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Human Rights and Business Actors

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Introduction

Problématique:

Due to **globalization**, the power of business actors has grown.

Power is here understood as existing options for the business actors' to choose their own activities and their possibilities to influence other actors' (states' and workers') behaviour.

Globalization is understood here as the facilitation of trans-boundary flows of products, labour and finance. There are cheaper and better communication means, cheaper transport, new markets, new production sites, new labour pools.

Globalization has created the possibility for business actors to evade domestic regulation (in the areas of labour, environment, and finance) through the transfer of their production sites.

→ Danger of evasion of (national) human rights standards.

→ Need for international human rights standards:

- Establishment of standards.
- Monitoring of compliance with standards.
- Enforcement of those standards and sanctions for non-compliance.

Terms:

The ILO and OECD use "Multinational Enterprises" (MNEs).

The UN uses "Transnational Corporations" (TNCs).

1. Three types of human rights problems of business actors

(1) Social human rights may be violated through bad production conditions in a firm. Relevant human rights are for example:

Art. 7 CESCR: Just and favourable conditions of work.

Art. 8 CESR: trade unions.

Art. 12(2) lit b) CESR: industrial hygiene.

(2) Direct benefit from human rights violations of the state of the production site.

Example: A firm could benefit from roads in Burma built by forced labourers.

(3) Economic support of states which violate human rights through investments.

2. De lege lata obligations of (private) business

2.1. No direct conventional human rights obligations of private business actors

Private business actors are not directly bound by the international human rights covenants, because they are not party to these treaties. The treaties' obligations are addressed to and bind the state parties.

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2.2. *Obligation of private business to observe customary human rights?*

Private business is obliged to observe customary international law and general principles only if the business actors were international legal subjects. International legal subjects (persons) are entities which have the capacity to possess rights and duties flowing from international law. In principle, business actors can be international legal persons.

A bindingness on private actors is acknowledged for *ius cogens* (= absolute norms, not only in terms of contents, but also with regard to their addressees).

See the Report of the independent international commission of inquiry on the Syrian Arab Republic (UN Doc. A/HRC/19/69, 22 February 2012), para. 106 “at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified.”

2.3. *Soft “responsibility” of business*

Under the UN Guiding Principles of 2011 (see below).

3. *De lege lata obligations of states*

Governmental obligation to protect:

The international Human Rights Covenants oblige State Parties to protect persons under their jurisdiction from harm emanating from other actors, for example from business. This means that states are obliged to take positive action as opposed to mere abstention.

This includes the enactment of “extraterritorial” legislation, that is laws which apply to business entities which have the legislating state’s nationality even when they act abroad. For example, China is obliged to enact sufficient (domestic) legislation to prevent human rights abuses by Chinese firms acting in Africa.

Such legislation does not violate the host state’s sovereignty when there is a sufficient link to the regulating state. The firm’s nationality is such a link.

4. *The UN Guiding Principles (2011)*

Three pillars.

(1) Governmental obligation to protect.

(2) Business responsibility (principles 11-24).

This includes human rights due diligence requirements.

(3) Remedies.

Normative quality? „The Guiding Principles’ normative contribution lies not in the creation of new international law obligations“ (preamble para. 14).

5. *Proposals de lege ferenda*

5.1. *Pros and cons of direct human rights obligations of business*

All actions of **state-owned firms which are organised in a public-law legal form** (as part of the state) are attributed to the state. These firms are organs or de facto organs of the state. Their human rights violations are imputed to the state and trigger the international legal responsibility of the state (cf. Art. 4 ILC Articles on state responsibility).

In a liberal state based on a public-private split, **private business actors** neither have the formal power to unilaterally impose rules on private persons, nor to enforce them by means of force on workers. The formal “consent” of workers is always required.

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But even private business may have the economic power to *de facto* impose the rules on workers and on host states due to inferior bargaining power of workers (and of host states). Business actors (public and private) also have a corporate social responsibility. Moral expectations of civil societies exist.

Are human rights the suitable tool to regulate business activity? Or is it better to use civil law, labour law, and criminal law which are more specifically tailored to the private actors?

Private business actors themselves also enjoy human (or at least fundamental) rights: property, freedom of economic activity.

Are the delicate balancing operations (rights and interests of business versus rights and interests of workers) best done by courts on the basis of broad human rights norms or better by the (international) law-maker?

If human rights are made directly opposable to private business actors, there is the danger that states **evade** their own responsibility and human rights obligations.

5.2. Technical (juridical) feasibility of the imposition of direct human rights obligations on private business actors

The existing international Human rights Covenants could be interpreted **dynamically** so as to bind also private business directly.

But such a dynamic and evolutionary interpretation (beyond the wording and intention of the state parties) would not respect the **principle of legality** (foreseeability).

Another strategy would be the adoption of an inter-state convention imposing direct human rights obligations on business. No categorical barrier exists. It is legally possible to impose direct international legal obligations on private actors (natural and moral persons), by means of an inter-state treaty. But this should be done only as an exception, in order to safeguard the private actors' sphere of liberty. (The normal case is and should remain only *indirect* obligations of private actors, stemming from the international treaties, but implemented by means of domestic law of the state parties).

Three pre- conditions:

(1) Very important legal goods must be at stake.

(2) There must be a **regulatory deficit**. This is the case when it turns out that the international state obligations to protect humans from dangers and harm emanating from private (business) actors) have been insufficient.

plus

(3) Respect of principle of legality.

This is the requirement of a sufficiently clear, specific, and accessible basis in law, so that the duties imposed are foreseeable for those who are bound by them. Importantly, international treaties (and international customary law) are not a priori insufficient as a legal basis.

Which human rights are most relevant and suited for being made opposable to private actors? These are notably the rights of non-discrimination, free speech, freedom of assemblies and of coalitions; physical integrity and health.

But the main problem of **implementation and enforcement** would persist, even if norms directly binding on private business were created.

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Documents

ILO

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United Nations

The UN Guiding Principles on Human Rights and Transnational Corporations and Other Business Enterprises (2011), Report of the Special Representative of the Secretary-General with Guiding Principles in the Annex (UN-Dok. A/HRC/17/31) of 21 March 2011, endorsed by the UN Human Rights Council on 6 July 2011 (UN-Doc. A/HRC/RES/17/4).

Older documents:

Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises of the UN- Sub-Commission on the Promotion and Protection of Human Rights (UN-Doc. E/CN.4/Sub.2/2003//12/Rev.2 (2003) of 13 August 2003);

Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights (UN-Doc. E/CN.4/2005/91 of 15 February 2005).

OECD

OECD Guidelines for Multinational Enterprises (2011), OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en>.

Cases

- UK National Contact Point, *Global Witness v. Afrimex Ltd.*, Final Statement of 28 August 2008.
- US Court of Appeals, *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111 (2d Cir. 2010): „No corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. (...) Acknowledging the absence of corporate liability (...) is (...) a recognition that the States of the world, in their relations with one another, have determined that moral and legal responsibility for heinous crimes should rest *on the individual* whose conduct makes him or her, *hostis humani generis*, an enemy of all mankind“ (Conclusions).
- US Supreme Court, *Kiobel v. Royal Dutch Petroleum*, judgment of 17 April 2013, 569 US _ (2013).

Literature

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Ingrid Wuerth, *The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co*, *American Journal of International Law* 107 (2013), forthcoming.