

An Introduction to Human Rights Duties of Transnational Corporations

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Introduction

The invisibility of transitional corporations accountability at international level, especially under international human rights law, has arisen from two factors. The first is the fact that historically, international human rights law has developed as a tool to protect individuals from states, not corporations. International human rights law holds states indirectly liable for the direct violations of corporations. This means that states have a duty to protect human rights and must ensure (by respecting and regulating) that corporations, do not abuse them. This duty on states gives rise to indirect obligations on corporations. International human rights Law places the primary responsibility to implement and ensure protection of human rights on states. States are obliged to protect, respect and fulfil human rights. When non-state actors commit acts that

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ISJ, Vol. 3, Special Issue, Winter 2007, pp. 69-80

are harmful to human rights states are obliged under international law to take action to prevent and stop the violations and to provide victims with appropriate remedies and relief. States therefore have a duty to ensure that human rights are respected by private corporations. They must create the legal and institutional framework to enforce this obligation. That is, while the human-rights discourse celebrates the retreat of the state, the realization of human rights is predicated on the expansion of the state. This is nowhere more evident than in the debate over which set of rights-political and civil or economic, social and cultural, -takes precedence. "The development of human-rights discourse has been central to this "etatization" of our social lives."¹ It is clear that states may decide at an international level to recognize rights and duties of non-state actors. States are, of course, the primary actors of international Law. Only states, can create international law. They can confer rights and obligations on individuals and companies if they so choose. Human-rights discourse very much rests on this understanding of sovereignty. Frequently however, states are unable or unwilling to enforce human rights guarantees against companies. Some host states are too weak economically and politically in relation to transnational corporations in particular, and have no effective possibility to hold companies to account. Some states lack effective control over all or certain parts of the country, or are unable to regulate companies effectively because of other legal or political obstacles. In these situations international standards

have started to, and must further develop criteria that define the direct responsibility of companies under human rights Law. This does not mean that companies are or should be bind by human rights Law in the same comprehensive manner as states. After all not all human rights can, by their nature, apply to companies. The extent of companies responsibility needs to be more clearly defined. International human rights law relies on domestic law implementing its provisions, with respect to actions between corporations. Where such application of domestic law is found, the need to

On the other hand, corporations law traditionally has been a domestic matter. The human rights responsibilities of corporations under domestic law are not usually mentioned in corporations or commercial laws, but in separate, workplace safety and labor laws. So, there domestic human rights laws are designed to operate intra-territorially only. As a result, the extra-territorial operations of transnational corporations are regulated neither by international nor domestic laws with respect to their impact on human rights. This apparent legal gap is what have been argued, could and should be filled by the development of international legal obligations imposed on transnational corporations. This article examines the extent to which the Universal Declaration of Human Rights (UDHR) creates binding legal obligations on companies. To what extent does it create legal obligations on private actors like companies? Is the responsibility of "organs of society", which is states in the preamble of

UDHR, legally binding on companies? Thought large issues underlie these questions, the UDHR is a basic reference, and should be a natural starting point for discussions of business practice. Despite this, too little attention has been given to the questions of whether international law can be used to hold private companies legally responsible for abuse of human rights.

The legal dimension: Direct obligations

The current scope of what might be loosely called the international human rights law duties of transnational corporations is wide, but thin. They will be customary international law, treaty obligations, and soft-law codes of conduct, guidelines and compacts. Companies have already been conferred rights under international law. In bilateral investment agreements, for example, they have international standing to enforce their rights against states. In some cases they have been able to assert their rights to enjoy a limited range of human rights found in international human rights treaties. But the area of direct corporate responsibility has been rapidly developing in recent years and member states of several international organizations have already concluded that companies should respect human rights principles. Some of these instruments are: The OECD Guidelines for Multinational Enterprises², The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy³, General comment No. 12 of Committee

on Economic, social and Cultural Rights⁴, Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regards to Human Rights⁵, The UN's Global Compact Initiatives 2006, The Alien Tort Claims Act; U.S.A ⁷, World Bank Policy Guidelines (Operational Directives)⁸, World Bank Inspection Panel (Resolutions)⁹, WTO Dispute Settlement Mechanism¹⁰, and etc. But, this instruments bring together existing standard of soft Law. They do not create or seek to create new international Law. They do not create detailed and operational regulations that can be used to determine the specific actions of companies. Rather they define in broad terms the human rights framework that applies to the activities of companies. For the most part, work on corporate accountability has emphasized voluntary approaches, systems of self-regulation based on ethical principles rather than forms of legal accountability supported by mechanisms to enforce them. Such standards have generally not been treated as legal commitments. With respect to the specific category of international human rights instruments, must be said that the provisions of some of them can be read to apply to corporations. For example, on the right to education, transnational corporations must abolish child labor and also provide financial assistance employment arrangements to children so that they could return to school. There are, however, certain international human rights duties which, are inappropriate to place on transnational corporations. For example, with protecting the right to asylum or the

right to nationality. For the time being, we begin the matter in relation to the Universal Declaration of Human Rights (UDHR), which is most often said to be a potential legal source of corporate human rights responsibilities.

Applying International Standards directly to companies (UDHR) The preamble of the UDHR states: "... every individual and every organ of society ... , shall strive¹¹ by teaching and education to promote respect for these rights and freedoms,to secure their universal and effective recognition and observance". Professor Louis Henkin¹², a noted scholar of international law, during the 50th anniversary of the UDHR in 1998, emphasized: "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The UDHR applies to them all."

Although it is true that the preamble's language expresses no more than an aspiration to "strive" to promote respect for human rights, there is a stronger language in the text of the UDHR itself. Article 29 specifies that:

"... everyone has duties to the community"¹³ and article 30 prohibits: "... any state, group or person" from engaging in any activity of performing any act that would be destruction of any of the rights and freedoms in the Declaration.¹⁴ This combination can be read as constituting a statement of non-state actors' duties not to violate the human rights of others.¹⁵ But even if this reading is accepted, the nature of the duties is

unclear. The UDHR is a declaration, and thus constitutes an obligation for the member of the international community and it is declaratory of international law.¹⁶ Although it is widely accepted that some provisions in the UDHR have become customary international law, it is unclear, however, which parts (including articles 29 and 30) have acquired such status and become binding.¹⁷ After all a rule of interpretation generally holds that preambles to international instruments are not themselves legally binding. Even though the preamble does not set out legally binding norms, it can be used to interpret or understand the rest of the document. The preamble sets out the purpose and object of the document and the rest of the document should be read with this understanding. The part of the preamble we have been examining, therefore, indicates that, in order to give the maximum protection to individuals and to ensure they enjoy all the substantive guarantees in the declaration, every government, individual and organ of society must play their part. The preamble and substantive provisions in the UDHR have a similar indirect legal effect, which themselves create legal obligations.¹⁸ Regardless of the legal force of the UDHR, few documents have acquired such authority in law. The UDHR has been endorsed in the preamble of every united nation's human rights treaty, whose substantive provisions also elaborate guarantees originally found in the UDHR. All United Nations member states except six (Brunei Darussalam, Kiribati, Micronesia, Nauru, Oman, and Palau) have ratified, and are therefore legally bound by, at least one of these

human rights treaties that refer to the UDHR. Provisions of the UDHR have been incorporated into many national constitutions and laws. The UDHR has also been approved repeatedly in political resolutions and world conferences of organizations such as the United Nations. The most important was the 1993 United Nations World Conference on Human Rights in Vienna, in which 171 states reaffirmed their commitment to the purposes and principles contained in the charter of the United Nations and the UDHR.¹⁹

Conclusion

Whether or not legally binding and enforceable, the reality is that states have drafted an international document that speaks to private enterprise as an “organ of society”. The UDHR calls on businesses to respect the same human rights guarantees that states themselves are required to respect. The preamble to the UDHR is, in effect, a fundamental affirmation by states of corporate responsibilities. It declares they should promote and respect all the rights guaranteed in the UDHR. It is difficult to see how companies might maintain that they are an exception or for any other reason have no duty to abide by such responsibilities. The UDHR is also a living document, which can be re-interpreted and applied to new situations. If they wish to do so, states may remove any ambiguity by confirming that “organs of society”, including companies, do have binding obligations under international law to uphold UDHR. So, in the

absence of binding effects, therefore the duties that the UDHR imposes on transnational corporations may amount to ethical duties at best. Thus, in terms of international law, the UDHR may be a weak basis on which to construct a doctrine of individual duties to respect human rights²⁰ and perhaps a most uncertain ground to bind corporations. It is states which promise to promote respect for and observance of human rights. It is true that greater certainty either way in this regard would have been possible had the drafters of the UDHR had corporations specifically in mind, but they did not. International instruments that do specifically intend corporations will therefore have to speak more directly to them and also be expressly fitted to their activities. To date, however, the only examples of such fittings are soft-law, non-binding agreements, and voluntary codes of conduct. The weaknesses of voluntary codes of conduct are clear: most are not supervised by an independent body and cannot meet the demand of the public for transparent and legal accountability, they differ greatly in the human rights standards they accept (many, for example do not accept freedom of association and the right to collective bargaining), their human rights clauses are often too general, they do not give any form of standing, remedy or relief to individuals or groups of individuals whose human rights are abused. □

Notes:

1. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third world Resistance*, Cambridge University Press, 2003, p. 191.
2. Look at: www.oecd.org
3. Tripartite Declaration adopted by the Governing Body of the International Labor Office on November 1977 and its addendum on November 1995, see also: www.ilo.org/public/english/Standards/norm/sources/mne.htm
4. The Right to Adequate Food (Art11): .12/05/99.E/C.12/1999/5.(General Comments), Economic and Social Council, May 1999, see also: www.ohchr.org/english/bodies/cescr/comments.htm
5. Norms on, U. N. Doc.E/ CN.4/Sub.2/2003/12/Rev.2 (2003).
6. Look at :www.unglobalcompact.org/AboutTheGC/index.html
7. United States Code, Title 28, Part IV, Chapter 85, Section 1350, Alien's action for tort.
8. The World Bank Operational Manual, Vol. 1&2 . see also: www.worldbank.org
9. Resolution NO.IBRD 93-10, NO.IDA 93-6 on establishing Inspection Panel in the World Bank, see also: www.worldbank.org
10. World Trade Organization: Ministerial Conference, Singapore, Dec. 1996, TheSingapore Ministerial Declaration, Section: Dispute Settlement, see also: www.wto.org/english/news-e/press96-e/wtodec.htm.

11. Universal Declaration of Human Rights, G. A. Res. 217 A(III)
12. Louis Henkin, "The Universal Declaration at 50 and the Challenge of Global Market," *Brooklyn Journal of International Law*, 25:1, 1999, pp. 17-25.
- 13 - UDHR, *supra note 1*, art 29,1.
- 14 - *Id*, art. 30.
- 15 - Jordan J. Paust. "The Other Side of Right: Private Duties under Human Rights law," *Harvard Human Rights Journal*, Vol. 5, (1994)pp. 51-54.
- 16 - Proclamation of Tehran, proclaimed by the International Conference on Human Rights at Tehran, 1968, para. 2.
- 17 - International Council on Human Rights Policy (ICHRP), "Beyond Voluntarism: Human Rights and The Developing International Legal Obligations of Companies," p. 75, 2002.
- 18- In 1971, the International Court of Justice said that South Africa's apartheid policies in Namibia Violated the UN charter. Advisory Opinion Namibia, ICJ reports (1971).
- 19 - The Vienna Declaration and Program of Action, adopted 25 June 1993, Vienna.
- 20 - Nigel S. Rodley, "Can Armed Opposition Groups Violate Human Rights?," in *Human Rights in the Twenty-first Century : Global Challenge*, pp. 297, 306, 30

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1. Advisory Opinion Namibia, ICJ Reports, (1971).
2. Henkin, Louis. "The Universal Declaration at 50 and the Challenge of Global Markets", *Brooklyn Journal of International Law*, 1999.
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4. Jordan, J. Paust, "The Other Side of Rights: Private Duties under Human Rights Law" *Harvard Human Rights Journal*, 5, (1992).
5. Jungk, Margaret, "Defining the Scope of Business Responsibility for Human Rights Abroad ," Danish Center for Human Rights, Dec. 2001, at www.humanrightsbusiness.org.
6. Proclamation of Tehran, Proclaimed by the International Conference on Human Rights at Tehran, May 1968.
7. The Vienna Declaration and Program of Action, adopted June 1993, Vienna.
8. Universal Declaration of Human Rights, G. A. Res. 217 A(III).