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Business' Duties Across Borders – the New Human Rights Frontier[79]

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Introduction

Modern human rights are dynamic. Through interpretation, and reinterpretation in new situations and contexts, they are adaptive to new challenges and societal risks to basic human interests. This paper addresses how this insight can be demonstrated through the expanding field of human rights studies of business entities. It examines experiences of the new regulatory turns on commercial actors, and discusses recent developments in human rights standard-setting and advocacy.

Human rights have long been understood as being state-centric: The basic model of human right claims that the individual is the rights-holder and the state (by all state organs and actors) is the duty-bearer. This remains the basic model of human rights, but it is increasingly being modified and developed in a world of rapid change in terms of a relative decline in state authority, and the rise of a polycentric world with comparably more powerful non-state actors. Alluding to these changes, Alston argue that there is need for a re-imagining of "the nature of the human rights regime in order to take adequate account of the fundamental changes" that have occurred globally in recent decades (Alston, 2005: 4). The paper takes account of this insight, and in line with situational human rights theory acknowledges that as part of contemporary globalisation, some types of non-state actors – notably business enterprises - are rapidly gaining influence and power that the human rights regime now has recognized it cannot neglect. The conduct of business has become a human rights topic.

This is not a surpirse. Legal development – including human rights law is generally reactive. It responds to new societal experiences that provoke a quest for regulation, restriction and control. This is indeed what has happened in the field of human rights and business. Accidents, events that uproar ethical consciousness and public moral, outright violations of workers rights and communities' suffering from ruthless environmental exploitation are all type of experiences that have triggered demands for human rights protection. Albeit slowly, attempts to define more precisely the human rights duties of commercial actors have been in process, in response to such experiences of economic globalisation. Accelerating rapidly with the neo-liberal economic policies introduced in the 1980s, globalisation has been structured by three interrelated processes: First, the growth of international economic, cultural and normative interaction, ignited by the end of the Cold War, the economic reforms in China under Deng Xiaoping (the one-country, two systems policy), the invention of the World Wide Web, and a

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cascade of information technology innovations. Second, a rapid spread of cultural norms and global consumerism. Markets are spreading rapidly througout the globe. And third, there has been a process of cosmopolitan diffusion of moral and legal norms, where universal human rights have been but one point of reference for legal developments, institutional reforms and more recently regulation of commercial market actors. The latter is, indeed, what interests us here; the current expansion of human rights duties of commercial actors as transnational norms. The new regulatory turn of businesses through the normative human rights system must be understood and interpreted in this global socio-political context. Human rights dynamism is reflexive of these changes in global co-existence, interaction and exchange, where the powers of transnational business entities trigger demands for regulations of business behaviour.

An early advance in this field was the development of corporate social responsibility (CSR) as expanded gradually in Western capitalist economies from the 1950s; although it had reminisces back to the 1920s, when some argued that corporations should be seen as "business services to society" (Rosamaria C. Moura-Leite and Robert C. Padgett, 2011: 529). According to Frederick, CSR in the 1950s mainly referred to three ideas: public managers as public trustees; balancing competing claims to corporate resources (share-holders vs. other stakeholders), and philanthropic services to society (Frederick, 2006).

Over the next decades until the 2000s, there were several shifts in the conceptual structuring and application of CSR by businesses. These shifts reflected changes in the normative foundation of corporate governance. In general, we observe a gradual development towards more responsiveness to the general public, as a means of keeping with businesses' legitimacy in society. Frederick characterises the 1950s and 1960s as a phase of "corporate social responsiveness" with some enterprises start engaging in charity work and philanthropy. Yet gradually, the general public began raising expectations about the functioning of companies' behaviour. While always having beein a f˝critical issue of the Left's agenda, from the 1970s onwards, there was, in some Western economies, a growing attention within the business community on the consequences of the conduct of business on society. Donald (1982) emphasised that an inherent 'social contract' between businesses and society was emerging and became an ideological justification for CSR. (The 'social contract' methafor has reappeared in the late 2000s debate on this issue, but now as a socalled "social licnce' to do business). In the 1980s, the conception that CSR was "good for business" and could improve profits was slowly acknowledged. Focus shifted towards a broader conception of CSR where ethical concerns where combined with institutional responsive practices internally in companies, e.g. by establishment of corporate assemblies with worker representation.[80] Reflecting the public political discourse of the time, a focus on the external environmental impact of conducting business emerged.

By the 1990s, the notion of CSR was widely accepted in global markets, with exception, perhaps, of several rapidly emerging market economies, most importantly in China

[80] This was debated in the Scandinavian social democracies in the 1970s and 1980s, and workers' representation in larger companies' boards of directors was institionalised and made compulsory by company law reforms.

(This is slowly changing – will include a reference to this developmen, with sources). According to Moura-Leite and Padgett (2011: 534), by the mid 1990s "the global capabilities of the internet and related technologies improved the power of institutions to create new pressure on companies to foster greater CSR". CSR was now gradually becoming a financial asset by *restructuring the reputational space* of companies. Increasingly, public reputation was not just determined by the qualities if products and services, standards of technical innovation and design, and so on; rather, these economic reputation was challenged by public perceptions of governance and ethical behaviour, concerns for workplace safety conditions and salaries, environmental awareness, and financial practices, in particular corruption in the conduct of business. For many international companies, CSR became part of the business model to improve public relations, and in the early 2000s CSR demands broadened to include awareness of environmental sustainability, stakeholder communication, and public transparency in the conduct of business (Lee 2008). By this time, CSR also begins to surface in China, and one decade into the new Millennium, Lee concluded with cautious optimism about the development of CSR in China. CSR was "ushered" into China in the late 1990s, and was gaining some ground under the control and guardianship of the state. Yet, while it was gaining some ground on environmental issues, this hardly included human rights concerns (Lee, 2010: 99).

This brings us to the relationship between CSR and the contemporary "human rights and business" discourse. In the 1990s, human rights began to surface in debates on CSR. It was a new topic. The *OECD Guidelines on Multi-lateral Enterprises* of 1976 had not referred to human rights, and neither did the revised Guidelines of 1979, 1984 and 1991. However, when the Guidelines were revised again in 2000, reference was made, albeit in general terms, to the UN Universal Declaration of Human Rights, and more specifically to the need for respecting human rights in companies' operations. According to paragraph 2 of the General Policies of the OECD Guidelines (2000), enterprises should "(r)espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments". Another important international instrument paving way for a rights approach to business responsibility was the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy Reform of 1977. The aim of the Declaration was "to encourage the positive contributions which multinational enterprise can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise". Similar to the OECD Guidelines, the ILO Declaration is voluntary in its nature. Yet, these documents were corner pillars of international CSR discourses and policies in the 1990s, and foundational for the developments in the first decade of the 2000s.

A major breakthrough in human rights attention to the conduct of business came in 1997, when the Sub-Commission on the Promotion and Protection of Human Rights set up a Working Group on the Working Methods and Activities of Transnational Corporations.[81] In

[81] Before 1999, the Sub-Commission on the Promotion and Protection of Human Rights was known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It was dissolved by the Human Rights Council, and met

its first session in 1999, the Working Group asked David Weissbrodt, one of the Working Group members, to prepare a code of conduct for the human rights principles for business enterprises. A first draft of a code was discussed at the Working Group's August 2000 session and revised drafts were discussed at the Sub-commission's sessions in 2001 and 2002.[82] A draft was adopted by the Sub-Commission in August 2003 (resolution 2003/16), titled the Draft Norms on **the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (usually referred to as the Draft Norms).**[83]

In section A, *General Principles*, the Draft Norms say that "(w)ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law**". These and other formulations, for instance, the formulation in section H paragraph 18 stating that "**(i)n connection with determining damages, and in all other respects, these Norms shall be enforced by national courts and/or international tribunals if appropriate**", went far in ascribing legal obligations to businesses, although they were designed as voluntary standards. Hence, confusion and discontent about the meaning, scope and binding nature of the Draft Norms soon occurred, and they met stiff critiques and resistance. The Human Rights Commission, to which the Sub-Commission reported, suggested to its superior UN body, the Economic and Social Council to "(a)ffirm that (the document containing the Draft Norms) has not been requested by the Commission and, as a draft proposal has no legal standing, that the Sub-Commission should not perform any monitoring function in this regard".[84] The Commission, however, did not put the issue to a close, but asked the High Commissioner for Human Rights to compile a report identifying how to strengthen standards on businesses human rights responsibilities, while taking the Norms into account. In April 2005, the Commission created a position as a Special Representative on the issue of human rights and transitional corporations "and other business enterprises".[85] In July 2005, UN General Secretary appointed Harvard Professor, John Ruggie, as Special Representative.**

Human rights and regulation theory

This nexus between human rights norms and moral assessment of business behaviour reflects the underlying idea of modern human rights. Theoretically, human rights are instrumental by guiding purposeful action, and represent evaluative norms and criteria for individual and social behaviour. Hence, in modern societies human rights are social mechanism for protecting against or governing significant social risks in society, or, as Ulrich Bech puts it, risks stemming from industrialisation and globalisation, that is, risks of

for the last time in August 2006. It was followed by a new expert body set up by the Council; the Human Rights Council Advisory Committee, which held its first meeting in August 2008.

82 E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1.

83 E/CN.4/Sub.2/2003/12 (2003).

84 Commission of Human Rights Decision 2004/116, adopted on April 20, 2004.

85 Commission on Human Rights Resolution 2005/59, adopted on April 2005.

modernisation (Bech, 1986: 30). Henry Shue referred to human rights risks as societal "standards threats" that endangered basic human interests, decent living and a normal healthy life (Shue, 1980: 17). Increasingly, with expanding globalisation, market agents - in particular powerful transnational corporations - are "producing" or perhaps more rightly, causing such standard threats, in particular by dictating poor working conditions, polluting local environments, depriving rural people of their land in search for natural resources, and in many other ways. The list of potential human and social harms is long, and reference cases many.

A standard reference, and the most deadly industrial disaster in modern history, the massive leak of methyl isconate gas at Union Carbide's pesticide plant in Bhopal in India on December 3 in 1984, stands out as 'shocking experience' of human atrocities stemming from modern business: The Bhopal case represented a watershed in the growing global awareness of negative human impact of transnational business. Thousands of people in nearby informal settlements died instantly from the leak, and tens of thousands became victims of diseases and disabilities related to the disaster in the years to follow: "Campaigners put the death toll as high as 25,000 and say the horrific effects of the gas continue to this day".[86] Still, a quarter of a century later surviving victims have not been granted proper assistance and remedy, in spite of numerous lawsuits inside and outside of India. The Union Carbide plant in India (Union Carbide India Limited) was owned by Union Carbide in the United States of America with 50 per cent of the shares, and the rest of shares divided between the Indian state and local Indian shareholders. Shortly after the disaster, a group of US lawyers filed more than 145 lawsuits against the parent company, Union Carbide, in US courts (Ruggie, 2013: 7), and the Indian state also made numerous lawsuits. However, the Federal High Court of New York, handling the cases dismissed them and argued that US courts were *forum non conveniens* for the cases; the cases, the Court held, should be brought before India's own courts. The parent company (based in the US) could not be taken to an Indian court, and hence, its complicity as majority shareholder was not held liable. The Indian judiciary, however, proved to be highly ineffective in handling cases brought to court, and only in 2010 were eight of the responsible managers of UCIL convicted for being responsible for "death by negligence" and sentenced to light prison terms and symbolic fines.[87]

The Bhopal case demonstrates very well the "standard threats" that Shue refers to. It also shows how lack of appropriate protection mechanisms renders people powerless and without effective rights safeguards. There was a lack of "social guarantees" (in this case an effective judiciary), that left people open to risk and traumatic harm. According to Shue "(c)redible threats can be reduced only by the actual establishment of social arrangements that will bring assistance to those confronted by forces that they themselves cannot handle" (Shue, p. 26). To be protected from such harms, people need firm institutional protection, "not protection against any imaginable threat, but defences against predictable remedial threats

[86] See http://news.bbc.co.uk/2/hi/south_asia/8725140.stm (2010)
[87] *Ibid.*

(*ibid*. p. 33). It is exactly this function as *institutional mechanisms of protection against standard threats* that is the essence of human rights in practice.

It is important to note that this feature of human rights is adopted by the new business and human rights agenda: To expand the field of social, and legal, guarantees to protect people from social and human harm that follows from business behaviour. According to Rugggie, "(i)ndeed, history teaches us that markets pose the greatest risks - to society and business itself - when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability".[88] In studying this issue, much of current research is addressing administrative and legal regulation, and organisational mechanisms to prevent violations from happening (notably different models of human rights due diligence assessment). Hence, the business and human rights field is a new regulatory space (Hancher and Moran, 1989) that provides justification, legitimacy and human rights based mechanisms for risk management, that is, mechanisms "to reduce undesirable effects through appropriate modification of the causes, or less desirable, mitigation of the consequences" (Renn, 1998: 49-70). A human rights approach implies that we address how human rights are rules of regulation that structure the relationship between businesses, and between business, governments and other stakeholders.

While we recognize that human rights standards have not yet penetrated the normative foundation of business, we see trends toward greater attention, knowledge and concern for human rights among domestic and international business actors. The assumption that human rights provide both ethical motivations and practical incentives for businesses to take rights seriously is not overtly naïve; human rights are part of a regulatory turn.

This implies that there is a case for both rational and normative institutional perspectives in studies of human rights responsibilities of business behaviour. From a rational business perspective, a company will pursue its legitimate goal of profit maximization, by market adaptation. Businesses continuously adapt to new demands, including norms in the market (competitors invent new ways of operating that are giving competitive success), or they may stem from new state regulations. Hence, demands of the market change over time; the market is not a given, and external regulatory requirements and rules by states or international institutions are continuously influencing domestic and international economic relations. The regulatory space is in constant flux. Human rights and environmental-friendly demands are among the latest regulatory standards that have been introduced. When businesses adopt these standards, it affects turns in the regulatory space. It is, however, paradoxical that this development arises in times when the neo-liberal economic policies for three decades have demanded deregulation of state and the private sector. One may wonder if the pendulum is on a return swing.

[88] A/HRC/8/5, 7 April 2008. 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.

Human rights law and business – concepts, principles, challenges

Recent formulation of human rights regulation of business behaviour was spearheaded by the work of the UN Special Rapporteur on Human Rights and Business, John Ruggie, from 2005-2011. The 'Ruggie process' restructured and reinterpreted existing human rights standards to make them applicable to market actors, reshaping the regulatory space, and by implication, the competitive environments of businesses. Critics of this process argue that voluntarism is not, and that only a legal doucment (treaty) will be able to address the accountability deficit of the buisness-human rights nexus. I return to this debate in the final section.

Ruggie attempted to apply what he refers to as "principled pragmatism" to his work. Through two mandate periods from 2005-2011, he produced a series of documents through a process of consultation with numerous stakeholders worldwide, and developed a *Framework* (the 2008 report) and *Guiding Principles* (the 2011 report) on human rights and business. Ruggies' basic approach is institutional combined with legal perspectives. He viewed the "root cause" of the quandary of human rights and business to be governance gaps created by contemporary globalisation "between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation". [89] Typically, the worst cases of business-related human rights harms occur in countries where governance challenges are greatest – they takes place disproportionately in low income countries, and countries with weak rule of law systems, large corruption problems and countries with high levels of internal conflict and in states with pockets of stateless territories.[90]

By the 1990s it had become widely recognized that the power of multinational corporations had expanded beyond the reach of effective public governance, and increasingly implied opportunities for companies to commit wrongful acts without sanction and redress. The framework and principles for the conduct of business that were developed, aimed at governing such prevailing governance gaps by regulating and reforming the conduct of both business and governments, by developing complementarity between public accountability and private actors' responsibilities.

Ruggie critiqued the Draft Norms for their "exaggerated legal claims and conceptual ambiguities…..engulfed by (their) own doctrinal excesses" (Ruggie, 2013: 54). Rather, Ruggie sought to develop an authoritative source of policy guidance for governments, businesses and civil society actors by "establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments".[91]

89 A/HRC/8/5, p. 3.

90 Ibid., p. 6.

91 A/HRC//17/31 (21 March 2011). Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, p. 7.

The "Ruggie Framework" was based on three pillars, and a conceptual architecture for identifying the respective roles of government and business in protecting and respecting human rights, and for their separate and shared responsibility for remedial efforts when human rights harms are committed. Pillar I refers to the state's duty to protect against abuses by third parties (in this context, business enterprises) through appropriate policies, regulation and adjudication. Pillar II refers to corporate responsibility to respect human rights, which implies duties to avoid infringing on people's human rights, and take action against adverse impact if it occurs. The third pillar refers to responsibilities to remedy and compensation, and to provide legal and or non-legal remedies in cases of human rights abuses. Within this three-pillar framework – which do not imply new norms and human rights standards, but a new space for application of existing standards and treaty-based rights – Ruggie identified a set of 31 principles with a number of sub-provisions, specifying the responsibilities of companies and duties of states.

Since the adoption of the Framework and the Guiding Principles, international and national effort to their implementation has been made. When the UN Human Rights Council adopted the UNGP in June 2011, it also established an Interregional Working Group on the issue of Human Rights and Transnational Corporations and other Business Entities to oversee and contribute to the implementation of the GPs by the UN (Ruggie, 2013: xxi). The Working Group was mandated to promote dissemination of the Principles, to identify and learn from good practices, support national capacity-building, develop dialogue with government and other stakeholders, and make recommendations about the implementation of the GPs at national, regional and international levels (Dhanarajan and O'Brien, 2014: 11). The mandate of Working Group was renewed in 2014 by the UN Human Rights Council, and in the renewal Resolution, the Working Group was tasked, in particular, in advancing the development of national action plans for the implementation of the Guiding Principles. In Geneva an annual Global Forum on Business and Human Rights has been held annually from 2012 to promote support and raise debates and dialogue among businesses, governments, non-governmental organisations and human rights academics.

A fundamental feature of the Guiding Principles is that they do not invent new law, and new standards; they rest on the existing system of human rights law, institutions and mechanisms. The main obligation of human rights protection and enforcement remains with the state. At the same time, the GPs strengthen the requirements that businesses as non-state actors and *organs of society* (Preamble of the Universal Declaration of Human Rights) have responsibilities to respect and not harm human rights norms. This re-orientation of human rights norms has been under way for some time (cf. Alston, 2005; Andreassen, 2010). It gets a break-through, as Dhanarajan and O'Brien states, "at a time when this was essential to ensure their continuing relevance as a narrative responsive to people's lived experience of indignity and injustice" (Dhanarajan and O'Brien, op.cit., p. 12). Yet, controversy remains on whether the best way of making business respect human right is through a legal approach by

developing a binding treaty, or a system based on voluntariness, which also entails institutional and cultural changes through awareness, monitoring and public discourses.

The UNGP represents a middle ground between these approaches. It stresses that companies have responsibilities to respect human rights and the "do no harm" principle. At the same time it puts emphasis on efforts needs to be made to develop new business behaviour through *due diligence*, and institutional and cultural changes inside business entities, and across business sectors. This duty of companies to respect human rights is, at the same time, nested in state duty to protect. A policy response to this duty is the development of the new mechanism if national action plans for business and human rights, encouraged by the UN Working Group.

Disputes on the best strategic paths towards respect for human rights – regulating transnational corporations through an international treaty instrument vs. a more pragmatic position that sees national law and voluntary initiatives as predominant strategies to advance business responsibilities for human rights - continues unabated in spite of the growing impact and dissemination of the UNGPs since their adoption. The issue was made evident in June 2014 when the Human Rights Council passed two resolutions on human rights and business.[92]

The first resolution adopted by a sharply divided vote (20 in favour, 14 against and 13 abstentions) decided to establish an intergovernmental working group with the mandate to elaborate on a legally binding treaty "to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[93] Hence, a majority of the Council's members did not vote for the resolution, and most of the home countries of transnational enterprises (the US, EU, South Korea, Japan) voted against, while China supported the resolution with significant conditionality. Quite remarkably, in defining the target of a future treaty, the resolution decided that it should address "transnational corporations and other business entities", but then adds in a footnote that "other business entities "denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of domestic law". This is certainly highly contentious, and implies, as illustration, that the language of the proposed treaty would have covered international brands purchasing garments from the factories housed in the Rana Plaza Building in Dhaka in Bangladesh, which collapsed on 24 April 2013 with a death toll o f 1.129, and more than 2.500 injured people, but not the local factory owners (Ruggie, 2014: 1). Critics of the a legalization of the issue thus argue that in view of past history of the making of human rights treaties, it is highly unlikely that a treaty will emerge and gather wide support in the near future. This certainly raises the question about what to do "between now and then" (Ruggie, op.cit). One straightforward answer is to implement as effectively as possible the UNGPs. However, the danger is that a long-lasting process of drafting a new treaty will significantly undermine efforts to implement the Guiding

[92] A/HRC/26/L.22/Rev.1, p. 1f.
[93] Ibid.

Principles. This would represent a setback in in the effort to advance the human rights and business agenda.

The second resolution reflected the view of the opponents of a treaty, and was proposed by a group of states supportive of the continued implementation of the UNGPs. This resolution was adopted unanimously by the Human Rights Council, without a vote, and expressed a strong support to the continued implementation of the UNGPs, including development of national action plans for the implementation of the Guidelines, and the role of the Working Group in developing national guidelines for judicial and non-judicial remedial mechanisms for victims of violations. The resolution also called for a three years prolongation of the mandate of the Working Group. In fact, the resolution may play an important role in the process ahead: "In the short run, the consultations it calls for on "the full range of legal options and practical measures to improve access to remedy" led by the Office of the High Commissioner and involving all stakeholder groups, will contribute practical information, insights, and guidance as the treaty negotiations get under way" (Ruggie, 2014, p. 6).

The quest for making businesses responsible for respecting human rights in their operations can hardly be pursued by one regulatory strategy; rather, it calls for composite measures that complement each other. Experiences with the Draft Norms in the early 2000s indicate that this was not a constructive path, and should not be repeated. The question whether a legal approach will give better results in terms of businesses' increased awareness, implementation and enforcement of human rights norms without hard-law regulation is hypothetical and not possible to answer *ex ante*. One issue is the uncertain path towards a treaty, and the challenge of having it ratified and implemented by the most central home states of TNCs; equally important is the question of how the key actors, that is, the transnational companies and other businesses enterprises, including host country subsidiary suppliers, will respond to different strategic paths. Creating more just business requires that respecting rights is integral to *doing* business. It requires changing conceptions of business as "organs of society", and institutional and cultural changes in the operation and functions of companies. It requires institutional internalization of human rights norms. A comparable experience has been made in terms of companies' responsibilities for environmental change in the *Sustainability Company Project.*[94] The aim of this research and innovation project, which started in 2010, was to examine how environmental concerns could be better integrated into decision-making and operations of companies. By doing this, the project aimed to contribute to sustainable development.[95] This, however, clearly require mixed strategies. According to the project outline, "(t)aking companies' substantial contributions to climate change as a given fact, companies have to be addressed more effectively when designing strategies to mitigate climate change. A fundamental assumption is that traditional external regulation of companies, e.g. through environmental law, is not sufficient. Our hypothesis, confirmed through research, is

[94] This is an international research project at the Department of Private Law, University of Oslo, see: https://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/ (accessed June 1, 2015).

[95] http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/project-description/ (accessed July, 2, 2015).

that environmental sustainability in the operation of companies cannot be effectively achieved unless the objective is properly integrated into company law and thereby into the internal workings of the company".[96]

This experience from the field of environmental law and protection reflects limitations of international legal regulation, and emphasises the importance of a mixed strategies that combine national legal regulation (of company law) with changes in company cultures and institutional reforms. It also points to the sectorial dimension of competitive markets. Companies compete within market sectors, and make cost-benefit analyses of the commercial and normative strategies they pursue. Regulations should reflect sectorial approaches that make human rights integral to cost-benefit calculation and as part of building and retaining commitment among business actors. Sectorial approaches in the implementation of the Guiding Principles may help construct and institutionalise intra-sectorial commitment enhancing the intra-sectorial regulatory spaces. Respecting human rights should give companies a competitive advantage (enhancing their benefit), while at the same time serve to manage their risks, and avoid doing human rights harm which will undermine their reputation and hence their market position, or what Ruggie referred to as *social expectations* in his 2008 report. However, the challenge of the cost-benefit approach to business and human rights is, as Deva rightly points out, marred with the reverse calculus where business may chose a fee or a reputational loss if the expenses of paying fees, or loss in reputational capital, is commercially smaller than the profits of harmful human rights practices. (Ref to Deva in here). This clearly accounts for invoking legal approaches to the ensuring respect for human right, primarily by improving national legislation and enforcement; whether an international treaty will give added force to ensuring rights commitment is, as noted still hypothetical. The argument here is that international law – in case of a new binding treaty on business and human rights - requires domestic jurisprudence as the predominant layer of law, and domestic means of implementation and enforcement. For an international treaty to be effective, recurring gaps of various types of governance need to be managed. This concerns the structure and governance of the legal and policy domains, that is, effective norms and practices of national and international law and jurisdictions that are capable of regulating multinational companies in both host and home state's jurisprudence, and legitimate, regulatory political institutions to ensure judicial independence. It also concern the support and advocacy for rights and responsibilities across border by civil society, including independent and effective media as a sphere of civic governance; and it certainly concerns corporate governance – how human rights principles are adopted and internalised by multinational companies and other business enterprises. The main human rights problem of today is not lack of human rights norms, but the failure of states to *implement* existing binding human rights instruments. A new legal treaty – on state regulation of business behaviour – requires that these norms be internalised in the culture, conduct, and

[96] *Ibid.* Se also B. Sjåfjell and B. Rochardson (eds.). Company Law and Sustainability – Legal Barriers and Opportunties (Cambridge: Cambridge University Press, 2015).

behaviour of multinational and other enterprises. With the adoption of a resolution by the Human Rights Council of Resolution 26/9 of 26th June 2014, the work with a possible treaty should not distract the implementation of the Guiding Principles which have gained astonishing support over the last four years.

(Txt to be inserted)

Conclusions

In spite if significant advances in soft law over the last years, there is still no consensus that corporations should have obligations under international law. What is quite obvious is that the work of the UN Special Representative on Business and Human Rights brought in a dynamism in this field of human rights fulfilment which was long overdue. The gradualist approach chosen by Ruggie should be commended, although his work was not the end game. In fact it has opened up for much broader processes of strategic complementarity, that is, further advances in this field need to expand along different lines; voluntary and mandatory; cultural and institutional; economic and political. This is in fact a strategic approach which resembles the integrative framwork of corporate regulation proposed by Deva (2012). Of late, much attention has been put on the quest for an internationally binding treaty. The ongoing work on a draft rteaty (text to be to be updated) is likley to be in the construction phase for a long time, important as it is; yet it should not divert attention from other strategies and issues, in *the indeterminate meantime*. The UNDG discourse has brought a momentum which should not be lost; it has been quite successful, not least, in bringing in companies in the process of gradual attitudal and behaviorial change. This might sound utopian and naïve, but it is not. There is clear evidence that it is possible to advance human rights awareness and conecerns also among business actors. The growth of the Global Compact and other reporting initatives are not in themselves, so far, statistically verifying change, but they do indicate that some change is taking place. We need more knowledge, however, to etablish how international voluntary human rights initiatives may lead to business behavorial changes. What is obvious is that interest of businesses themselves, achieved by persuation, conviction based on knowledge and conviction, or by "the power of the market" – repuational conerns (or most liklely a mix of these factors), have entailed communicative impulses that are required for better human rights respect and compliance by companies. It is essential, moreover, that human rights respect and compliance does not just concern MNCs, but also concerns "any other business enterprise" – small, medium-sized or large, national as well as transnational. Here, there is s serious weakness of the ongoing work with a possible new treaty in its eclusion of national companies.

Over time real changes need to be refelcted in a variety of legislative measures and regulations. A new and important field of law and regulation is bilateral and multilateral trade agreements; equally important are reforms of domestic company law and regulations. The logic of human rights law requires doemstic legal adaptation and ccompliance, and human rights law is never stronger than the indiviual states is willing and able to do. State

willingness and capacity for human rights compliance is the Achilles heel of human rights law. Hence, business respect for and compliance with human rights norms and law relies on governance reforms. But in the case of business and human rights, governance refoms must take place at two levels: corporate governance and state governance. The governance capacity and reforms of states must permeate the vision and mission of commercial actors. It is not very likely that this will happen over night, but it is a necessesary condition for human rights change in the business and human rights field to take place. The regulatory turn, therefore, requires a nexus of political and economic-institutional processes of change. Law, inculding a stronger human rights legal framwork is an important factor, but conditional on other changes in culture, political commitment and the normative structuring of markets. Market-sectorial approaches of regulation and reform may help to retain the interest and commitments of commercial actors as long as regulation is conceived as contributing to a fair level playing field of respective sectorial markets.

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