

A Brief History of the Development of Human Rights & Business at the UN

1. The United Nations and transnational corporations during the 1970's

- On the back of revelations that US company, ITT, had conspired with the CIA to interfere in the internal political leadership of Chile in 1972, Chile led an initiative within the UN Economic and Social Council (ECOSOC) to adopt a resolution that created a study group in charge to study "the role and effects of multinational companies in the development process, particularly in developing countries, and their implications for international relations".¹
- Following this resolution, and under the influence of a group of States (referred to as the 'Group of 77'), the General Assembly of the United Nations adopted the program of action on the establishment of a 'new international economic order' in 1974.² Section V of this resolution was entitled "**regulation and control of the activities of transnational corporations.**"
- The implementation of this action program resulted in the creation of the **United Nations Centre on Transnational Corporations (UNCTC)**³ and the **Intergovernmental Commission on Transnational Corporations (ICTC)**, attached to the United Nations Secretariat and composed of 48 members. This latter body was responsible for defining the objectives of the UN CTC.⁴
- The whole process aimed to regulate the activities of transnational companies in order to give States the means to effectively monitor their activities on their territories, and to create an international legal statute to regulate transnational companies. The Centre was mandated to elaborate a **code of conduct on transnational corporations.**
- While a text for the code was produced there was no agreement among the states on the legal nature of the text, and so **the code was never adopted.**

2. The 1990's: Replacing Hard Law with Soft Law

¹ Resolution 1721 (LIII), July the 28th 1972 of the UN Economic and Social Council du Conseil.

² The UN General Assembly adopted on the 1st of May 1974 the Declaration on the Establishment of a New International Economic Order (3201 Resolution (S-VI)) and the Program of Action on the establishment of a new International Economic Order (3202 Resolution (S-VI)).

³ Resolution 1908 (LVII), 2nd of August 1974, ECOSOC.

⁴ Recall that ECOSOC is one of the five principal organs of the United Nations, next to the secretariat of the General Assembly, the Security Council and the International Court of Justice.

- ***Closing of the UNCTC and the ICTC:*** In 1992, as part of a restructuring of the United Nations Secretariat,⁵ the UN CTC's was incorporated into the Department of Economic and Social Development and finally closed in 1993. In 1994, the continuing work of the ICTC was merged with the UN Conference on Trade and Development (UNCTAD).⁶
- ***1992, the Earth Summit in Rio de Janeiro:*** Corporations play an active role in the process of developing the global 'Action Plan of Agenda 21',⁷ which is the design platform of countries' approach to development for the next generation. The Earth Summit marks a systemic shift in the political direction of how States conceive of the way to address accountability of corporations. No longer is the objective to establish an international legal framework to regulate transnational corporations, but rather transnational corporations now are viewed as partners in growth and development, with some states actively inviting them to participate in these international spaces.
- ***1998, Lead up to the 'UN Norms':*** the UN Sub-Commission on the Promotion and Protection of Human Rights passed a resolution to establish a 'sessional working group' to *inter alia* 'examine...the effects of transnational corporations on human rights'. In 1999 this working group set about developing a Code of Conduct for Transnational Corporations.
- ***2000, the Global Compact:*** In 1999 then Secretary General of the UN, Kofi Annan, called on businesses to set up and establish principles upon which to operate in the interests of advancing a form of globalization that works for everyone. By July 2000 the first meeting related to the Global Compact took place in New York. The UN Global Compact was the first step in a softer approach to developing a global framework related to the activities of transnational corporations. Launched at the initiative of the Secretary General of the United Nations in 1999, the Global Compact requires companies to embrace, support and enact, within their sphere of influence, the ten principles in the 'four core areas' of human rights, labor, corruption and environment. There is no remedy mechanism attached to the Global Compact, and no recourse against companies that violate the core principles, other than the potential for the Global Compact to remove them from the list of companies committed to them.

3. The 2000's: the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

- ***The finalization and adoption of the Norms by the UN Sub-commission:*** By 2003 the sessional working group set up by the United Nations Sub-commission on Human Rights to explore the effects of transnational corporations on human rights

⁵ Restructuring of the United Nations Secretariat, the Secretary-General notes(A/46/882, 21st of February 1992.

⁶ Resolution 1994/1, July 14th 1994, ECOSOC.

⁷ Chapter 30, "Strengthening the role of trade and industry" of Agenda 21.

(mentioned above) had drafted a proposed set of new rules for corporations in relation to human rights which they submitted to the Sub-Commission for approval. These new draft rules are called the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* ('the Norms'). This ambition of the UN Norms were different and more expansive than any previous attempts to develop a set of standards for corporate conduct. In the preamble of the Norms it reads that "transnational corporations and other business enterprises, as organs of society, have also the responsibility to promote and safeguard the rights contained in the Declaration universal of all human rights "and they and their staff," must respect the principles and standards subject to a general recognition enshrined in numerous United Nations conventions and other international instruments". The Sub-Commission adopted the Norms in 2003.

- ***Rejection of the draft norms by the UN Commission on Human Rights:*** When the Sub-Commission submitted the Norms to the Commission for approval by States in 2004 they were rejected as having no legal value.⁸ In their decision, the Commission claimed not to have requested the Sub-Commission to carry out the creation of such a document. The rejection of the text by the Commission of Human Rights, an intergovernmental body, was due to the potential legal implications of the text, since it was intended to impose direct obligations on businesses, as well as States.⁹

4. 2005-2011: from the Mandate of the UN SRSG to the UN Guiding Principles

- ***2005, nomination of the UN SRSG on business and human rights:*** In the wake of the rejection of the Norms there was much division and as a result then Secretary-General of the UN, Kofi Annan, appointed the primary author of the Global Compact, Professor John Ruggie, to continue examining the issue for three years under a mandate of the Human Rights Council, referred to as the *Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises* (the 'SRSG'). In a 2006 report to the Human Rights Council by the SRSG he summed up the mood around this division as follows: "earlier debates ended in stalemate – with most of business opposed, many if not most human rights groups in favor, and governments adopting the SRSG's mandate as a means to move beyond the stalemate"¹⁰

⁸Resolution 2004/116, §. c: "Affirm that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard".

⁹ "States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises", §17 of the Norms.

¹⁰ SRSG, (2006) '*Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*', U.N. Doc. E/CN.4/2006/97. Available at: <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>

- ***The mandate of the SRSG:*** The SRSG was first given a mandate to identify and clarify standards of corporate responsibility and transparency of enterprises with regard to human rights (E / CN.4 / RES / 2005/ 69). His mandate was then renewed June 18, 2008 for three years, to provide: 1/ concrete recommendations on how states can meet their obligation to protect human rights when it involves transnational corporations ; 2/ to deepen the concept of "corporate responsibility to respect human rights"; 3/ to explore options and make recommendations to the national, regional and international level to increase access to means of redress to those affected by violations of human rights caused by corporate activities (A /HRC/RES/8/7).

- ***2008 SRSG discredits the UN Norms in first report to the UN Human Rights Council:*** Delivering “his own assessment of the exercise”¹¹ to create the Norms, the SRSG concluded that the Norms were entangled in “doctrinal excesses” which “exaggerated legal claims and conceptual ambiguities [which] created confusion and doubt”. At the time the SRSG’s principle concern was that the Norms took “existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law – hard, soft, or otherwise”. His second main concern was that “while it may be useful to think of corporations as “organs of society,” in the preambular language of the Universal Declaration, they are specialized organs, performing specialized functions... The Norms... articulate no actual principle for differentiating human rights responsibilities based on the respective social roles performed by states and corporations.” In short, he said that the responsibilities of states are not the same as those of corporations, and the Norms did not clearly differentiate the different types of responsibilities these have. He continued “lacking a principled basis for differentiating responsibilities, the concept of “spheres of influence” is left to carry the burden... But it has no legal pedigree... Neither the text of the Norms nor the Commentary offers a definition... So the strictly legal meaning of the concept remains elusive”. This left the basis for advancing this concept in the Norms legally uncertain.

Considering the potential for making advances beyond the Norms the SRSG noted that “there are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended. Moreover, there are no inherent conceptual barriers to states deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firms, or by establishing some form of international jurisdiction. But these are not propositions about established law; they are normative commitments and policy preferences about what the law should become that require state action for them to take effect”.

¹¹ Above, n 11, para 55.

- **2011, Adoption of the UN Guiding Principles on Business and Human Rights:** The exercise of his two terms allowed the SRSG to draft text for a new set of non-binding responsibilities for corporations called the Guiding Principles on Business and Human Rights ('the Guiding Principles').¹² In June 2011 the Guiding Principles were adopted by the Human Rights Council. The Guiding Principles do establish that "businesses should respect human rights", although no system was included to reprimand businesses for non-compliance, beyond restating the States duties to provide remedy. In the absence of any binding legal effect, the political effect of this text is nonetheless significant since it has notably led to the expansion of the concept of business responsibilities by advancing general agreement of the idea that corporations have to respect human rights.
- **The implementation of the Principles:** In 2011, at the same time that the Human Rights Council adopted the UN Guiding Principles they also established a UN Working Group on the issue of human rights and transnational corporations and other business enterprises. This Working Group (made up of five members) are appointed for three years. They have the mission to promote and disseminate the Guiding Principles, to disseminate good practices and to make recommendations on their implementation¹³.

5. 2013-2014, Towards a Legally Binding Instrument?

- In September 2013, following significant civil society activity in 2013 expressing dissatisfaction with the progress of the UN Guiding Principles to prevent and provide remedy for corporate human rights abuses, and urging developments in the international legal framework beyond the UN Guiding Principles, a statement was made to the Human Rights Council by a group of States (approx. 80), and led by Ecuador and South Africa. The statement affirmed their commitment "to work towards the elaboration of a legally binding instrument on the basis of a careful and serious assessment of options available in the framework of the Human Rights Council".¹⁴ The statement marked a reigniting of the desire by some states – predominantly from the global south – to establish a binding international framework, reflecting the spirit of the developments undertaken prior to the UN Guiding Principles.

¹² Resolution adopted by the Human Council, Human rights and transnational corporations and other business enterprises, Resolution 17/4, 16 June 2011.

¹³ See for instance the first report of the working group on the issue of human rights and transnational corporations and other business enterprises, A / HRC / 20/29 dated 10 April 2012.

¹⁴ 'Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council', (2013), available at: <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>

- Following the statement in September 2013, Ecuador and South Africa led an initiative at the Human Rights Council to establish a new UN Intergovernmental Working Group with a mandate to develop a treaty on the issue of human rights and transnational corporations and other business enterprises. The resolution, number 26/9, passed in June 2014. The following day the Human Rights Council passed another resolution, number 26/22, which renewed the mandate of the UN Working Group on Business and Human Rights for a further three years.