


# Business and Human Rights in the Inter-American System; the case of the Miskito Divers

*(Lemoth Morris et al)  
v. Honduras*



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## Introduction

On August 31st, 2021, the Inter-American Court of Human Rights issued the judgement in *Lemoth Morris et al. v. Honduras*. This case refers to the working conditions of the Miskito divers. The Miskito are an indigenous people that inhabit the shared border between Nicaragua and Honduras, mostly concentrated in the Honduran department of Gracias a Dios.<sup>1</sup> Miskito men traditionally practice “free diving”, that is without equipment, to catch lobsters and shells for family consumption.<sup>2</sup> However, due to the commercialisation of fishing, Miskito people started to catch these products using deep diving and not by artisanal fishing, a practice that is carried out outside the current labour legislation.<sup>3</sup> Miskito divers represent 98 percent of lobster fishers. They start working when they are, on average, 14 years old, and suffer several health problems associated with diving.<sup>4</sup> Fishing companies do not meet minimal safeguard requirements, since they do not offer employment contracts, nor provide adequate equipment for deep diving.<sup>5</sup> Naturally, this situation has resulted in an increased risk for the Miskito divers. In particular, this case refers to the situation of 42 victims, which the Court divided in four groups: a) 34 divers that suffered different accidents due to deep submersions that causes decompression syndrome or other diving-related illnesses (12 of whom died as a result of these accidents), b) 7 Miskito divers that passed away as a result of the fire in the “Lancaster” boat, due to the explosion of a butane tank, c) the child Licar Méndez Gutiérrez, who was abandoned in a canoe and whose whereabouts is unknown, and d) the families of the victims.<sup>6</sup> Honduras accepted the facts, as presented by the Inter-American Commission in its Merits Report, and acknowledged its responsibility for the violation of the rights to life, to life with dignity, to personal integrity, to judicial guarantees, to the rights of the child, to equal protection of the law, to judicial protection, health, work, social security, and to non-discrimination with respect to the aforementioned victims.<sup>7</sup>

The significance of the Miskito Divers case comes from the fact that it is the first time that the Inter-American Court addresses business responsibility with regards to human rights.<sup>8</sup> In order to narrow the scope, this analysis will focus only on this relevant jurisprudential evolution for the Inter-American System. For that, it will refer to the development of the Guiding Principles on Business and Human Rights, the previous case-law of the Inter-American Court in this area, and to the improvements this judgement represents.

1. *The Miskito Divers (Lemoth Morris et al.) v. Honduras* [2021] Inter-American Court of Human Rights Serie C 432, 28.

2. *Ibid.*, 31.

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*, 33.

6. *Ibid.*, 40.

7. *Ibid.*, 23.

8. “Key Take-Aways from the Inter-American Court Judgement on Miskito Divers vs. Honduras” (Business & Human Rights Resource Centre) – <https://www.business-humanrights.org/en/blog/portes-de-la-señalencia-de-la-corte-ida-en-el-caso-de-diversos-miskitos/> accessed 18 August 2022.



## Non-State Actors and Human Rights: The Guiding Principles on Business and Human Rights



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Non-State Actors, or NSA, is a broad concept that encompasses entities that do not exercise governmental functions, namely non-governmental organisations or multinational and national corporations.<sup>9</sup> Traditionally, private persons were not considered subjects of international law, and therefore they did not

9. Ilian Bastiákas and Luz Oette, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020) 833 <<http://www.cambridge.org/highereducation/books/international-human-rights-law-and-practice/CEF55A04F2B090246890702B450A29A#contents>> accessed 28 May 2022.



enjoy rights nor had any international obligations.<sup>10</sup> During the last decades, an increasing number of NSAs have become relevant centres of both political and economic power. This in itself is potentially dangerous for human rights. The fact that many NSAs have as much power as proper States, as well as the increased blurring between the public and the private sphere, suggest that their acts fall within human rights law.<sup>11</sup> Therefore, as some have argued, they should be equally accountable to human rights obligations as States.<sup>12</sup> However, current international human rights systems are not designed to apply to NSAs.

In the specific case of corporations, international treaties have worked their way around the limitations of international law by indirectly applying human rights obligations to them, mainly through two methods.<sup>13</sup> The first is by including provisions that oblige States to prohibit certain corporate practices.<sup>14</sup> The second is by establishing provisions that create criminal or administrative liability for corporations.<sup>15</sup>

A more direct approach has been suggested by the Human Rights Council in the UN Guiding Principles on Business and Human Rights, which establish that States should enforce laws that require business enterprises to respect human rights.<sup>16</sup> The Guiding Principles are grounded in three pillars: a) the State duty to protect human rights, b) the corporate responsibility to respect human rights, and c) the access to remedies.<sup>17</sup>

With respect to the State duty to protect, the Guiding Principles stress that the State would not be responsible per se for the human rights abuses carried out by private actors.<sup>18</sup> Nonetheless its responsibility may appear if the abuse can be attributed to it or if the State failed to implement adequate measures to prevent, investigate, punish, and redress private actors' abuse.<sup>19</sup> States have to adopt policies, legislation, and regulations to achieve that end.<sup>20</sup>

The Guiding Principles state that the corporate responsibility to respect is a global standard for all business enterprises that exist independently from the ability or willingness of States to comply with their own human rights obligations.<sup>21</sup> In order to address human rights,

businesses have to adopt adequate measures for prevention, mitigation, and remediation.<sup>22</sup> The responsibility to respect applies to all human rights contained in the Universal Declaration on Human

10. *Ibid.*

11. *Ibid.* 836.

12. *Ibid.* 834.

13. *Ibid.* 846.

14. *Ibid.* 846.

15. *Ibid.*

16. 'Guiding Principles on Business and Human Rights' 9 <[http://www.ghcrn.org/sites/default/files/document/guidingprinciplesbusinesshr\\_en.pdf](http://www.ghcrn.org/sites/default/files/document/guidingprinciplesbusinesshr_en.pdf)>

17. *Ibid.*

18. *Ibid.* 4.

19. *Ibid.*

20. *Ibid.*

21. *Ibid.* 13.

22. *Ibid.*



Rights, the International Covenants on Human Rights, and in the Declaration on Fundamental Principles and Rights at Work.<sup>23</sup> Depending on the circumstances, businesses may need additional measures.<sup>24</sup>

Finally, States must take appropriate steps to redress human rights abuses related to businesses.<sup>25</sup> This means there has to be access to effective and adequate remedies, which must contemplate both procedural and substantive aspects.<sup>26</sup> The Guiding Principles propose grievance mechanisms, which are “any routinized, State-based or non-State-based, judicial or non-judicial process” through which grievances about human rights abuses in business contexts can be denounced and redressed.<sup>27</sup>

In summary, the Guiding Principles essentially propose the notion that States must protect the people against the human rights abuses perpetrated by enterprises within their territories by adopting all the necessary measures.<sup>28</sup> In addition to other instruments, the Guiding Principles are part of the ever-growing body of soft law that seeks to regulate business and human rights.<sup>29</sup>

23. *Ibid.* 14.

24. *Ibid.*

25. *Ibid.* 27.

26. *Ibid.*

27. *Ibid.*

28. *Baurekar and Oette (n 8) 848.*

29. *Ibid.* 849.



## Inter-American Court's case-law and third party responsibility for human rights violations



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As it was already mentioned in the previous section, traditionally it was understood that only States could be responsible for human rights violations, since these are international obligations and only States were considered subjects of international law. What happened, then, when the actions of third parties harmed or affected human rights? The traditional approach taken by the Inter-American Court was the application of the Osman test. This test was elaborated by the European Court of Human Rights in the case of *Osman v.*





United Kingdom. In that judgement, the European Court said that the State's obligation to protect life extends beyond the primary duty to secure it by establishing effective criminal law provisions.<sup>30</sup> The right to life also encompasses positive obligations that demand that authorities take "preventive operational measures" to protect an individual's life that is at risk.<sup>31</sup> However, this obligation should not be interpreted in a way that imposes a disproportionate burden on the authorities.<sup>32</sup> The State only has to adopt these measures when the authorities know or ought to have known that there is an immediate risk to the right to life, or to any other right at risk.<sup>33</sup> This is the Osman test.

The Inter-American Court's case-law has implemented this approach on several occasions. For instance, in *Pueblo Bello Massacre v. Colombia*, a case about a paramilitary group that tortured and killed 43 civilians, the Court stated that the *erga omnes* character of conventional obligations do not entail unlimited responsibility of the State for every human rights violation carried out by third parties within its territory.<sup>34</sup> Its duty to adopt preventive and protective measures depends on the knowledge the State has of the immediate risk. In other words, the Court applied the Osman test.<sup>35</sup>

This approach is again seen in *Hacienda Brasil Verde Workers v. Brazil*, a case about forced labour. While applying the Osman test, the Court stressed that the duty to prevent human rights abuses depends on the knowledge at the time of the facts that authorities have, or should have, regarding a situation that puts a right at risk.<sup>36</sup>

A precedent of the jurisprudential change that was going to be the *Miskito Divers* case was *Employees of the Firework Factory v. Brazil*.<sup>37</sup> In this case about an explosion in said factory, the Court mentioned the same standards used in *Pueblo Bello* and in *Hacienda Brasil Verde*.<sup>38</sup> However, the Court also referred to the obligation to regulate, supervise, and control dangerous activities that may entail relevant risks to the right to life and personal integrity.<sup>39</sup> While the reasoning is similar to the traditional application of the Osman test, the State has to take measures to prevent a known risk. In *Firework Factory* the Court considered that the State has an obligation to regulate, supervise, and control those activities that inherently pose a risk for the rights of workers.<sup>40</sup>

30. *Osman v United Kingdom* [1998] European Court of Human Rights 23452/94 115.

31. *ibid.*

32. *ibid.* 116.

33. *ibid.*

34. *Pueblo Bello Massacre v Colombia* [2006] Inter-American Court of Human Rights Series C 140 123.

35. *ibid.* 124.

36. *Hacienda Brasil Verde workers v Brazil* [2017] Inter-American Court of Human Rights Series C 318 324.

37. "Key Take-Aways from the Inter-American Court Judgement on *Miskito Divers vs. Honduras*" (n 7).

38. *Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil* [2020] Inter-American Court of Human Rights Series C 407 115, 117.

39. *ibid.* 118.

40. *ibid.* 121.



## The Miskito Divers case



Source: © Marco Martinez/Wikimedia Commons, 2016.

While the Osman test remains the main standard for human rights violations carried out by third parties, it is not sufficient for those situations in which there is an absolute disbalance of powers between the abuser and the victim. The Miskito divers case and the incorporation of the Guiding Principles into the Inter-American case-law,<sup>41</sup> which is its main innovation, represents an important development in the area of business and human rights, and it will allow the Court to address in a more comprehensive way these kinds of cases.

The Court began its analysis of corporate responsibility and human rights by reminding that States have the obligation to ensure the free and full exercise of the rights recognised by the American Convention on Human Rights.<sup>42</sup> While the Court recognised that this obligation goes beyond the relation between States and persons, since it extends to the private sphere where the State has the obligation to prevent abuses

41. The Miskito Divers (Leinath Morris et al.) v. Honduras (01/17) 47.

42. *Ibid.* 43.

carried out by third parties, it also reminded the aforementioned standards of the Osman test regarding the limited responsibility of States in this kind of cases.<sup>43</sup> Nonetheless, following the doctrine of the control of conventionality, the Court also pointed out that article 2 of the Convention establishes the obligation to adopt domestic law provisions to guarantee the rights that this instrument contains.<sup>44</sup>

Nevertheless, the Court's analysis went even further with its application of the Guiding Principles and its three main pillars: protect, respect, and redress.

With respect to the state duty to protect, and in accordance with articles 1.1 and 2 of the Convention, the Court reached to the conclusion that States have the duty to prevent human rights violations by private companies.<sup>45</sup> To that end, States “must establish regulations requiring companies to implement actions aimed at ensuring respect for the human rights recognized in the various instruments of the Inter-American System [...] especially in relation to hazardous activities”.<sup>46</sup> In that sense, States must ensure that businesses adopt appropriate policies for the protection of human rights, due diligence processes, and redress mechanisms, especially to remedy human rights violations that are the result of their activities and that affect vulnerable groups.<sup>47</sup> States should actively promote the incorporation of good corporate governance practices.<sup>48</sup>

Regarding the corporate responsibility to respect human rights, the Court considered that companies are the primarily responsible for the respect and enforcement of human rights while carrying out their activities, and that their active participation is fundamental.<sup>49</sup> Companies must assume the responsibility to carry out continuous risk assessments with regards to human rights violations.<sup>50</sup> They have to implement mitigation measures, as well as accountability mechanisms to remedy the damage caused.<sup>51</sup> This obligation of corporations must be regulated by the State.<sup>52</sup>

Finally, the Court also referred to the redress pillar in relation to article 25 of the Convention.<sup>53</sup> Article 25.1 establishes the right to a simple, prompt, and effective recourse for

protection against violations of the recognised both by domestic law and by the Convention.<sup>54</sup> In the

43. *Ibid.* 44.

44. *Ibid.* 45.

45. *Ibid.* 47, 48.

46. *Ibid.* 48.

47. *Ibid.* 49.

48. *Ibid.*

49. *Ibid.* 51.

50. *Ibid.*

51. *Ibid.*

52. *Ibid.*

53. *Ibid.* 50.

54. American Convention on Human Rights, article 25.



Miskito divers case, the Court stated that the State must ensure the existence of both judicial and extrajudicial mechanisms to provide redress for human rights mechanisms.<sup>55</sup> This duty entails the obligation to eliminate legal and administrative barriers to the access to justice in order to achieve the effectiveness of these redress mechanisms.<sup>56</sup>

In adopting the standards of the Guiding Principles into the Inter-American case-law, the Court increased the protection of human rights for situations in which corporations are involved in the abuses. This way, the inherent risk that corporate activities impose on the protection of human rights, primarily those of their employees, is addressed.

The importance of this judgement goes beyond the implications for the specific case of the Miskito divers. This is due to the doctrine of the control of conventionality, which was mentioned by the Court in this case.<sup>57</sup> This doctrine was first developed in the case of *Almonacid Arellano v. Chile* and basically means that domestic authorities must to carry out an harmonisation between domestic law and the standards established by the Inter-American corpus juris, which includes the provisions of the American Convention on Human Rights and the other Inter-American human rights instruments, as well as the interpretation of these norms by the Inter-American Court.<sup>58</sup> As a consequence of this, the standards for business and human rights developed by the Court should be implemented as public policies by other Member States of the Convention, which would be a significant and positive change in the relationship between employees and corporations in the region.

55. *The Miskito Divers (Lemeth Morris et al. v. Honduras)* (n. 1) 50.

56. *Ibid.*

57. *Ibid.* 45.

58. Laura Alicia Camarillo Govea and Elizabeth Nataly Rosas Rabago, 'El Control de Convencionalidad como Consecuencia de Las Decisiones Judiciales de La Corte Interamericana de Derechos' 64. *Revista Instituto Interamericano de Derechos Humanos* 127, 137.



## Conclusion

The accountability of private corporations with respect to human rights violations committed in the context of their economic activities is a growing challenge to modern international law. The increased influence and accumulation of social and economic power by corporate businesses, both national and international, poses a risk for the effective protection of the people within State's borders.

Initiatives like the Guiding Principles for Business and Human Rights represent a necessary step in the right direction to tackle this relevant issue. Addressing how the responsibilities of the State and of corporate businesses are intertwined is pivotal to have adequate protection for human rights. Here lies the importance of the Miskito Divers case. Through this judgement the Inter-American Court incorporated the Guiding Principles into its jurisprudence, setting a precedent for all the member states to implement these measures within their domestic law.



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**Others:**

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