**INTERNATIONAL HUMAN RIGHTS**
**LouvainX online course - prof. Olivier De Schutter**

**READING MATERIAL**
**related to: section 4, sub-section 3: Transnational corporations and human rights**

Where the immediate cause of the infringement of human rights is in the behavior of a private actor, two avenues can be explored to engage the responsibility of the State. As we have seen at the beginning of this section, we can either impute to the State the violations committed by non-State actors; or we can extend the scope of the State's obligation to protect. Both options are premised on the idea that international human rights are binding upon the State, which is therefore the primary duty-bearer; and indeed, the existing mechanisms in international human rights law are addressed to the State, and are not directly controlling on private actors. However, a third option could be explored, which would consist in strengthening the ability of international law to address directly the human rights violations committed by non-State actors. National institutions, including national courts, routinely apply international human rights norms directly to the acts of private parties: there should be no obstacle in principle to allow this to develop at the international level, if necessary, in order to overcome the inability or the unwillingness of States to control non-State actors adequately. Indeed, this may be particularly relevant in the context of economic globalization, because of the threat this process may represent to the regulatory capacity of States.

The insistence on an improved control of the activities of transnational corporations initially formed part of the vindication of a 'new international economic order' in the early 1970s, which the recently decolonized States pushed forward during that period (see the resolution adopted by the General Assembly of the United Nations on 1 May 1974, calling for a New International Economic Order (UN Doc. A/Res/3201 (S-VI)); and followed upon, in particular, by GA Resolution 3281(XXIX) of 15 January 1975, UN GAOR Supp. (No. 31), UN Doc. A/9631 (1975), the Charter of Economic Rights and Duties of States). The context then was relatively favourable to an improved regulation of the activities of transnational corporations: while developed States feared that certain abuses by transnational corporations, or their interference with local political processes, might lead to hostile reactions by developing States, and possibly to the imposition of restrictions on the rights of foreign investors, the 'Group of 77' non-aligned (developing) countries insisted on their permanent sovereignty over natural resources and on the need to improve the supervision of the activities of transnational corporations. On the basis of a report prepared at the request of the Economic and Social Council, a draft Code of Conduct on Transnational Corporations (TNCs) was even prepared until 1992 within the UN Commission on Transnational Corporations (see E/1990/94, 12 June 1990). The Draft Code failed to be adopted, however, because of major disagreements between industrialized and developing

countries, in particular, on the reference to international law and on the inclusion in the Code of standards of treatment for TNCs: while the industrialized countries were in favor of a Code protecting TNCs from discriminatory treatment of other behaviour of host States which would be in violation of certain minimum standards, the developing States primarily sought to ensure that TNCs would be better regulated, and in particular would be prohibited from interfering either with political independence of the investment-receiving States or with their nationally defined economic objectives.

It is also during the 1970s that the Organization for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises. These Guidelines were revised on a number of occasions since their initial adoption on 21 June 1976. In 2000, the supervisory mechanism was revitalized and a general obligation on multinational enterprises to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments' was stipulated. Almost simultaneously, the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted by the Governing Body of the International Labour Organization at its 204th session (November 1977), and revised at the 279th session (November 2000)). The aim of the Tripartite Declaration of Principles is to 'encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the Establishment of a New International Economic Order' (para. 2).

Although of high moral significance because of its adoption by consensus by the ILO Governing Body at which governments, employers and workers are represented, the Tripartite Declaration remains, like the OECD Guidelines, a non-binding instrument. But both these instruments impose on States certain obligations of a procedural nature. Under the OECD Guidelines, States must set up national contact points (NCPs) in order to promote the Guidelines and to receive 'specific instances', or complaints by interested parties in cases of non-compliance by companies. When such 'specific instances' are filed, these NCPs operate as mediators, seeking to design a solution that would address the concern raised in the complaint, with the collaboration of the company concerned; at the end of the process, they may publish a communiqué stating the facts and describing the solution agreed to, or if no such solution is found, that the concerns remain unaddressed, with potentially significant reputational consequences for the company. The ILO's Tripartite Declaration of Principles also has some follow-up mechanism: States must report on a quadriennal basis on the implementation of the principles listed therein. These are promising developments, and after 2000 in particular, the establishment of NCPs by all OECD member States, providing a new, accessible mechanism allowing interested parties to denounce instances of corporate misconduct, was perceived as a significant step forward. However, both the ILO Tripartite Declaration and the OECD Guidelines instruments are explicitly presented as non-binding instruments, with respect to the multinational enterprises whose practices they ultimately seek to address, and their effectiveness in bringing about change in the conduct of companies is questionable.

The debate on how to improve the human rights accountability of transnational corporations was relaunched as concerns grew, in the late 1990s, about the impacts of unbridled economic globalization on values such as the environment, human rights,

and the rights of workers. At the 1999 Davos World Economic Forum, the UN Secretary-General, K. Annan proposed a Global Compact based on shared values in the areas of human rights, labour, and the environment, and to which anti-corruption has been added in 2004. The ten principles to which participants in the Global Compact adhere are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption. The process is voluntary. It is based on the idea that good practices should be rewarded by being publicized, and that they should be shared in order to promote a mutual learning among businesses. The companies acceding to the Global Compact are to 'embrace, support and enact, within their sphere of influence', the ten (initially nine) principles on which it is based. By 2013, more than 10,000 companies had joined, from some 130 countries, which makes this by far the broadest corporate social responsibility initiative measured by its number of participants. These adhering companies report annually on initiatives that contribute to the fulfilment of these values in their business practices, through a 'Communication on Progress' filed with the Global Compact Secretariat: at the end of 2011, more than 2,000 participating companies had been 'de-listed' from for failure to comply with the reporting requirement for more than one year. In addition, though the Global Compact is not a mechanism to monitor compliance with the principles which the participating companies pledge to promote, allegations of systematic or egregious abuse brought to the attention of the Global Compact Office are examined, and the company is contacted unless the allegation is seen as frivolous: if the company fails to cooperate in the process or to provide satisfactory answers, it may be treated as 'non-communicating' and de-listed. The ultimate sanction is of a reputational nature: if 'the continued listing of the participating company on the Global Compact website is considered to be detrimental to the reputation and integrity of the Global Compact, the Global Compact Office reserves the right to remove that company from the list of participants and to so indicate on the Global Compact website' (www.unglobalcompact.org).

Developments occurred also within the UN Commission on Human Rights. On 14 August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights, the group of independent experts supporting the work of the Commission on Human Rights, approved in Resolution 2003/16 a set of 'Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises' (E/CN.4/Sub.2/2003/12/Rev.2 (2003)). The 'Norms' proposed by the Sub-Commission on Human Rights essentially present themselves as a restatement of the human rights obligations imposed on companies under international law. They are based on the idea that 'even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights', and therefore 'transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments' (Preamble, third and fourth Recitals).

Although the initiative of the UN Sub-Commission on Human Rights was received with suspicion, and sometimes overt hostility, both by the business community and by a number of governments, it did serve to put the issue on the agenda of the UN

Commission on Human Rights. In April 2005, the Commission on Human Rights requested that the UN Secretary-General appoint a Special Representative to identify ways through which the accountability of transnational corporations for human rights violations may be improved. The Special Representative of the Secretary-General, John Ruggie, set aside the 'Norms' of the Sub-Commission, on the basis that they mistakenly equated the human rights responsibilities of companies with those of the State and thus 'would turn transnational corporations into more benign twenty-first century versions of East India companies, undermining the capacity of developing countries to generate independent and democratically controlled institutions capable of acting in the public interest – which to my mind is by far the most effective guarantor of human rights' (Statement of the Special Representative of the Secretary-General on the issue of business and human rights to the Human Rights Council, 25 September 2006). Then, following almost three years of consultations and studies, he proposed a framework resting on the 'differentiated but complementary responsibilities' of the States and corporations. The framework comprises 'three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies' (*Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/5, 7 April 2008, para. 9). Hence, while restating that human rights are primarily for the State to protect as required under international human rights law, the framework does not exclude that private companies may have human rights responsibilities: although companies essentially should comply with a 'do no harm' principle, this also entails certain positive duties: 'To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts' (para. 56). After the Human Rights Council renewed the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, he could build on this framework and, after further consultations and road-testing of some key concepts by companies willing to contribute, he proposed a set of Guiding Principles on Business and Human Rights implementing the framework, accompanied by a Commentary providing further guidance to governments and businesses. The Human Rights Council endorsed the Guiding Principles in its Resolution 17/4, adopted on 16 June 2011. After the failed attempts of the past, this was the first adoption of an authoritative text on business and human rights within the United Nations. They also go beyond the plethora of voluntary initiatives, often sector-specific, that existed hitherto. They form the basis of a new follow-up mechanism within the United Nations system, through the Working Group on business and human rights and an annual forum to be held on this issue. The most remarkable, however, is that the Guiding Principles have been reverberating outside the UN, because of their wide endorsement not just by governments, but also by the business community and – though somewhat grudgingly at times – civil society. In particular,

- when it revised its Guidelines on Multinational Enterprises in 2011, the Organization for Economic Cooperation and Development (OECD), it included a chapter IV on human rights, that is based on the 'Protect, Respect and Remedy' framework: this enables the NCPs that the OECD member States must establish to promote the Guidelines and to address 'specific instances' to

be much more explicit as regards their expectation that companies will comply with human rights;

- the European Commission endorsed the Guiding Principles on Business and Human Rights, and developed specific guidance for various sectors of the industry as well as for small- and medium-sized business enterprises;
- when the International Finance Corporation revised its Sustainability Framework, including both Sustainability Principles and Performance Standards, references to human rights were included, reflecting core concepts of the GPs such as the responsibility of IFC clients to respect human rights and to exercise due diligence in order to ensure that they do not negatively affect human rights. As J. Ruggie has noted, these Principles and Standards 'affect companies' access to international capital, amplified manifold because they are tracked by private sector lending institutions party to the so-called Equator Principles, which account for more than three-fourths of all project financing worldwide' (J.G. Ruggie, 'Global Governance and 'New Governance Theory': Lessons from Business and Human Rights', *Global Governance* 20(2013), 5, at 11);
- finally, 1SO26000, the social responsibility tool developed by the International Organization for Standardization – founded in 1947 and now the world's largest and most influential standard-setter for the private sector –, now includes a human rights chapter (6.3.) closely tracking the GPs.