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# Non-state actors and human rights

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## Overview

- Increasing importance of non-state actors for the realisation of human rights
- Multinational enterprises (MNEs) / transnational corporations (TNCs) as non-state actors
  - Status of MNEs in general international law
  - Legal framework
- Responsibility of MNEs for implementing human rights

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## Increasing importance of non-state actors (1/2)

- Privatisation of governmental functions
  - Outsourcing of prisons, schools, public services
  - Are contractors bound by human rights? e.g. private security companies
- Globalisation
  - Possibility for enterprises to outsource different links in the supply chain
  - Competition between states to attract foreign direct investment
- Trade liberalisation
  - Free movement of capital, goods and people
  - Impact on human rights, especially pressure on labour rights?
    - Regulatory competition, race to the bottom?
    - Investment treaties: clauses



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## Increasing importance of non-state actors (2/2)

- Shift of competences away from governments to international organisations
- Influence of civil society on state decisions
- Increasing number of internal conflicts
  - Internally displaced persons
  - Protection of minorities
- Growth of international terrorist networks and international organised crime
  - Cannot be attributed to one state
  - Affects more than one state

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## MNEs in international law (1/2)

- Generally not recognized as subjects of international law
  - No direct obligations
  - No direct responsibility
- Indirect responsibility under international law
  - Acts of MNEs can be attributed to a state
    - IG Farben during World War II
    - Private security companies?
  - Acts of MNEs can be attributed to an individual
    - Crimes against humanity
    - Cf. Art. 5 ICC Statute



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## MNEs in international law (2/2)

- Distinction between responsibility and accountability?
  - Responsibility on a voluntary basis
  - Accountability as legal obligations to implement international standards
- New principles to guide the companies in fulfilling their responsibility
- New concept of accountability influenced by human rights policies

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## Legal framework: self-regulation (1/2)

- Authors
  - MNEs themselves
  - International Organisations
  - NGOs
- Motives
  - Reputation:
    z.B. http://youtu.be/ToGK3-2tZz8
  - Consumer protection
  - Humanitarian considerations
  - etc.
- Applied standards
  - Deference to existing norms
  - "New" standards



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## Legal framework: self-regulation (2/2)

- Examples
  - ILO Tripartite Declaration
  - OECD Guidelines for MNEs
  - UN Global Compact
  - UN Draft Norms on TNC responsibilities
  - John Ruggie's framework: Protect, respect and remedy
  - International Finance Corporation (IFC) Sustainability framework
  - ISO26000
  - Business Social Compliance Initiative (BSCI)
  - etc.

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## Legal framework: domestic regulations

- US: Alien Tort Claims Act of 1789:

  "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

  - Extraterritorial application
  - High risk of litigation: Many cases against companies since 1980
  - Applicable law: Customary international law
- Other domestic regulations
  - Decision by governments to link export credit guarantees to human rights impact assessments
  - Criminal law for abolishing child prostitution (e.g. tourism)
  - etc.



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## International reactions (1/2)

- UN “Draft norms” on business and human rights
  - Combine international and domestic responsibility
  - Build upon binding horizontal obligation of states to prevent human rights violations by private actors
    - Binding domestic norms for MNEs
    - States remain responsible under international law
  - Adopted by the Sub-Commission on the promotion and protection of human rights in 2003 (E/CN.4/Sub.2/2003/12/Rev.2)
  - No consensus on binding nature of norms ⇨ Not approved by the Human Rights Commission in 2004 (decision 2004/16)
  - Secretary General appoints Special Representative on Business and human rights, John Ruggie

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## International reactions (2/2)

- Report to Human Rights Council, by John Ruggie, 2008 proposes new framework: protect, respect and remedy
  - State duty to protect
    - Prevent, investigate, redress and punish abuse by private actors
    - Extraterritorial scope is still unclear
  - Corporate responsibility to respect
    - Act with due diligence to avoid infringing on the rights of others
    - Comply with national laws + respect human rights
    - Reflected in many soft law instruments
  - Access to remedy
    - Access to formal judicial systems is difficult for victims
    - Therefore: Develop non-judicial mechanisms



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## Current state of the debate

- "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" endorsed by the Human Rights Council in June 2011
- Needs to be further developed in order to become operational
  - New working group and forum based on the Human Rights Council Resolution (A/HRC/17/L.17/Rev.1); Working group appointed in October 2011
  - First UN-Forum on Business and Human Rights took place in December 2012 in Geneva
  - Role of National Human Rights Institutions (e.g. Denmark, Australia)
  - Company and sector specific implementation
  - Studies by NGOs

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## Examples of implementing corporate responsibility

- Oslo Convention on cluster munitions
  - Implementation in national law required
  - Belgium, Ireland, Luxemburg, New Zealand, Italy and Swiss law for implementation include ban on investment in cluster munitions producers in national law
- Montreux Document on Private Military and Security Firms (PMSCs) and the related Code of Conduct
  - Implementation of Montreux Document in national law required
  - International Code of Conduct (ICoC) may serve as an instrument for certification or – if required by the state – licence to operate
  - ICoC Oversight mechanism adopted in February 2013



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## Case study: Kuoni

- How to implement due diligence in practice
- Who is monitoring the implementation?
- Case study: Kuoni (travel agency):
- http://www.kuoni.com/corp-responsibility