rules establishing the size, the composition, the level of involvement and the circumstances in which the security personnel have to intervene, particularly with regard to land forced evictions (ONSC, 2011b). Consequently, despite the Canadian mining company's declarations in which it took on direct responsibility for implementing a cooperative and peaceful resolution of land disputes and for adequately hiring, training, managing and supervising the security personnel entitled to cope with those situations, HMI Nickel executives and managers were reported of violent actions at the detriment of indigenous communities on the part of Fenix Security personnel for the first time on 8th and 9th January 2007 However, these allegations were not investigated and did not give rise to a

[116] Mynor Ronaldo Padilla Gonzáles was the Head of Security at the Fenix Mining project.

change in regulation of the Fenix Security Personnel's conduct (ONSC, 2011b). Despite the knowledge that the security personnel operating at the Fenix mining project were undertrained, inadequately supervised, unlicensed and detaining illegal weapons, HudBay Minerals Inc. did not intervene creating a high-risk environment that could easily precipitate into further episodes of violence. This is exactly what actually occurred on 17th January 2007 when a second eviction asked and authorized by HMI Nickel Inc. took place: as men were not present in the villages at the moment, women were trapped in order to avoid any attempt to escape, they were physically assaulted and gang-raped by members of the police, of military forces and of the Fenix Security Personnel which were easily identifiable thanks to a CGN's logo in their uniforms (ONSC, 2011b). Among the several public representations that the company delivered, HMI Nickel Inc. argued that it "has maintained a strong community relations effort in the El Estor region for two years. As a result of recent events, Skye reaffirms its commitment to an open a dialogue with the local communities and to working with local stakeholders to seek solutions to outstanding issues" (ONSC, 2011b). Furthermore, on the same day in which women's rights abuses actually occurred, the HMI President and CEO Mr. Austin declared what follows concerning the evictions:

We have been working with management in Compañia Guatemalteca de Niquel S.A. (CGN), Skye's subsidiary in Guatemala […] to assist them in resolving issues relating to the land invasions that started a few months ago and subsequent evictions. […] The company did everything in its power to ensure that the evictions were carried out in the best possible manner while respecting human rights." (ONSC, 2011b)

Consequently, it clearly emerges that the pleadings advanced by the plaintiffs with regard to proximity rests on a solid basis which avoid an unjust or unfair imposition of the duty of care on the defendants (ONSC, 2013).

Finally, since it is necessary to establish whether policy issues exist negating or restricting the enjoyment of the 'prima facie' duty of care, both parties developed different and quite opposed arguments. On the one hand, HudBay Minerals Inc. claimed that recognizing the duty of care owed to victims of corporate human rights abuses in foreign country would mean exposing Canadian multinational corporations to an increase in the number of claims against them and also posing severe challenges to the distinction already existing in Canadian legal system between corporate personality from a common law perspective and the attempts to boost corporate social responsibility by devising voluntarily codes of conduct (ONSC, 2013). On the other hand, the plaintiffs put forward credible reasons in order to promote the duty of care in policymaking. Particularly,

recognizing this duty would allow the Canadian government first of all to foster the development of higher standards for corporate social responsibility on the part of Canadian companies, something that is actually lacking in Canada due to the government's inability to enforce them; to prevent and bring down the extensive human rights abuses perpetrated by private security personnel employed in foreign operations by Canadian mining companies; and finally, to facilitate the reform of tort law according to the changing political economic dynamics triggered by globalization which actually prevents indigenous victims to effectively access the judicial system of the country in which the perpetrator is domiciled in order to seek redress (ONSC, 2013).

In order to further substantiate the existence of a duty of care for a parent company in the case one of its subsidiaries is involved in alleged human rights abuses, the plaintiffs additionally relied on the submissions provided by Amnesty International Canada (ONSC, 2011c) on the issue[117]. First, the NGO stated that the duty of care should be recognized by Canadian mining companies to victims of harmful corporate practices on the part their subsidiaries, paying particular attention to conflict zones or high risk-areas, as it was Guatemala at the time of the alleged abuses against the Mayan Q'eqchi' women, and that tort law could be applicable despite the transnational nature of the litigation (ONSC, 2011c). They substantiated the endorsement of the duty of care's principles thanks to references to the OECD Multinational Guidelines, the UN Global Compact and the UN Guiding Principles on Business and Human Rights. With regard to the latter, provided that Amnesty International Canada considered them as "the authoritative global standards for business and human rights" (ONSC, 2011c), it called attention to Principle 25 and Principle 23. The former establishes that in order to comply with the state's duty to protect human rights within their territory or jurisdiction, it is imperative to provide effective judicial, administrative and legislative measures ensuring a proper remedy to the victims of corporate abuses (OHCHR, 2011:28). Conversely, the latter acknowledges that:

"Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue." (OHCHR, 2011:26)

Consequently, business operations are subject to a heightened risk of severe human rights violations when taking place in conflict or high-risk areas, a context which is

[117] They were elaborated as a result of the judge's Order of February 14, 2013.

worsened in case the multinational corporation involved belongs to the extractive or mining sector, such as HudBay Minerals Inc. For this reason, Amnesty International Canada also underlined the crucial importance of the Voluntary Principles on Security and Human Rights, which require mining companies to carry out a risk-assessment process with regard the impact of private security forces, to ensure an acceptable training and monitoring of their activities, and to establish precise and adequate parameters governing the use of force on the part of the security personnel (ONSC, 2011c). Moreover, by looking at the Hudbay's Human Rights Policy (HudBay Minerals Inc., 2015), the Canadian multinational corporation explicitly expressed its commitment to respect human rights through the promotion of the Universal Declaration of Human Rights and through the respect of human rights principles in both policy and action. This specifically include the implementation of ethical business practices, including the prohibition of discrimination and harassment, compliance with labour standards, greater community participation by providing greater opportunities and human rights respect, and the adoption of security measures adhering to human rights standards (HudBay Minerals Inc., 2015). With regard to the latter, Hudbay Minerals Inc. had not only endorsed the Voluntary Principles on Security and Human Rights to which all contracts entered into force after their adoption have to adhere, but it is also in charge of instructing private companies involved in security activities according to the norms established by the United Nations' Code of Conduct for Law Enforcement Officials (UN General Assembly, 1979) and the Basic Principles on the use of Force and Firearms by Law Enforcement Officials (OHCHR, 1990). Consequently, it seems that Canadian legal forums did not have to face concrete obstacles in deriving the duty of care that HudBay Minerals Inc. owed to the indigenous communities living near the Fenix mining project from basic human rights principles set out in the above-mentioned international instruments and standards. Indeed, the practice of recognizing direct liability of a parent company for its own negligent conduct in governing the activities of its subsidiaries in foreign countries or in failing to do so has been recently developed within the international tort law framework. For instance, in *Guerrero and others v. Monterrico Metals PLC.*[118], the UK courts having jurisdiction on the case established that the multinational corporations involved owed a duty of care to the victims of corporate human rights abuses caused either directly or indirectly by corporate conduct provided

[118] Royal Court of Justice, London. *Guerrero and others v. Monterrico Metals PLC.* [2009] EWHC 2475 (QB). Case No.: HQ09X02331.

that of foreseeable and acknowledged risks were present (ONSC, 2013). Finally, Amnesty International Canada put forward consistent policy reasons to recognize a duty of care in the circumstances of the case *Caal v. HudBay Minerals Inc*.

Therefore, Canada needs a consistent legislative reform of corporate accountability for human rights violations that would enhance the respect for international recognized human rights standards: it would not only strengthen the chances for non-nationals to seek justice in Canadian legal forum for abuses committed by mining companies or their subsidiaries headquartered in Canada, but it would also benefit Canadian society as a whole (ONSC, 2013).

Coming back now to the motions brought about to the defendants, it is necessary to analyse the limitation period motion that is employed by HudBay Minerals Inc. to dismiss the *Caal* action on the ground that it was statute-barred (ONSC, 2013). Provided that on the basis of the Statement of Claim, the *Caal* lawsuit was filed on 28th March 2011, according to the defendants the limitation period motion of two years since the date in which the women's rights abuses took place, namely 17th January 2007, is applicable to this case. However, the claim advanced by HudBay Minerals Inc was dismissed by the Superior Court of Ontario on the grounds of an exceptional provision included in the Limitations Act (ONSC, 2013). Although the allegations of gender-based violence and particularly of sexual assault could be considered the result of the negligent conduct on the part of the parent company in effectively supervising the activities of the private security personnel hired by its subsidiary in Guatemala, the sexual assault is at the centre-stage of the claim as without it no lawsuit would subsist. Therefore, as the claim is based on sexual assault, the provision s.10(1) of the Limitations Act stating that the plaintiffs were "presumed to have been incapable of commencing the proceeding earlier than it was commenced", unless the contrary is proven, is applicable (ONSC, 2013). Consequently, as the defendants did not interpret the physical, mental or psychological conditions as a concrete obstacle preventing them from starting a legal proceeding, the Superior Court of Ontario established that the limitation period did not started from the day in which the abuses occurred but rather from the beginning of the litigation, which actually denies the *Caal* action to be statute-barred (ONSC, 2013).

Finally, with regard to the jurisdiction motion presented by the defendants and, particularly, by one of the HudBay's subsidiaries, namely CGN, the Superior Court of Ontario decided to dismiss it. The CGN's claim would have been valid only if the motion to strike the three lawsuits had been successful as in that case the Superior Court of

Ontario could not have exercised jurisdiction over a Guatemalan company. Therefore, since the Rule 21.01 motion was not accepted, the CGN constitutes necessary and proper party to the claim (ONSC, 2013).

In conclusion, Justice Carole Brown for the Superior Court of Ontario determined that all the three motions presented by HudBay Minerals Inc. and its subsidiaries were dismissed: the motion to strike all the three lawsuits on the grounds of the Rule 21.01, the motion to strike the *Caal* action as a consequence of the statute-barred status deriving from Rule 21.01, and the motion to reject Canadian jurisdiction over CGN (ONSC, 2013). As a result, by ruling in favour of the plaintiffs, the Ontario Superior Court established that their claims were consistent with the doctrine of separate legal personality existing between the parent company and the subsidiary as they specifically revolved around the direct negligence of the parent company, namely HudBay Minerals Inc., rather than of its subsidiaries (ONSC, 2013). Consequently, the lawsuits can proceed to trial in Canada although it is necessary to establish the law applicable for each of the claims advanced by the Guatemalan community living near the Fenix mining project in the El Estor region (ONSC, 2011b). While the plaintiffs proposed the civil legal proceedings[119] to take place in Canada, particularly in Ontario, with regard to the law applicable, they initially pleaded the lawsuits to be judged according to the Ontario law both in relation to defendants' liability and damages. In case it is not possible they proposed two different alternatives: on the one hand, British Columbia Law will determine defendant's liability while Ontario law the remedy assigned to the victims; on the other hand, Guatemalan law will be applicable to decide on defendants' liability while Ontario law on damages. In the latter case, the plaintiffs specifically will rely on the Civil Code of Guatemala and the Criminal Code of Guatemala for their claims to be judged (ONSC, 2011).

Since the Ontario Superior Court's decision in 2013, both parties were involved in the process of evidence disclosure, for which they were obliged to provide information and to disclose all the documents available and related to the lawsuits in question. However, as HudBay voluntarily delayed the handover of internal corporate documents and communications and publicly made false accusations concerning the allegations of human rights abuses in which the mining company was involved, Angelina Choc, German Chub and Rosa Ich travelled to Toronto. There, in order to reject the accusations

[119] While civil law is a body of law dealing with disputes between private parties, including torts, contracts, property etc., criminal law is a "body of law that prohibits conduct that constitutes a threat to the public at large or to accepted social values and that imposes punishment for unlawful behavior". See Above Ground. (2016).

and to prompt HudBay to disclose all the necessary documents, the plaintiffs delivered a public speech to HudBay's directors and shareholders at its Annual General Meeting in May 2015[120]. In the end, however, the plaintiffs' lawyers had to resort to a court judgement (ONSC, 2015) in order to speed up the process which in June 2015 required by law the Canadian mining company to turn over all the documents the plaintiffs are entitled to.[121] Consequently, the examination for discovery process followed: on the one hand, the 13 plaintiffs had to depose in Toronto and be questioned by HudBay's lawyers; on the other hand, Hudbay and Skye company executives underwent the same process on the part of plaintiff's lawyers of Klippensteins Barristers and Solicitors (Russel, 2017:7). Finally, once these phases had been completed, the plaintiffs started to prepare for the actual trial whose date of beginning has still to be decided, although it is already clear it will constitute a large and complicated process (Russel, 2017:7). In conclusion, at the moment, the three lawsuits in the civil case for alleged human rights abuses occurred in Guatemala against HudBay Minerals Inc. are still pending in Canadian legal forums.

Furthermore, two of these three victims, namely Angelica Chic and German Chub, also strived to carry out criminal legal proceedings against the Canadian mining company in a parallel but distinct criminal trial in Guatemala against Mynor Padilla, the former Head of the Security at the Fenix mining project, for the assassination of Adolfo Ich and the shooting of German Chub. However, on 7th April 2017, the Guatemalan court in charge of judging the case actually acquitted Mynor Padilla for both allegations; moreover, it went even further specifying that legal proceedings should begin against the victims as well as several witnesses of the human rights abuses for "alleged 'crimes' such as false testimony, obstruction of justice, forgery of public documents, and document tampering" (BHRRC, 2017). Consequently, after the sentence of acquittal delivered by the Guatemalan court one of the plaintiffs' lawyers declared:

"Unfortunately, this acquittal in Guatemala is what we always expected and predicted. The Guatemalan legal system is corrupt and seeking justice there is, sadly, hopeless, especially against large international corporate interests like Hudbay. It is common for judges to be bribed, witnesses threatened, and powerful interests protected. That's precisely why Angelica's and German's best hope for justice against Hudbay has always been in Canadian courts." (BHRRC, 2017)

[120] See Declaration of Angelica Choc. HudBay Minerals AGM, Toronto (2015), online at: http://www.chocversushudbay.com/wp-content/uploads/2010/10/2015-05-22-HudBay-AGM-Angelica-Choc-Statement-English.pdf

[121] See Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc. Lawsuits against Canadian company HudBay Minerals Inc. over human rights abuse in Guatemala. http://www.chocversushudbay.com

In addition to the lack of consideration of eyewitness testimony of the murder and ballistic and forensic evidence concerning the shooting and linking Mynor Padilla and the security personnel of the Fenix mining project to the crime, other severe irregularities and problems characterized the course of the trial in Guatemala, which also raised fears of retaliation for victims, as a result of their attempt to seek justice at national level: an order from the judge preventing both the public and journalists to participate to most of the sessions of the trial for not clear security reasons; witnesses supporting the defendants receiving funds from HudBay Minerals Inc. for their favourable testimony; and the destruction of the Ich's widow's and children's home in a midnight gunfire attack. However, the resolve of Angelica Choc, German Chub and the eleven Mayan Q'eqchi' women remained the same and they did not abandon their quest for justice and a proper and effective remedy in the Canadian legal system (BHRRC, 2017).

5.2.5 The consequences for the Canada's mining sector

As a result of the adoption of international treaties that have been later incorporated into national law, Canada is subject to the obligation to protect, respect and fulfil human rights. Nevertheless, on the one hand, both the Canadian legal system and the corporate social responsibility standards enshrined in international guidelines were not effective in holding Canadian multinational corporations involved in mining operations abroad legally accountable for their human rights abuses basically due to the lack of enforcement and remedial mechanisms; on the other, Guatemalan judicial system was widely renowned for corruption and repression which allowed multinational corporations operating there to enjoy almost complete impunity (Pena, 2014:18). Therefore, thanks to the establishment of subsidiaries or affiliates in foreign countries like Guatemala, multinational corporations involved in the extractive sector managed to build up a shield to avoid legal accountability for alleged human rights abuses at the detriment of indigenous communities in spite of being constantly exposed to the international public opinion by NGOs (Daley, 2016:2). Consequently, the likelihood of the lawsuits filed against HudBay Minerals Inc. to succeed in both the Canadian and Guatemalan forum was extremely reduced (Russel 2017:1). However, contrary to all the expectations, the legal proceedings have overcome in both countries consistent and apparently insurmountable obstacles: while the trial in Canada may require some years before starting, in November 2017 an appeal court of Guatemala established that Mynor Padilla

in spite of having previously acquitted for the killing and the injury of two indigenous activists had to face a new murder trial (Russel, 2017).

In summary, these lawsuits are deemed to initiate a process of consistent change within the legal and political framework in Canada, condemning once and for all corporate impunity and immunity from legal accountability for human rights abuses (The Canadian Press, 2017). The ruling delivered by the Ontario Superior Court of Justice instituted a precedent concerning the development of concrete legal liability for Canadian multinational corporations and its subsidiaries operating abroad: for the first time three lawsuits concerning cases of alleged human rights violations perpetrated by a Canadian mining company within the scope of its foreign operations will proceed to trial (Above Ground, 2016). Although, as it has been previously acknowledged, Canadian legal forums have generally dismissed cases involving human rights abuses caused by foreign subsidiaries of Canadian multinational corporations up until that moment, the plaintiffs' lawyers adopted a different approach in order to substantiate their allegations against Hudbay Minerals Inc. They identified as the primary cause of action supporting their claims of the direct negligence against HudBay Minerals Inc., which failed to devise an effective monitoring system in order to control and supervise the activities of its subsidiaries and to ensure the duty of care it owed to local Mayan communities, in spite of having full knowledge of how operations were conducted at the Fenix mining project (Pena, 2014:13). This allowed the Superior Court of Ontario to dismiss all the three motions presented by the defendants and to address violations of human rights committed by multinational corporations abroad in an unprecedented judgement (ONSC, 2013). Claiming direct negligence actually became a viable option for Canadian legal forums to accept jurisdiction over a case of alleged human rights abuses on the part of a Canadian multinational corporations operating abroad, or more specifically women's rights violations (Pena, 2014:13), as it occurred in the case of *Caal v. Hudbay Minerals Inc*. However, a final court ruling is needed not only to confirm Canada's jurisdiction to hear and decide on the submission of that specific case, but also to foster developments of both domestic jurisdiction and customary international law, which will turn Canada into a forerunner of corporate legal accountability of multinational corporations in the mining sector worldwide (Pena, 2014:19).

Finally, as it is reported by Kassam (2017:3), these precedent-setting legal decision offered new means for indigenous people to seek justice and redress as one of the lawyers

of the Klippensteins Barristers and Solicitors representing the eleven Mayan Q'eqchi' women highlighted:

"These are some of the first attempts in Canadian legal history to try and bring some accountability to a Canadian mining company for horrific human rights abuses in another country."

Obviously, this will trigger huge and significant consequences for the Canadian mining industry as the decision on the part of the Ontario Superior Court of Justice allows the plaintiffs to progressively pierce the corporate veil by reducing the longstanding obstacle represented by the separate legal personality between multinational corporations and their subsidiaries concretely carrying out on-ground operations and, therefore, responsible for human rights abuses in the host states (Pena, 2014:19). Indeed, the 2013 decision of the Ontario Superior Court of Justice over the lawsuits against HudBay Minerals Inc. actually paved the way for an increasing number of lawsuits to be filed to Canadian legal forums claiming human rights abuses perpetrated by Canadian multinational corporations (Russel, 2017:6). For instance, it is possible to mention the lawsuit filed in 2014 against a Canadian corporation headquartered in Vancouver, namely Nevsun Resources, by three Eritreans refugees who reported the alleged use of forced labour by Nevsun's local sub-contractor, Segen Construction, at the Bisha mine in Eritrea (BHRRC). Although the mining company explicitly presented a motion to deny the subsistence of claims, the Supreme Court of British Columbia dismissed it in a 2016 decision in which the case also received the green light to proceed to trial on the grounds of alleged violations of international law, including crimes against humanity, forced labour, torture and slavery.[122] Another case could be identified in the lawsuit filed by seven men to Canadian courts against Tahoe Resources as a result of the injuries they suffered during a peaceful process on the part of the Escobal silver mines' security personnel in April 2013 (BHRRC). Although the Supreme Court of British Columbia dismissed the case on the basis of lack of jurisdiction, the British Columbia Court of Appeal overturned the previous judgement and recognized jurisdiction over the case due to procedural difficulties inherent to the Guatemalan legal system that would actually prevent the plaintiffs to be granted the right to a fair trial.[123]

In conclusion, the three lawsuits against HudBay Minerals Inc., and specifically *Margarita Caal v. HudBay Minerals Inc,* constitute a significant and ground-breaking

[122] See https://www.business-humanrights.org/en/nevsun-lawsuit-re-bisha-mine-eritrea
[123] See https://www.business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala

step forward not only in order to offer a new legal pathway for victims who have been adversely affected by a Canadian mining company or its subsidiaries abroad but also an egregious progress in the effort to hold multinational corporations legally accountable on a global scale, shifting corporate behaviour within their transnational operations towards the inclusion of an improved women's rights protection (Russell, 2017:6).

6. CONCLUSIONS

The initial purpose of the present study was to examine how women's rights and corporate social responsibility relate to each other within the scope of the transnational operations of multinational corporations worldwide. We took as a point of departure the standards of protection of women's basic rights and fundamental freedoms as they are incorporated into the renowned international human rights treaties, conventions, instruments; then we moved to the realm of corporate social responsibility considering the Codes of Conduct elaborated at both intergovernmental and corporate level; and finally we analysed the judicial mechanisms that victims of alleged women's rights abuses perpetrated by multinational corporations could resort to in order to seek justice and an adequate remedy. At this point, it is therefore necessary to draw some conclusions with regard to the analysis we have conducted throughout the previous chapters.

First and foremost, the basic premise underpinning the present study which also represents its foundation consists in recognizing that since the emergence of neoliberal ideology in 1980s and of economic globalization in the last decade of the twentieth century, new challenges faced the international economic and social system. Notably, multinational corporations qualified as the new actors experiencing a sensational growth and gaining enormous power and influence on an international scale. At the same time, however, the shift from the national to the transnational dimension triggered mounting concerns for the detrimental impacts they produce on poor local communities of developing or underdeveloped countries in which foreign direct investments take place, in terms of human rights (Cernic, 2010: 18) and, especially, of women's rights.

By looking at international human rights law as it is enshrined in the International Bill of Rights and in the CEDAW, and at regional human rights law at both European, American and African level from a feminist perspective, it emerges with undeniable and straightforward clarity that international law has not proved particularly keen on considering and incorporating gender issues, although they are deemed crucial in order to reach gender equality worldwide and to ensure women a better quality of their lives (Charlesworth & Chinkin, 2000:1). Indeed, these instruments were merely conceived with the purpose to tackle human rights abuses perpetrated by states within and outside their national territory; consequently, even in the case in which it is clear that women's rights abuses have been committed by a non-state actor within the jurisdiction of a state, they only allow to recognize the international responsibility of the state on the grounds of

lack of due diligence. However, provided that massive power imbalances persist between transnational business entities and women as individuals, and that women's rights abuses committed by large business entities within their transnational operations are still extensive in areas such as labour, health, access to land and property, gender-based violence etc., the exclusive reliance on state responsibility to promote a more responsible corporate conduct towards women's rights is not enough, but it rather means "turning a blind eye to human rights abuses inflicted by non-state actors" (Kinley & Tadaki, 2004:1021). The recognized inability of nation-states to devise an effective regulatory system on the part of international human rights law for prompting women's rights protection within the activities of multinational corporations in their national territory may be imputed to different factors. In addition to the emergence in 1980s of neoliberal ideology that posed many challenges to the process of implementation of the CEDAW Convention due to increasing power that these large business entities achieved at international level and within the host countries in which they carry out FDIs (Schopp-Schilling & Flinterman, 2007:106,) and to the threats posed by religious fundamentalism, legitimizing the perpetration of traditional, deep-seated and cultural discriminatory against women (Raday, 2012:515), feminist studies outlined obstacles of different nature preventing the realization of women's rights in both private and public sphere. Once it has been recognized that international human rights law has developed throughout decades in a gendered way, it is not difficult to conclude that it is substantially male-oriented (De Vido, 2016:17). This feature actually prevents international human rights law to adequately incorporate the women's concerns and to completely address the ultimate causes at the roots of women's inequality which ends up being perceived as normal and culturally accepted (Charlesworth & Chinkin, 2013:33).

Subsequently, we have considered more closely multinational corporations and their connections with women's rights. After having defined multinational corporations as the primary actors involved in the system of international economic relations (Carreau, 2003:26), the analysis of the feminist doctrine helped us to recognize that corporate violations of women's rights during their activities abroad could be traced back to the extensive patriarchalism which has given rise to a dividend between men and women in societies based on the persistence of gender pay gaps, the unequal share of labour market participation, inequalities in ownership and access to land, and finally gender-based violence (Connell, 1998:12). Therefore, in order to effectively promote multinational corporations' regulation and respect of women's rights, it is necessary to dismantle the

male-oriented conception characterizing not only international human rights law thanks to the adoption of a gender mainstreaming approach, but also of multinational corporations whose conduct is mainly driven by gendered discourses of rationality and competition (Elias, 2008:409).

However, since human rights standards at both international and regional level failed in ensuring 'hard' direct responsibility for corporate abuses mainly due to the limited legal liability of large business entities which actually prevents them to be recognized as subject of international law with legally binding obligations (Ruggie, 2013:12), we considered the effectiveness of corporate social responsibility standards elaborated not only by regional and international organizations but also by multinational corporations. While the former failed in their attempt due to the lack of a legally binding nature and of any enforcement mechanisms to foster the respect of the human and women's rights principles enshrined within them, corporate codes of conduct strived to promote gender equality and women's empowerment within the multinational corporations' agenda thanks to the adoption of the so-called 'business case'. However, since the rationale behind the 'business case' tends to incorporate women's rights exclusively to extent they brought about advantages in terms of financial performance and brand reputation (Hart, 2009:586), the multinational corporations' commitment to protect, respect and fulfil women's rights is called into question as it tends to be perceived as a means to shield corporate violations occurring within the scope of their operations. The latter option seems to find some legitimacy if we consider the lack of adequate judicial mechanisms to address women's rights abuses at both the home and the host state level. Indeed, by looking at our study case, namely *Caal v. HudBay Minerals Inc.*, the difficulties on the part of Canadian jurisprudence, on the one hand, and the lack of an adequate corporate social responsibility framework within the country, on the other, seriously hampered the chances of the eleven Mayan Q'eqchi women to obtain justice and to receive an appropriate remedy for the human rights violations perpetrated by the Canadian mining company and its Guatemalan subsidiaries. However, contrary to all expectations, in an unprecedent judgement, the Ontario Superior Court of Justice dismissed all the claims advanced by the defendants aiming at asserting the inapplicability of Canadian jurisdiction, and it established that the three lawsuits, including the one presented by the Mayan Q'eqchi women, could proceed to trial in Canada (ONSC,2013). Obviously, this precedent constitutes a ground-breaking progress in the attempt to provide a new legal pathway for victims of human rights abuses perpetrated by Canadian mining companies,

but it also represents an advancement with a global outreach. Indeed, it may help fostering international legal accountability shifting corporate behaviour within their transnational operations towards the inclusion of an improved human and women's rights protection (Russell, 2017:6).

Therefore, from the analysis we have conducted throughout the chapters of our study we can conclude that international human rights law has revealed quite ineffective in regulating the transnational activities of multinational corporations worldwide. Conversely, the conduct and legal accountability of these non-state actors has been extensively addressed by stakeholders who specifically engaged in the effort to elaborate a wide array of soft law initiatives, ranging from voluntary guidelines to corporate codes of conduct (Kinley & Tadaki, 2004:1022). However, since they are inherently limited by the inability to enforce the human rights principles enshrined within them through effective monitoring mechanisms and, therefore, to tackle the irresponsible conduct of business entities in the field of women's rights, there is actually an impelling need to devise an instrument enshrining legally binding norms in order to challenge and put an end to corporate impunity (Awori et al., 2018:4).

The idea for the development of a binding treaty on human rights constraining multinational corporations to comply with legally binding obligations to protect, respect and promote human rights was firstly suggested by the Secretary-General's Special Representative for business and human rights in 2008, although he also reported that the states' commitment to negotiate, sign and ratify the treaty was limited, at that time, to the recognition that something needs to be done in order to tackle these prevailing and severe abuses to the detriment of women (Ruggie, 2008:43). However, this proposal could soon become a reality as negotiations for a legally binding instrument are currently ongoing within the framework of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises[124] (Awori et al., 2018:4). Since human rights violations perpetrated by multinational corporations are not gender neutral (Elias, 2008:408), the incorporation of a gender perspective within the binding treaty is forcefully supported by feminist organizations (Awori et al., 2018:4). In the paper they submitted in the third session of the IGWG[125], feminists outlined three recommendations that has to be necessarily followed: the incorporation of a gender

[124] It was instituted by the Human Rights Council in 2014.

[125] WILPF. (2017). *Joint Submission. Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises.* https://wilpf.org/wp-content/uploads/2017/10/Jt-statement-gender-into-the-treaty-October-2017.pdf

assessment concerning the impacts of transnational business activities from an economic, political, social and cultural perspective in order to identify specific threats to women; the elimination of all obstacles in order to ensure women the access to justice; and finally the consistent support to women's rights defenders in order to safeguard their operations (Awori et al., 2018:4).

In summary, a feminist perspective should never be overlooked in international law (De Vido, 2016:252) as it allows to concretely overcome an approach perceiving women as inherently vulnerable actors within the political, economic and social system, rather than "right-holders whose dignity, agency and autonomy are undermined by structural inequalities" (Awori et al., 2018:5). Therefore, the inclusion of a *gender mainstreaming* perspective within a binding treaty regulating multinational corporations' conduct and strengthening their legal accountability is deemed crucial in order to ensure that the unequal power relations characterizing corporate related human rights violations are addressed once and for all.

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