

Lecture 4: International business and human rights

I. The traditional focus of human rights law on public authorities

- Traditionally, human rights focus on the acting of the state and other governing entities (provinces, communes etc.). Only institutions exercising public power are the addressees (obliged subjects) of human and fundamental rights norms. Private persons are not directly bound (*no direct horizontal effect*).
 - *exception: h.r./f.r. norms directly prohibiting* certain activities (e.g. the prohibitions of slavery, human trafficking, eugenic practices, reproductive cloning and human organ trade in art. 3, 5 ChFR)
- However, private persons are indirectly bound via the legal norms of criminal law, civil law and admin. law or admin. decisions (*indirect horizontal effect*). If private actors encroach on the freedom, property, human dignity or other protected goods of others, the *public authorities must intervene* in order to protect the h.r./f.r. of the victims (→ **duties of protection**)
 - example: the state must stop and prosecute private persons who threaten others because they express their opinion in the social media
 - example: the insufficient protection of privacy by appropriate laws against the encroachments by big data companies (Facebook, Google etc.) constitutes a violation of the right to privacy by the states, which fail to perform their duty of protection

II. Global enterprises and their direct and indirect impact on human rights

- due to the enormous financial and economic power of global enterprises (which often exceeds the power of many states), the activities of international enterprises, in particular of the big global enterprises can have a strong direct and indirect impact:
- threatening to cease their economic activities in a state, big global enterprises can often force a state to pass laws and regulations that serve their interests but disregard human rights
 - e.g. excessive protection of private property, unfair regulations on the expropriation of land owners in favour of investors, deficient protection of employees' rights, consumer rights or the environment
- due to their economical importance as employer, tax payer, investor, foreign currency earner or supplier with important goods and services, they can often treat their employees (e.g. by hard or unsafe working conditions), harm their neighbours (e.g. by polluting the environment or encroachments by their security services) or fleece the local consumers (e.g. by excessively collecting personal data) in a way that leads to a situation incompatible with human rights - without the state intervening appropriately to fulfil its duty of protection
- furthermore, state authorities may commit themselves h.r. violations (e.g. illegal expropriation of land owners or suppression of trade union activities) in order to attract/keep global investors
- a new problem lies in global players operating worldwide social media and messenger services (e.g. Telegram) who facilitate attacks on private persons by not blocking offensive or inciting contents but are out of reach for the domestic authorities because they are operating from and registered abroad

III. The responsibility of enterprises in the field of human rights

- With regard to the possible impact of their activities on human rights, global enterprises have the *political and ethical responsibility*
 - to avoid negative effects of their activities on human rights
 - to respect human rights standards themselves (without intervention of the state)
 - to urge their partners in the state to respect human rights (even if it increases the costs) and
 - to refrain from taking any advantage from h.r. violations in the state (e.g. by refusing to open new factories on land expropriated illegally or under unfair conditions)
- the awareness (of the public and of the enterprises) of this corporate responsibility has risen considerably in the last two decades

IV. Possible and current approaches to implement the responsibility of enterprises in the field of human rights

1) Possible approaches

- to generally *extend the direct horizontal effect* of h.r. to private persons with special economic power
 - approach chosen by the European Court of Justice for some economic fundamental freedoms of the European Union citizens but meeting objections in human and fundamental rights doctrine
- to introduce *more clauses with direct horizontal effect* (prohibition clauses) into international human rights treaties
 - an option for the future; difficult to implement
- to promote the *self-commitment* of global enterprises *in non-binding agreements*
 - an instrument that has already proved ineffective in environmental law...
- to promote the *self-commitment in binding agreements* and the *certifying of "human rights-aware enterprises"*
 - thus appealing to the consumer to buy responsibly - an effective instrument?
- to prohibit the import of goods produced in violation of human rights
 - an approach difficult to implement for goods assembled of parts produced in many different countries
- to introduce *domestic criminal and civil liability* of enterprises and their management for h.r. violations committed or fostered abroad
 - an approach entailing difficult legal problems
- to prepare a *comprehensive international treaty on the responsibility of transnational enterprises in the field of human rights*
 - could include clauses on h.r. due diligence and on criminal and civil liability of enterprises and managers
 - could oblige domestic authorities to intervene against domestic enterprises committing or fostering h.r. violations abroad
 - currently, a UNHRC working group is preparing a draft (third revised draft presented 08.2021)

2) Current approaches

- raising awareness by information and discussion
 - see the UN FORUM ON BUSINESS AND HUMAN RIGHTS (since 2012)
 - see the BUSINESS AND HUMAN RIGHTS JOURNAL (Cambridge, since 2016)
- development of human rights policies by many transnational enterprises
- binding self-commitments
 - e.g. the Bangladesh Accord of 2013 (a binding agreement between global brands and retailers and trade unions to secure safe and healthy working conditions in the Bangladeshy garment industry)
- UNHRC resolution of 2011: GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS
 - political guidelines (not legally binding)
 - 31 principles stressing (a) the duty of protection of the state, (b) the corporate responsibility to respect human rights and (c) the need of the citizen to have access to effective judicial remedies and other state-based and also non-state-based grievance mechanisms
- domestic *legislation on human rights due diligence*, in particular *in the supply chain*
 - obliging domestic enterprises to carefully screen their foreign suppliers for potential h.r. abuses in the foreign manufacturing process or even to conduct h.r. due diligence throughout all business relationships in the value chain
 - a new development still in progress
 - an early example: sect. 54 of the UK Modern Slavery Act of 2015 on transparency in the supply chain (requiring domestic businesses to make an annual statement on steps taken to prevent slavery and human trafficking in their supply chain)
 - other examples, each with slightly different approaches, in France, the Netherlands, Australia, Norway, Switzerland and Germany
 - in preparation: European Union Directive on Corporate Sustainability Due Diligence
 - proposal of the European Commission of February 2022

V. Further reading

- *Bantekas, Ilias; Stein, Michael Ashley (editors): The Cambridge Companion to Business & Human Rights Law, 2021*
- *Bilichitz, David: The Necessity for a Business and Human Rights Treaty, Business and Human Rights Journal 1 (2016), p. 203 ff., <https://doi.org/10.1017/bhj.2016.13>*
- *Gomez, James; Ramcharan, Robin (editors): Business and Human Rights in Asia. Duty of the State to Protect, 2021*
- *Quijano, Gabriela; Lopez, Carlos: Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?, Business and Human Rights Journal 6 (2021), p. 241 ff.*
- *Schutter, Olivier de: International Human Rights Law. Cases, Materials and Commentary, 3rd edition 2019, p. 530 ff.*
- *Schutter, Olivier de: Towards a New Treaty on Business and Human Rights, Business and Human Rights Journal 1 (2016), p. 41 ff., <https://doi.org/10.1017/bhj.2015.5>*