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Soft Law, Human Rights and Non-state Actors: Framing Transnational Corporations' Accountability

Some of the most relevant effects of globalization on the law concern the role played by private actors. In particular, transnational corporations (TNCs) have acquired not only increasing freedom to transcend legal orders but also the ability to influence political decisions as well as the lawmaking process within the transnational law sphere. More generally, it has been widely recognized that corporations play a pervasive role in public national and international policy making.

TNCs can transcend national boundaries, do not have international legal personality, and are usually limited liability companies. These features lie at the basis of theoretical and practical difficulties in ascribing them legal responsibilities at the international level, so that alternative tools in order to prevent violations of, and foster compliance with, human rights have been developed by international and non-governmental organizations that tend to directly address firms. Such instruments belong to the domain of soft law. Their content is a mix of norms belonging to international law of human rights and principles stemming from the Corporate Social Responsibility (CSR) paradigm. The content of these tools cover all the range of obligations - both negative and positive - associated to human rights: the obligation to respect, the obligation to protect, and the obligation to fulfill human rights.

By addressing the topic from a legal point a view, the talk aims at analysing and assessing some implications, both in terms of advantages and in terms of shortcomings, of this merge of ethical and legal perspectives within the 'soft' path towards making TNCs accountable for human rights. The main problem is found in the fact that this path fails to distinguish between the duties to protect and to respect human rights, on the one hand, and the duty to fulfill them, on the other hand. In this sense, the talk makes the following arguments: (i) the interplay between law and ethics should be differently assessed depending on the kind of correlative duty that is at stake. Correlative duties may be negative, when imply that the duty bearer does not interfere with the enjoyment of rights, or positive, when imply that the duty bearer become active in fulfilling and promoting the content of rights; (ii) the interplay between law and ethics seems to give rise to a useful path when positive correlative duties are at issue, since in

this case soft law on human rights turns out to be actually coherent with the *social* aims of the CSR approach.

In developing this point, the interpretation of the “political” role played by TNCs becomes crucial, and so become (i) the notion of *horizontal effect of human rights*, i.e. the possibility that human rights apply not only to the relationships between the government and private actors but also directly among private subjects; and (ii) the view of human rights as *basic* rights having a *minimum* content.

The background issue is whether the path opened by the resort to soft law tools that overlap with the notion of *corporate social responsibility* may successfully lead to promoting a new social and international order in which human rights are protected and respected, according to the art. 28 of the Universal Declaration of Human Rights.