11 International Law Issues in Human Rights and the World of Business

Lénárd Sándor[*]

Abstract
One of the prominent international human rights issues of the past decades has been the question of responsibility for human rights infringements related to the activities of non-governmental actors and especially transnational corporations (TNCs). This challenge is directly related to the continuous increase in foreign capital investments witnessed in the past fifty years. The phenomenon is faithfully characterised by the fact that there are 80,000 transnational companies and some ten times as many subsidiaries operating in today's world economy whose impact on people's everyday lives has been steadily growing. This study aims to outline certain correlations between this new phenomenon of the business world and internationally acknowledged human rights. Within this framework the study attempts to explore the essence of the dilemma and presents the international law attempts aimed to remedy the infringements. Finally, the study analyses the international law solution currently in force and then examines the perspectives of the latest efforts.

Traditionally speaking, human rights and theworldof businessrepresent two fields of law that do not, or rarely do overlap. The main reason for this is that, while human rights provide protection from arbitrary legislation and state measures primarily, the activities of business actors, including enterprises of various legal forms, are governed by law. This leads to the traditional view that the two fields may mainly overlap if arbitrary legislation or public power measures restrict or violate basic human rights that by nature apply to economic actors as well.[1] This interpretation is faithfully reflected also by the case law of international human rights forums like the European Court of Human Rights (ECHR),

* Constitutional Court of Hungary, Pázmány Péter Catholic University, Budapest; e-mail address: <sandor.lenard@jak.ppke.hu>.

1 Article I (4) of the Fundamental Law of Hungary and Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature in Rome on 4 November 2950 (hereinafter ECHR), according to which everyone shall have the rights and freedoms defined in ECHR. From the case law of ECHR cf. e.g.: *Stran Greek Refineries and Stratis Andreadis v. Greece*, Judgment of 9 December 1990, no. 13427/87, § 66; *Anheuser-Busch Inc. v. Portugal*, Judgment of 11 January 2007, no. 73049/01, §§ 66-78, as well as *Steel and Morris v. the United Kingdom*, Judgment of 15 February 2005, no. 68416/01, § 94.; *Kulis and Rozycki v. Poland*, Judgment of 6 October 2009, no. 27209/03. § 35, *Új v. Hungary*, Judgment of 19 July 2011, no. 23954/10, § 22.

according to which the protection of the property rights and the good reputation of economic actors are essential not only for the benefit of the individual shareholders and employees but also for the healthy operation and development of the wider economy.[2] In other words, according to the traditional view of the relationship of human rights and the business world some of the human rights facilitate the development of business players' economic/business activity and protect their market operations from arbitrary state interventions and public power measures.

This traditional view has, at the same time, been complemented by a series of new phenomena in the past fifty years that shed new light on the correlations between human rights and the business world as well ason the role and task of human rights in the world of business. All over the world the traditional theorem that human rights can exclusively provide protection from the arbitrariness of state measures or serve as a benchmark for state legislation and, accordingly, their role in the business world may ultimately be restricted to the protection of the market and its players, has been refuted increasingly frequently. This continuous change and expansion of the roles of businesses have primarily been triggered by the trade and capital liberalisation that has been characteristic for the past fifty years and has fit closely with the general globalisation process of the world economy. This liberalisation was both extremely enhanced in intensity and extended geographically by the political changes characterizing the early 1990s. The ultimate liberalisation of colonial empires and territories on the one hand and the collapse of the communist political and economic regimes on the other hand opened way to an exceptional economic integration. This phenomenon is characterised by several authors, including the historian and political scientist *Henry Kissinger* in his latest book, as a *governance gap*, i. e. a sort of regulatory hiatus.[3] This expression implies that one of the major challenges faced by today's international community, as a consequence of the globalisation of the world economy, is a hiatus in legal and especially international law regulations.

What specific human rights infringements indicate this novel dilemma? What attempts have been made in the past fifty years to remedy these human rights infringements? What framework does international law currently offer to remedy these infringements? What future ambitions are envisaged in this field? This study gives an overview of this novel challenge of international law and explores these topical dilemmas of the field. First it gives a brief overview of the essence of the new phenomenon of human rights infringements (10.1), followed by the description of the international law efforts aimed to remedy the infringements (10.2). The study then outlines the international law regulations currently in force, meant to address this challenge, and finally it examines the perspectives of the latest initiative (10.3).

The study aims to present a comprehensive picture of certain correlations between the world of business and internationally acknowledged human rights. By analysing the de-

2 *Új v. Hungary*, Judgment of 19 July 2011, no. 23954/10., § 22.

3 Henry Kissinger: *World Order* (Penguin Press New York 2014).

velopment of international law, it wishes to contribute to systemising this challenging public debate and to further considering the potential courses of the required reforms.

11.1 International Law Facing a New Challenge

1. As a characteristic feature, the past fifty years have witnessed growing liberalisation in international trade and foreign capital investments,[4] which has enabled a sharp increase in the cross-border activities of business entities.[5] According to the interpretation of several authors, as consequences of the former some of the business operation of market actors has become unregulated or their activities have been measured against extremely different benchmarks at the same time, as their business/economic activities fall under the scope of various jurisdictions simultaneously.[6] In other words, transnational corporations[7] have increasingly frequently pursued business activities in a social and political context unstable from the point of view of the observation of human rights. The growing number of cases faithfully reflects that this regulatory gap has more often create an environment that endangers the implementation of human rights and led to committing legal violations.[8] It was in a case of this nature that in June 2000 the UN Security Council initiated setting up an expert committee that has investigated into the unlawful exploitation of the natural resources of the Democratic Republic of Congo.[9] Since 1996, the Eastern part of the Democratic Republic of Congo has been suffering from continuous internal armed conflicts and civil war.[10] The investigation by the expert committee aimed to

4 The volume of both international trade and foreign operating capital investments has been on a continuous increase in the past fifty years; cf. the official UNCTAD statistics available at: <http://unctad.org/en/Pages/Statistics.aspx>. In the early 1990s, the collapse of states representing a communist or socialist system, paving the way for a continued expansion of transnational companies, accelerated this process, which is genuinely reflected by the fact that the number of investment protection agreements multiplied in that period, cf. e.g.: Michael Mandelbaum: *Coup de Grace: The End of the Soviet Union*, accessible on the website: <https://www.foreignaffairs.com/articles/russian-federation/1992-02-01/coup-de-grace-end-soviet-union>; and Coit D. Blacker: *The Collapse of Soviet Power in Europe*, available at: <https://www.foreignaffairs.com/articles/belarus/1991-02-01/collapse-soviet-power-europe>.

5 Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), pp. 4-8.

6 John Gerard Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013) p. 33 and Thomas Cottier et al. (ed.): *Human Rights and International Trade* (New York Oxford University Press 2005) pp. 32-34,79-80 and 120.

7 In this study, the term transnational corporation is used in the broader sense, as a collective term, irrespective of the corporate structures enacted in the respective legal regulations.

8 The Business & Human Rights Resource Centre (BHRRC) is a London-based social organisation that explicitly investigates into human rights violations which may be related to the operation of transnational corporations. In the past five years, this social organization has registered over sixty cases which throw light upon grievous human rights violations that can be related to the operation of transnational corporations, cf.: <http://business-humanrights.org/en/search-topics>.

9 Cf.: <www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2000/20>.

10 Cf. e.g.: Malcolm N. Show: *International Law* (Cambridge, Cambridge University Press 2003) pp. 1044 and 1146. <https://www.foreignaffairs.com/articles/africa/2013-11-11/congo-s-sudden-calm>. For more infor-

assess the role of transnational corporations present in the country, primarily with an interest in the exploitation of natural resources, in armed conflicts and in committing further violations of human rights protected by international treaties. According to a summary by the UN Security Council, on the one hand, the transnational corporations operating in the region directly committed actions prohibited by several international human rights conventions, including imposing forced and slave labour on the local population. On the other hand, both corporations exploiting raw materials and those processing them or involved in financing indirectly contributed to sustaining the armed conflict. In its conclusion the expert committee ultimately established that business actors were responsible to prevent their activity from potentially facilitating or playing a role in an armed conflict.[11] This example faithfully illustrated the extreme cases of a regulatory gap, specifically business activity carried out in armed conflict-affected areas and regions which were, accordingly, characterised by poor administration and a low level of law enforcement and regulation.[12]

2. In addition and at the same time, human rights violations that can be related to the production or provision of services by transnational corporations do not only characterize armed conflict zones today. The dilemma roots primarily in the transnational nature of the corporations, i.e. the character that, while a corporation actually operates as a uniform company from a business and economic point of view, in the legal sense it has separate identities in each country of operation.[13] Additionally, all aspects of the opera-

---

mation on the actual distribution of African state power and the evolution conflict zones cf.: <https://www.foreignaffairs.com/articles/2015-11-08/real-map-africa>.

11 UN Security Council S/2003/1027. §§ 9. and 68, available at: <http://daccess-ods.un.org/TMP/7986447.21508026.html>.

12 Some extreme cases of legal violation also raise the issue of the international criminal law responsibility of those involved in them. It is specifically this kind of international criminal law responsibility that is governed by the Convention on the Protection of the Environment through Criminal Law (CETS No. 172) worked out within the framework of the Council of Europe and opened for signature in 1998. Article 9 of this Convention specifically regulates on assigning criminal law responsibility to corporations and is available at: <www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f4>. Hungary is not a party to this convention.From the universal human rights conventions it is primarily the convention for the suppression of the financing of terrorism, worked out within the framework of the UN and opened for signature in 1999, that should be highlighted in this category, Article 5 of which regulates on assigning criminal liability to legal persons. Hungary is a signatory to this convention, promulgated by act XIL of 2002. Resolution of the UN Security Council 1373 (2001) dated 28 September 2001, binding for all UN member states, which calls for establishing the liability of legal persons, also belongs to this category. Even though these conventions do not regulate on the direct corporate responsibility under international law, they were clear steps by the state towards establishing responsibility for corporate operation.

13 There may be cases where the seat of a company is in a certain country, while it was registered as a company in a different country and its owners come from yet another country; it operates in a different country with most of the employees recruited from yet another different country. Cf. Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006) pp. 199-201 and Steven R. Ratner: *Corporations and human rights: a theory of legal responsibility* (Yale Law Journal Vol. 111. 2001), p. 463.

tion of transnational corporations actually influence and affect human life and thus the implementation of human rights. They have a fundamental impact on employees, consumers as well as the local population at their place of operation. *Steven R. Ratner* identifies three major sources of human rights violations following from the business/economic operation of transnational companies. First it is developing and capital importing countries that are unable or unwilling to enforce the national and international standards protecting human rights primarily in view of their economic needs. Secondly, closely related to the former, cases should be mentioned where the operation of a transnational company related to several countries is not regulated by the host country and the other interested countries refrain from implementing extraterritorially their own legal benchmarks.Thirdly, countries should be mentioned whose own national regulations are different from the international legal standards and which therefore require companies operating under their jurisdiction to comply, in their business activity, with these different regulations.[14]

Although, depending on their activity, the operation of transnational corporations has a more intensive impact on one or the other internationally acknowledged human right,[15] their operation on the whole may affect all interests protected by international law.[16] According to a research conducted by special UN representative *John Ruggie*, corporations operating in the mining and exploitation industries, in retail trade and the consumer goods sector as well as in the chemical and pharmaceutical industries have the greatest impact on human rights. According to geographical location, it mostly affects Asian, African and Latin American regions, i.e. explicitly developing countries where the government and public administration are rather weak.[17] His survey also included the question if, according to the statements formulated, transnational corporations were directly or indirectly involved in certain legal violations. According to the findings, in some 60% of the cases the legal violation originated directly from the transnational company, while the remaining 40% showed an indirect relationship, i.e.the legal violation originated from governmental bodies related to the transnational company concerned or from other smaller companies like a supplier hired within a contractual relationship or from a subcontractor.[18]

14 Steven R. Ratner: *Corporations and human rights: a theory of legal responsibility* (Yale Law Journal Vol. 111. 2001) pp. 462-463.

15 Thus, corporations exploiting raw material or energy may restrict, through their impact on the environment, the right to a free private and family life and the right of ownership; the activity of clothing industry corporations may primarily affect child and slave labour, while internet service providers have an impact on the freedom of private life, speech and press.

16 The operation of corporations essentially affects human rights of all the three generations. Thus, most frequently those in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Declaration of the International Labour Organization on Fundamental Principles and Rights at Work.

17 John Gerard Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013) pp. 24-25.

18 John Gerard Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013) pp. 26-27.

Thus, the primary reason why the correlations of business life and human rights present a challenge in today's world economy is that despite their intensive mutual impact on each other, there are to this day neither institutional, nor regulatory guarantees governing their relationship. This challenge is of an exceptional nature because the need to arrange their relationship is beyond the governmental capabilities and at the same time it does not at present fit well with the traditionally established set of instruments of international law.

11.2 The History of the Responses of International Law

1. The primary response to this challenge, based on the international human rights conventions currently in force, is the international legal liability of the state where the business activity is performed.[19] In their provisions regarding jurisdiction and scope of authority, both universal and regional human rights conventions call upon states parties to them in general to undertake to ensure the equal right of every person to the enjoyment of the rights guaranteed in the convention concerned.[20] In the course of their practice, the control mechanisms of these human rights conventions quoted the provisions of the conventions on jurisdiction in several cases when they faced individual complaints that actually arose from the activity of a non-governmental actor, which could be a transnational company. In such cases, the respective human rights control bodies focus their investigation on whether the state concerned violated the obligation of the human rights convention that required the actual implementation of the rights.[21] The most advanced practice in this area is represented by the Committee on the Elimination of All Forms of Discrimination against Women and the Committee of Children's Rights. The former control body explicitly called upon states parties to the convention to have specific measures in place to enforce the elimination of discriminative measures or policy applied by any corporation or other organisation against women.Besides, in the Committee's

19 This approach fits best in with, on the one hand, the nature of international law based on the sovereignty of states and, on the other hand, the historical development of the international protection of human rights. It follows exactly from this that for the protection of the beneficiaries of the human rights guarantees, all human rights control bodies focus on the international legal obligations of states.

20 Cf. among others: Article 2 (1) of the International Covenant on Civil and Political Rights, promulgated in Hungary by Decree Law No. 8 of 1976, Article 2 (1) and (2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights, promulgated in Hungary by Decree Law 9 of 1976 and Article 2 (d) and 2 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination, passed in New York on 21 December 1965, promulgated in Hungary by Decree Law No. 8 of 1969, Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women, promulgated in Hungary by Decree Law 10 of 1982.

21 This obligation is referred to by different names in the practice of the various control bodies; among others, the European Court of Human Rights calls it a positive obligation or the horizontal effect of human rights; the Committee on the Elimination of Discrimination against Women calls it a state's failure and a *"due diligence"* obligation (cf. para. 9 of General Recommendation No. 19 of June 1992), and the Committee of Children's Rights calls it the indirect responsibility of non-governmental actors.

interpretation, in cases where "*due diligence*" obligations are neglected, the state's liability for private actors' activities follows from the general rules of international law.[22] The Committee of Children's Rights, on the other hand, mentions in a general recommendation, in addition to the positive obligation of states, the indirect international legal obligation of non-governmental actors for compliance with the convention.[23]

Another auxiliary response rolling out of the jurisdiction rules is provided by the question of the legal liability of the state where the transnational company was established or registered.[24] At the same time, the implementation of jurisdiction over persons in the regulation of the conduct of transnational corporations faces several difficulties in practice. Such extraterritorial legislation of a state is, on the one hand, restricted by the host country's jurisdiction and sovereignty[25] and, on the other hand, it faces difficulties to overcome evidence and punishment/enforcementobstacles[26] in the course of securing the implementations of regulations. Accordingly, the legislation or liability of the state of registration or home state may at most play an auxiliary role when compared to the role of the state hosting the transnational company.

Despite every attempt and effort of the progressive interpretationof the law, the control mechanisms of human rights conventions do not interpret the underlying conventions in a way that would involve rules or expectations obligatory for non-governmental actors. It is among others this deficiency that certain authors of the legal literature blame for the increased number of human rights violations and challenges faced in relation to transnational corporations today.[27] The problem is that this interpretation does not offer a reassuring response to cases of weakened state power and public administration, i.e. it is unable to respond to the cases per se where the likelihood of committing such human rights infringements is the highest. In order to move beyond this interpretation, there

22 General Recommendation No. 19 of June 1992 of theCommittee on the Elimination of Discrimination against Women. The recommendation discusses in detail explicitly issues that are especially characteristic in the course of the activity and operation of non-governmental players, e.g. harassment at work, violence in the family or questions of access to health services, available at: <www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

23 General Recommendation No. 5 passed in November 2003, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11>. In addition, cf. in more detail: Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), pp. 317-346.

24 It is explicitly such obligations that Article 7 c) of the International Convention for the Suppression of the Financing of Terrorism, opened for signature in December 1999, provides for, according to which the state shall establish its jurisdiction over certain offences committed by a national of that state. In Hungary, the convention was promulgated by Act LIX of 2002.

25 Non-intervention in matters within the jurisdiction of a state, Article 2 (7) of the United Nations Charter.

26 Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006) p. 238, and Case *Doe I v. Unocal Corp*. et al. 248 F. 3d915 (2001) of the United States Court of Appeals for the Ninth Circuit.

27 Steven R. Ratner: *Corporations and human rights: a theory of legal responsibility* (Yale Law Journal December 2001), p. 466.

were several initiatives to prepare a new international draft treaty that was meant to regulate explicitly on the international legal liability of transnational corporations.

2.1. The idea to work out international normative rules setting a legal framework for the operation of transnational companies was first raised not long after the international protection of human rights had been reinforced.[28] In the early 1970's the United Nations Economic and Social Council initiated with the UN General Secretary setting up a committee whose explicit objective was to be to examine the impact of the operations of transnational corporations on development and international relations.[29] It was thus that in January 1975, the "*Commission on Transnational Corporations*", i.e. the United Nation's commission focusing on transnational corporations (hereinafter: UNCTC)[30] started operation, which among several other tasks[31] set the objective of preparing a code of conduct binding for transnational corporations in order to guarantee that internationally acknowledged human rights norms should be complied with and protected in the business life as well.[32] UNCTC made its final draft regulating on the rights and obligations of transnational companies and their host countries by 1990.[33] The key of a compromise between developed and developing countries was to create a balance between the investment protection rules prescribed for host countries and the restriction of the operation of transnational corporations. The former was lobbied for by capital exporting developed countries, while the latter by developing countries that were mostly just capital importing countries at the time. In addition, the fundamental disagreement between the two rooted in the fact that while developing countries opined that investors should be only entitled to the same treatment as domestic enterprises, developed countries demanded specific international legal treatment following from customary interna-

28 The universal international human rights conventions were opened for signature in 1966 and were followed by what are referred to as sectoral international human rights conventions in the decades thereafter.

29 In addition, the New International Economic Order resolution (available at: <www.un-documents.net/s6r3201.htm>) passed in the UN General Assembly in 1974 and the Charter of Economic Rights and Obligations of States (available at <www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3281)> passed also in the UN General Assembly a year later made explicit implications about the necessity to pass international norms about the operation of transnational corporations.

30 Deva Surya, *Guiding Principles on Business and Human Rights: Implications for Companies* (European Company Law 2012 Vol. 9. No. 2), p. 102. Setting up a committee was also made necessary considering a growing number of crisis symptoms in the world economy, including among others the collapse of the Bretton Woods system of fixed exchange rates, a sharp rise in the price of crude oil and the energy crisis that followed and a growing number of suspected corruption cases at transnational corporations. The commission was set up by virtue of Resolution 1913 LVII of the UN Economic and Social Council dated 5 December 1974.

31 The committee successfully contributed to exploring the political, economic, social and legal impact of transnational corporations; by strengthening international cooperation and the negotiation position of developing countries it made efforts for the sustainability of economic development.

32 Resolution 1721 (LIII) of the UN Economic and Social Council dated 28 July 1972.

33 The working committee was chaired by Swedish international law expert *Sten Niklasson* and the draft treaty devoted separate chapters to the treatment of transnational companies, intergovernmental cooperation and the implementation of code of conduct rules.

tional law.[34] The ultimate failure of the negotiations on the draft agreement coincided with the global political and economic change characterising the early 1990s, specifically the collapse of the Soviet Union along with the socialist-type economic systems.[35] The capital importing countries thus newly appearing at the global market, meeting the demands of developed countries, settled the questions discussed in the draft agreement concerning the treatment of investors in bilateral investment protection agreements.[36] The initial compromise in the preparation of the treaty to lay down the obligations of transnational corporations evaporated in the changed economic environment of the nineties.[37] This resulted in an asymmetrical set of regulations in international law: while international regulations provided ample guarantees for the protection of investors' rights, the question of responsibility of transnational companies remained unsettled.[38]

2.2. The next stage in the attempts to draw up a binding international regulation is indicated by an increased role and number of foreign capital investments. It was in August 1998 that the preparatory work[39] started within the framework of the UN Human Rights Council, as a result of which, in August 2003, the norms on the human rights responsibility of transnational and other corporations, imposing direct obligations[40] on

34 This dispute comprised all the issues of whether laying down the fundamental rules of treatment including the requirements of fair and equitable proceedings, the question of nationalization and its consequences and the settlement of disputes should be governed by national or international jurisdiction. Another disputed issue was whether the international treaty should be formulated as an obligation or a recommendation.

35 The economic change was foreshadowed by the popularity of the neoconservative and free market-oriented view dominating the second half of the 1980's, which in the United States was advocated by the Reagan administration and in the United Kingdom by the government of Margaret Thatcher; for more information cf.: Steven R. Ratner: *Corporations and human rights: a theory of legal responsibility* (Yale Law Journal December 2001).

36 From the 1990s, the number of bilateral investment protection agreements multiplied; by today, more than three thousand have been signed worldwide. The investment protection agreements signed in the 1990s offered more favourable conditions for foreign operating capital. Cf.: John Gerard Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013). Investment protection agreements offered the only way for emerging states to channel their national economy in the international economic and production system. The number of corporations operating abroad increased ten times, from 7,000 in 1960 to 70,000 in 2010.

37 For more detail cf.: Karl P. Sauvant: *The negotiations of the United Nations Code of Conduct on Transnational Corporation* (The Journal of World Investment and Trade 2015), pp. 56-62. After the states did not approve the draft treaty, the scope of authority of UNCTC was transferred to the UN Conference of Trade and Development (UNCTAD) in 1994.

38 In addition, a growing number of developing countries are becoming capital exporters, which gradually reduces their interest in having the operation of transnational companies restricted by binding international minimum legal norms.

39 Resolution E/CN.4/SUB.2/RES/1998/8; The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations. The mandate encompassed the analysis of the effects of the activities of transnational corporations on human rights, the analysis of the contrary provisions of investment protection and human rights agreements and the evaluation of the regulatory options of the state.

40 Including e.g. the ban on discrimination or the introduction of the direct horizontal effect, cf. e.g. Points 5-9 of the Norms. Nevertheless, the concept of the Norms preserves the principle of the primacy of state sovereignty, laid down under A) and E) of the Norms. Point A) of the Norms lays down the primacy of responsibility for compliance with human rights rules, while Point E) specifically emphasizes the liability

transnational corporations(hereinafter: Norms) were presented.[41] Contrary to earlier proposals and as one of the most significant novelties, the scope of the Norms extended to most business enterprises, including all business partners entering into an agreement with transnational corporations that were part of the global supply chain of the transnational corporations.[42] The Norms must be complied with in these contractual relationships, including in the course of the contractual partners' activity and operation, as well, which the transnational company is responsible for.[43] Further significant novelties were, on the one hand, that a continuous, regular, independent and public control system was introduced, making it possible to lodge a complaint when the Norms were violated,[44] and, on the other hand, that the Norms also provided for the legal consequences, i.e. the rules of compensating for the damage caused.[45] The fact that the control mechanism and the legal consequences were incorporated clearly indicates that the aim was to move beyond the*soft law* nature. The Norms were actually meant to respond to the challenges of today's time by working out the principles of the UN Global Treaty in more detail. However, despite theircareful elaborateness, both the business world and a great many of the states opposed the Norms because of the introduction of the immediate international law obligations on the one hand and the establishment of the obligatory control mechanism on the other hand.[46] As an effect of the former, the UN Human Rights Council laid down in its resolution that the Norms did not have a binding force.[47]

---

of transnational corporations for respecting the legal and political order of the host country and contributing to the implementation of human rights. Cf. Point E) (10) and (12) of the Norm.

41 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights Available at: <www1.umn.edu/humanrts/business/norms-Aug2003.html>.

42 The most significant aspect of extending the personal scope of the Norms was the realization concerning today's economic/business reality that it is not individual corporations but much rather supplier chains that are competing at the world market, for the formulation of whose joint business policy it is transnational corporations that are responsible in general.

43 David Weissbrodt et al.: *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (The American Journal of International Law Vol. 97. 2003), pp. 910 – 911 and Articles 15 and 29 of the Norms. The human rights responsibilities of corporations established in the Norms reflect the classical rules of the human rights responsibilities of states. The difference is that corporations are obliged, within their scope of activity and authority, to comply with human rights obligations, cf.: Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), pp. 225-229.

44 Article (16) of the Norms. In addition the Norms require at the same time that business enterprises establish internal mechanisms themselves that facilitate the implementation of the Norms both within the corporations and in their contractual relationships.

45 Articles (16)–(18) of the Norms. By virtue of this latter rule, immediate, complete and appropriate compensation shall be provided for the damage caused, which may have the form of paying damages, restoring the original state, in compliance with the regulations of the international or national contractual law.

46 Cf.: David Litvin: *Needed: a global business code of conduct: memorandum to UN Secretary-General Kofi Annan* (Foreign Policy, 2003), and: Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), p. 234.

47 Commission on Human Rights Resolution 116/2004., E/CN.4./2004/L.73/Rev.1 (16 Apr., 2004).

3. As is clear from the above, while the internationalization and institutionalization of the protection of human rights were decisive characteristic features in the development of international law in the past fifty years, to pass an international treaty on the human rights obligations of transnational companies seems just a distant wish at the moment. It is clear at the same time that lacking the relevant international norms and efficient control mechanisms, there is no hope for the protecting human rights in their entirety. Having realized all this, several organizations have worked out international guidelines of a *soft law* nature that have set minimum standards for the operation of transnational corporations.[48]

3.1. Among these, mention should be made first of all, within the framework of the Organization for Economic Cooperation and Development (hereinafter: OECD), of the guidelines regulating on the operation of multinational corporations, worked out in 1976 and comprehensively revised in 2000.[49] Their scope covers, through the entire supply chain, the operation of up to the very last subcontractor, irrespective of the country of operation.[50] The guidelines have a separate chapter governing corporate obligations arising from human rights, which prescribe, among others, the introduction of human rights impact assessments as well as the obligation of compensation.[51] The parts of the OECD guidelines for non-government actors, thus corporations, are at the same time only recommendations based on the corporations' voluntary compliance, i.e. their violation does not involve any sanctions. However, compliance with the guidelines may be a requirement for making an investment decision or acquiring export subsidy, and is thus also governing when assessing what should be considered as good business conduct and practice in the world economy.[52] In addition, the OECD guidelines are complemented by a strong and complex control mechanism. On the one hand, the OECD Committee on International Investment and Multinational Enterprises (CIME) unfolds the essence of the guidelines in the course of examining actual cases and, on the other hand, national contact points as forums of debate and legal remedy have helped, since 1979, the imple-

48 Considering the international draft treaties under preparation and the guidelines of a *soft law* nature passed, transnational corporations began to show growing openness to voluntary commitments referred to as "corporate social responsibility? (CSR).The first such CSR initiative under the name "Sullivan principles? was adopted by the American General Motors in 1977. The "Sullivan principles? gained popularity with American corporations very soon. For more details cf.: Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), pp. 195-199 and Steven R. Ratner: *Corporations and human rights: a theory of legal responsibility* (Yale Law Journal December 2001), pp. 531-533.

49 Declaration on International Investment and Multilateral Enterprises, available at: <http://mneguidelines.oecd.org/text/. The immediate cause triggering the codification was, among others, the corruption cases of certain American corporations abroad. So far, almost forty countries have signed the guidelines>.

50 Thus the scope of the OECD guidelines extends well beyond the territories of OECD member states, ct.: Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), p. 203.

51 OECD Guidelines II, Point 2.

52 Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), p. 207.

mentation of the guidelines.[53] Since the institutional reforms implemented in 2000, furthermore, the opportunity to use these forums has been open to non-governmental organisation and private persons as well.[54]

3.2. Considering the world of universal international law, the United Nations passed a similar initiative towards the end of the past millennium, prompted mainly by the failure of the UNCTC codification efforts.[55] The initiative of drafting the Global Compact[56] was made by the Secretary General of the UN at the World Forum in Davos.[57] The Global Compact[58] of a *soft law* nature, prescribing voluntary commitments for corporations, formulates ten principles in the fields of human rights, environment protection, labour law and anti-corruption measures, which business actors must respect throughout their entire operation on the one hand and, on the other hand, they must proactively facilitate public policies helping to implement these principles. Additionally, the Global Compact expects corporations not to contribute to committing human rights violations. This latter ban formulates obligations primarily as regards the contractual relationships of corporations, according to which corporations must not assist committing such infringements or benefit from the committing of thereof.[59] Despite the wide-scale support and success of the Global Compact, it is criticized mostly for the fact that its lacking actual control and implementation mechanisms, the corporations who become parties to the treaty may attain a favourable reputation with the public without actual efforts.[60]

53 These forums are familiar with and apply a wide spectrum of dispute settlement, including, among others, the institutions of good office and mediation as well.

54 Accordingly, the number of cases before national contact points has grown some tenfold since 2000. The openness of the OECD control mechanisms makes the continuous and flexible revision of the OECD principles possible. Karl P. Sauvant: *The negotiations of the United Nations Code of Conduct on Transnational Corporation* (The Journal of World Investment and Trade 2015), pp. 31-37. Not long after the OECD guidelines had been passed, smaller-scale, sectoral recommendations and principles were worked out within the framework of the International Labour Organisation (hereinafter: ILO) and the United Nations Conference of Trade and Development as well. The former is known under the name "The Tripartite Declaration of Principles Concerning Multinational Enterprises?, and the latter as UNCTAD Restrictive Business Practice Set. Cf.: Karl P. Sauvant: *The negotiations of the United Nations Code of Conduct on Transnational Corporations* (The Journal of World Investment and Trade 2015), pp. 29-31.

55 The objective of the UN was to pass a document that, even though it could not be regarded as an international law obligation, would nevertheless mean more than the corporations' voluntary commitments.

56 UN Global Compact, available at: <https://www.unglobalcompact.org/what-is-gc>.

57 For more details cf.: Surya Deva: *Guiding Principles on Business and Human Rights: Implications for Companies* (European Company Law 2012 Vol. 9. No. 2), pp. 102-103.

58 There are nearly 3000 business enterprises who currently participate in the Global Compact. They undertake to make these principles part of their business strategies and they also prepare annual reports on those elements of their business operations that concern the principles formulated in the Global Compact.

59 Andrew Clapham: *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006), pp. 218-225.

60 Daniel Litivin: *Human Rights are Your Business* (Foreign Policy, November-December 2003).

11.3 The Current Response and Future Challenges of International Law

1. Considering the failure of the codification efforts on the one hand and the multiplication of foreign investments stock on the other hand, in July 2005, the Secretary General of the UNappointed *John Ruggie*[61] Special Representative on the issue of business and human rights. The mandate of the special representative did not embrace the preparation of a new international treaty but constituted, through reviewing the international regulations in force, the comprehensive analysis and systemization of corporate responsibility for human rights violations.[62] As a result of his analysis, the Special Representative presented, in June 2011, the principles referred to as United Nations Guiding Principles[63] (hereinafter UNGP), which, as the first one among the initiatives concerning the relationship between human rights and the business world, gained the support of the UN Human Rights Council and thus became an international benchmark for business conduct.[64] The UNGP established a system of the already existing international human rights benchmarks,[65] in view of which they can be considered as an important stage rather than the end result on the horizon of the international minimum rules of the business world.[66]

The UNGP organize the issues of the human rights responsibility of business enterprises around three main pillars. Following the interpretation of human rights agreements according to which the responsibility for compliance with human rights is borne by the state, the first pillar is the state's duty to protect human rights within its jurisdiction. The first pillar is divided into general and special rules. Among the general rules, it appears as an obligation that the regulations, public policies and international agreements shaping the world of business must be consistent with international human rights obligations.[67] In addition, according to the special rules, there is enhanced state responsibility if the state is in any way entangled with business actors[68] or if the business operates in some kind of a conflict-affected area.[69] It

61 This initiative was proposed by the UN Human Rights Council in their Resolution No. E/CN.4/2005/L.87 in April 2005, which was later extended by virtue of resolution of the UN Human Rights Council No. A/HRC/RES/8/7dated 18 June 2008, Cf.: <www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>.

62 John Gerard Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013), pp XVI-XX.

63 Available at: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164&LangID=E>. The core of UNGP is constituted by the so-called "Protect, Respect and Remedy Framework? passed by the UN Human Rights Council in June 2008.

64 In its Resolution No. 17/4 dated on 16 June 2011, the UN Human Rights Council unanimously supported UNGP.

65 Thus primarily the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Declaration on Fundamental Principles and Rights at Work, cf.: Principle 12 of UNGP and John Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013), pp. 19-20.

66 Surya Deva: *Guiding Principles on Business and Human Rights: Implications for Companies* (European Company Law 2012 Vol. 9. No. 2), p. 102.

67 UNGP Principles 1-10.

68 UNGP Principle 4.

69 UNGP Principle 7.

is considered the first shortcoming of UNGP that they ignore the fact that capital importing countries are, in many cases exactly due to their weak public administration, unable to, or in view of their disadvantage in the competition for foeign investments unwilling to comply with the obligations arising from human rights, while the main reason why capital exporting countries do not demand compliance with these benchmarks in the operation of their companies abroad is that by doing so they would impose competitive disadvantage on them compared to the corporations of other countries.[70] Towards the goal to overcome the shortcomings and restrictions arising from the traditional interpretation of the first pillar it is considered a great novelty that the second pillar, by virtue of which all companies[71] prescribe respecting human rights as an obligation, is irrespective of whether the human rights obligations of states are met. It is also viewed as a novelty that the respect for human rights arises as a double obligation: on the one hand, enterprises must refrain from committing human rights violations in the course of their own operations and, on the other hand, they must make efforts to prevent or at least mitigate the human rights infringements that are related to their products, services or business relations e.g. by arising from the activities of companies operating in their supply chains.[72] Satisfying this obligation means commitment to adhering to the human rights benchmarks[73] elaborated in detail and appearing also in the corporations' business strategy and policy. The obligations laid down in these rules can be divided into three major parts: firstly they mean business strategy commitment, secondly what is referred to as *due diligence* commitment according to which the company must, by carrying out human rights impact assessments, constantly evaluate, analyse and integrate the human rights impact of their operations and finally an obligation to provide remedial instruments and avenues.[74] All these require that individual financial resources and incentive and control systems be made available. There is a special provision applicable to business operation carried out in conflict-affected areas or countries ruled by authoritarian regimes, according to which in such situations companies must strive for compliance with internationally acknowledged human rights benchmarks.[75] The third pillar provides for the opportunity of legal remedy, which is a guarantee to the effective implementation of the first two pillars. As regards the types of grievance, the UNGP demands the provision of both state judicial and

70 Robert McCorquodale et al.: *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law* (The Modern Law Review 2007), p. 598.

71 By virtue of UNGP Principle 14, the rules apply to all enterprises regardless of their size, ownership and structure, as well as from their operational context. At the same time, responsibility may vary according to these factors.

72 The commentary to UNDP Principle 22 restricts this advanced expectation to some extent by failing to demand, in such cases, that the characteristically transnational company whose contractual partner/supplier commits the infringement should provide legal remedy.

73 UNGP Principles 15-24.

74 For more details cf.: John Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013), pp. 112-116.

75 UNGP Principle 22.

other governmental and non-governmental ways of remedy.[76] Non-governmental ways of remedy may be provided by the company itself or the company together with other interested organizations. This type of grievance serves a double purpose: on the one hand it helps identify activities that might have an adverse impact on human rights and on the other hand it may provide early and appropriate remedy to the injured parties.[77]

Although formally speaking the UNGP is not an mandatory international legal source, since, regarding their contents, they coordinate international and national legal benchmarks, they are practically governing for assessing the activities of corporations. There is an individual working group facilitating the enforcement and implementation ofthe UNGP.[78] Thanks to their consensual nature, all interested parties, i.e. states, business players and civil society organizations responded favourably to the UNGP. Besides its success is faithfully indicated by the fact that several international organizations including ISO, OECD and the International Finance Corporation, as well as the Council of Europe have complemented their own benchmarks with the *due diligence* requirement, which is considered as the major novelty of the UNGP and covers the complete global supply chains of corporations.[79] Besides, the UN Human Rights Council called upon all member states in June 2014 to implement the UNGP principles within the framework of national action plans.[80]

It is exactly this consensual nature and minimum standard characteristic of UNGP that primarily prompted criticism claiming that instead of detailed rules, the principles provide for lax regulations only without setting up a central organ, they offer just a weak protective mechanism; besides, they totally discard the attempt of setting up a mandatory international legal requirement. Although they impose direct provisions for corporations, there are no consequences involved if these provisions, e.g. working out a human rights impact assessment, are not complied with. In addition, it is formulated as a critical remark that the principles do not strive to settle the issue of corporate human rights responsibility in an exclusive manner. In other words, when evaluating such issues, other sources of international law, e.g. the OECD guidelines or provisions of international customary law must continue to be considered. Another criticized aspect is that they fail to give well elaborated answers to decisive questions like the responsibility of the parent company and, on the other hand, by guaranteeing the opportunity of multiple grievance options they enable parallel procedures which may under given circumstances impose unnecessary burden for corporations.[81]

76 UNGP Principles 25-31.

77 As the effectiveness criteria of grievance UNGP Principle 31 formulates basic principles like among others the principles of accessibility, transparency, predictability and legitimacy. Cf.: SuryaDeva: *Guiding Principles on Business and Human Rights: Implications for Companies* (European Company Law 2012 Vol. 9. No. 2), p. 108.

78 <www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

79 John Ruggie: *Just Business* (New York W.W. Norton & Company Ltd. 2013), pp. 119-122.

80 Human Rights Council Res. A/HRC/26/L.1, <http://daccess-ods.un.org/TMP/8000873.32725525.html>.

81 Surya Deva: *Guiding Principles on Business and Human Rights: Implications for Companies* (European Company Law 2012 Vol. 9. No. 2), pp. 104 and 108.

2. Although working out and adopting the UNGP has undoubtedly been the most significant step made so far towards acknowledging the international legal responsibility of, and adopting an international legal benchmark which govern the world of business, the events of the past few years have clearly indicated that there is no consensus at all as to whether it was a sufficient step.[82] At the initiative of Ecuador and South Africa, the UN Human Rights Council set up a working group in June 2014 in order to work out an international treaty regulation binding for transnational and other business enterprises.[83] This is thus the third attempt for the international community to work out an international treaty that may set a mandatory legal benchmark for the cross-border operation of the business world. This international set of regulations may embrace several fields that may contribute to the more efficient and complete implementation of human rights. Thereby it may reinforce the state obligation of protecting human rights making it more specific at the same time, including extraterritorial legislation for the implementation of international human rights benchmarks, i.e. extending and tightening the responsibility of parent companies for the operation of companies owned by them, introducing responsibility for certain activities of companies operating at lower levels of the supply chain, and setting up either international or national forum(s) with the task of evaluating these issues specifically. It may help work out the principle of the most efficient possible mutual assistance and cooperation between states, which is an essential procedural prerequisite of an efficient judicial and grievance opportunity. In addition, it may attempt to legislate on the immediate international legal liability of transnational corporations.[84] Depending on political realities, the negotiations began last year offer an opportunity, by reinforcing one or the other element, to attain fuller protection of human rights.

3. The enhanced presence and operation of transnational corporations as well as the freedom of capital influx and investments have been among the most typical characteristic features of the international economic and public life in the past fifty years, which is faithfully reflected by the facts that, on the one hand, the growth in foreign investments has exceeded the growth in international trade and, on the other hand, foreign investments have become increasingly embedded and active components of the respective national economies.[85] On a worldwide scale they have contributed to increasing the number

82 Nicole R. Tuttle: *Human Rights Council Resolutions 26/9 and 26/22: Towards corporate accountability?* (ASIL Volume 19 Issue 20 2015), available at: <https://www.asil.org>.

83 Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC Res. 26/9 (26 June 2004). In the 47-member Council 20 states supported the decision, 14 voted against it, while 13 states abstained. The United States and the Member States of the European Union did not support the resolution. Beyond these, there are some six hundred civil organizations that, forming an alliance, support the initiative, cf.: <www.treatymovement.com/>.

84 Olivier De Shutter: *Towards a New Treaty on Business and Human Rights* (Business and Human Rights Journal Cambridge University Press Vol. 1, Issue 1, 2016) pp. 41-66.

85 Steven R. Ratner: *Corporations and human rights: a theory of legal responsibility* (Yale Law Journal December 2001).

of workplaces and by efficiently using the scarce resources they also enhanced economic growth, infrastructure development and the basis for personal welfare. The minimum benchmarks of the operation and responsibility of transnational corporations operating beyond the national framework, in an international economic environment, and the institutionalized forums of their control are nevertheless incomplete. This hiatus is especially apparent when it is embodied in the violations of international human rights guarantees, i.e. when the operation of certain transnational corporations does not meet international human rights standards or societal expectations in the broader sense. The international treaty-making efforts constantly ongoing in the past fifty years until today faithfully reflect the presence and significance of this legitimacy gap, highlighting the fact that adopting minimum international institutional guarantees and benchmarks is essential for establishing a sustainable international economic order.