



zka
stracji

Uniwersalny i regionalny

wymiar ochrony praw człowieka

Nowe wyzwania – nowe rozwiązania

tom 3

Redakcja naukowa Jerzy Jaskiernia



Warszawa 2014

International and Constitutional Approach of Business and Human Rights

I. Introduction

Business and human rights [BHR] is seemingly a recent movement, however its roots can be found in the concept of Corporate Social Responsibility [CSR]¹. Thus it is not a completely new initiation, although still a recognised challenge since the late 1980's. In the last decades a range of research projects, books and articles applying multidisciplinary approach were devoted to the topic.² The main objective of BHR discussion is to expand somehow the (international) human rights obligations to multinational enterprises [MNEs], transnational companies [TNCs] and other business entities. It is more than the CSR as softly tries to create enforceable duties for companies beyond the self-regulation, and establish the grounds of their accountability for human rights violations. In constitutional legal terms it leads to the old question of third party effect of human rights on the one hand and extraterritorial jurisdiction of the national courts on the other. As a related problem, the constitutional background of the application of international law by the courts can also be mentioned.

To understand BHR, one can choose a top down approach, and analyse the actions and instruments of the United Nations and – at least in regional context – the follow-up actions of the European Union, which are to date of voluntary nature, and even not belong to the international soft law, but they may be assessed as a kind of policy. The other choice is the bottom up approach, from the side of the national feedbacks to the

* The publication was supported by the Bolyai János Research Scholarship of the Hungarian Academy of Science.

¹ The term “corporate social responsibility” came into common use in the late 1960s and early 1970s. CSR is a form of corporate self-regulation integrated into a business model. CSR policy functions as a built-in, self-regulating mechanism whereby a business monitors and ensures its active compliance with the spirit of the law, ethical standards, and international norms.

² See e.g. K.M. Leisinger, *Business and human rights – In The Future of Sustainability*, ed. Marco Keiner, Springer 2006, p. 117–151; R. Falk, *Interpreting the Interaction of Global Markets and Human Rights*, in *Globalization and Human Rights*, ed. Alison Brysk, Berkeley–Los Angeles–London 2002; M. Weschka, *Human Rights and Multinational Enterprises, How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?*, “Zeitschrift für ausländisches öffentliches Recht und Völkerrecht” 2006, № 66, p. 625–661; F. Wettstein, *Multinational Corporations and Global Justice*, Stanford, 2009; S. Joseph, *Corporations and Transnational Human Rights Litigation*, Oxford and Portland, 2004; J. Dine, *Companies, International Trade and Human Rights*, Cambridge 2007; *The UN Guiding Principles on Business and Human Rights, Foundations and Implementation*, ed. R. Mares, Boston 2012; J.G. Ruggie, *Just Business. Multinational Corporations and Human Rights*, New York–London 2013. See also Institute for Human Rights and Business; see: <<http://www.ihrb.org>> and <<http://www.business-humanrights.org/Home>>.

international standards and the relation of international human rights and domestic fundamental rights obligations, determined by the constitutional design of the states.

Both of the mentioned approaches may be influenced by the concept of global constitutionalism, which accepts the convergence of national constitutional configurations in case of those states that share the same constitutional values, i.e. belong to the same constitutional families³. According to Law and Versteeg, this convergence is characterised by constitutional learning (i.e., in the course of attempting to learn from one another, countries are likely to imitate one another), constitutional competition (i.e., the need to attract and retain capital and skilled labor gives countries an incentive to offer similarly generous constitutional guarantees of personal and economic freedom), constitutional networks (i.e., reward countries for adopting the same type of constitutional regime that others have already adopted), and constitutional conformity (i.e., countries face pressures to conform to global constitutional norms in order to win acceptance and support)⁴.

This article applies both the top down and bottom up approach and tries to evaluate the outcomes of the BHR policies and strategies in the light of global constitutionalism.

II. Top down approach

The core problem is how the individual's inviolable and unalienable fundamental rights can be guaranteed in a globalised community, if we presume that a kind of "world democracy" may come into existence. In other words, as Galgano formulated the question is how can the features of democracy, having developed within a national framework, be adapted to a post-state system of governance?⁵ Surely essential is the access to effective fundamental right protection with efficient remedies for the legitimisation of international law and international public order.

According to Tomuschat, the international community has attained the positive international protection of human rights in three theoretical and historical stages. The first step is reaching a consensus with respect to the necessity of protection and the scope of the rights to be protected. The second stage is international codification, putting it into a treaty and national adoption. The third stage is establishing and operating a mechanism for the enforcement of rights. Even the universalist approach admits that whilst the first two steps have, by and large, been taken successfully, the third – and perhaps most important phase – has not yet been accomplished⁶. In addition, the system of international protection has to be treated as a dynamic system; it has to be continuously adjusted to the changing state of global reality (handling terrorism, crime, flow of data, environmental disasters, pandemics, economic and financial crises, ethnic tensions, etc.).

³ D.S. Law, M. Versteeg, *The Evolution and Ideology of Global Constitutionalism*, Washington University in St. Louise, School of Law, "Faculty Research Paper Series" 2010, № 10-10-01, p. 7–10.

⁴ *Ibidem*, p. 11–24.

⁵ F. Galgano, *Globalizáció a jog tükrében* [Globalisation through the prism of law], HVG-ORAC, Budapest 2006, p. 7, 9.

⁶ Ch. Tomuschat, *Human Rights, Between Realism and Idealism*, Oxford 2003, p. 3.

As the UN Human Rights High Commissioner formulates the phenomenon in respect of business, "The global developments over the past decades have seen non-state actors such as transnational corporations and other business entities play an increasingly important role both internationally, but also at the national and local levels. The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of such actors with regard to human rights. International human rights standards have traditionally been the responsibility of governments, aimed at regulating relations between the state and individuals"⁷. In Ruggie's words, "The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge"⁸.

Many scholars pointed out that MNEs can infringe human rights directly or indirectly. The infringement is direct, if the enterprise uses child or forced labour, does not guarantee safety and health precautions, or establishes inhuman working conditions (like in sweatshops), discriminates on the bases of gender, race, sexual identity, belonging to ethnic, religious minority on the workplace, pollutes the environment, etc. Indirectly, typically during armed conflicts or by supporting autocratic or totalitarian regimes MNEs can be complicit in or benefit from human rights violations committed by host states⁹.

At the same time, it also worth to keep in mind that the increased economic development goes hand in hand with improvement in human rights; and the role of the MNEs (their investments and operation) is inevitable in this respect. They not only contribute to the socioeconomic welfare but promote the efficient exercise of civil and political rights as well¹⁰.

This dual effect shall be taken into consideration in constructing the international and constitutional legal instruments in the field of accountability of business enterprises for human rights.

1. Assessment of UN instruments for responsible business

With the increased role of corporate actors, nationally and internationally, the issue of business' impact on the enjoyment of human rights has been placed on the agenda of the United Nations. Over the past decade, the UN human rights machinery has been

⁷ See: <<http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>>.

⁸ J. Ruggie, *Protect, Respect and Remedy – A Framework for Business and Human Rights*, innovations spring 2008, v. 3, № 2, p. 189–212, see: <<http://www.mitpressjournals.org/doi/pdf/10.1162/itgg>>.

⁹ M. Weschka, *op.cit.*, p. 626–627; D. Weissbrodt, *Business and Human Rights*, "University of Cincinnati Law Review" 2005, v. 74, p. 57–58; K.M. Leisinger, *op.cit.*, 117ff.

¹⁰ R. Falk, *op.cit.*, p. 61 and W.H. Meyer, *Human Rights and International Political Economy in Third World Nations, Multinational Corporations, Foreign Aid, and Repression*, Westport 1998, p. 108.

considering the scope of business' human rights responsibilities and exploring ways for corporate actors to be accountable for the impact of their activities on human rights¹¹.

For initiating universal attempts, instruments and strategies it was necessary to recognise that the human rights treaties just provide for indirect human rights responsibilities of businesses. The first efforts to define direct responsibilities of companies were more or less unsuccessful, or too 'soft', however good lessons to learn. Amongst these the drafts of the UN Commission on Transnational Corporations have to be mentioned that tried to create a code of conduct for companies from the 1970s¹², as well as the OECD Guidelines¹³ and ILO Tripartite Declaration¹⁴ that promoted responsible business in their sphere of competence¹⁵.

The UN Global Compact – a voluntary framework for responsible business with the objective of sustainable, stable and inclusive global economy – was proposed by Secretary-General Kofi Annan in 1999 and it was launched in 2000. It contains a set of legally non-binding values on general human rights duties of businesses, labour standards, environmental protection and – since 2004 – anticorruption¹⁶. As UN Secretary-General Ban Ki-moon introduced the instrument, "The Global Compact asks companies to embrace universal principles and to partner with the United Nations. It has grown to become a critical platform for the UN to engage effectively with enlightened global business"¹⁷. A unique feature of the Global Compact is that participation not only commits the company as

¹¹ Business and human rights – UN High Commissioner for Human Rights. See: <<http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>>.

¹² See e.g., United Nations Draft International Code of Conduct on Transnational Corporations, 23 I.L.M 626 (1984).

¹³ The OECD Guidelines for Multinational Enterprises are far reaching recommendations for responsible business conduct that 44 adhering governments – representing all regions of the world and accounting for 85% of foreign direct investment – encourage their enterprises to observe wherever they operate. The Guidelines were updated in 2011 for the fifth time since they were first adopted in 1976. See more at: <<http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>>.

¹⁴ The ILO's search for international guidelines in its sphere of competence resulted, in 1977, in the adoption by the ILO Governing Body, of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). See: <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm>.

¹⁵ D. Weissbrodt, *op.cit.*, p. 62–63.

¹⁶ The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption, Human Rights, Principle 1, Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2, make sure that they are not complicit in human rights abuses. Labour Principle 3, Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4, the elimination of all forms of forced and compulsory labour; Principle 5, the effective abolition of child labour; and Principle 6, the elimination of discrimination in respect of employment and occupation. Environment Principle 7, Businesses should support a precautionary approach to environmental challenges; Principle 8, undertake initiatives to promote greater environmental responsibility; and Principle 9, encourage the development and diffusion of environmentally friendly technologies. Anti-Corruption Principle 10, Businesses should work against corruption in all its forms, including extortion and bribery.

¹⁷ See: <<http://www.unglobalcompact.org/>>.

a whole, but specifically its leadership. However, its effect is limited because of the lack of clarity regarding the definitions and distinctions on the duties of businesses and states; furthermore there are neither clear standards for monitoring and evaluation of corporations' conduct, nor repercussions for failing to adhere to the principles¹⁸.

It is not accidental that there is no international convention on the basic human duties yet, as such an international obligation presumably would cause more damage than advantage to human rights law, providing governments with excuses to limit the exercise of human rights¹⁹. The human duties have fallen into two categories. The first category comprises "vertical" duties in the relation of the individual and the state, which might be enforced by the government. The second category comprises horizontal duties in relations of the individual with other members of the society. Vertical duties usually appear in national constitutions, however separately from constitutional rights, i.e. the exercise of the rights is independent from the fulfilment of the duties. Horizontal duties are usually not written into the constitution, as the constitution transforms these into vertical duties, as authorises the state to specify and enforce them, and thus intervene into the organic relations of the society. In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights – building upon the previous initiatives regarding corporate social responsibility – approved a draft declaration on human social responsibilities (i.e., corporate human rights duties),²⁰ but finally the Human Rights Council [HRC] had not even considered the Norms. The draft was harshly criticised by the stakeholders because of its scope, vagueness, uncertain legal status and force, etc. As Arnold assessed, "the Norms fail to provide a plausible and defensible account of those duties and in so doing undermine, rather than enhance, efforts to ensure that corporations contribute to the fulfilment of those basic human rights necessary for a decent standard of living for all"²¹.

In 2005, John Ruggie, professor of Harvard University was appointed as a Special Representative to the Secretary-General of the United Nations [SRSG] with a mandate to investigate a number of important questions relating to the obligations of business for the realisation of fundamental rights. As Knox emphasized, that time the application of human rights law to corporations was highly contested: human rights groups [NGOs] and corporations differently approached whether corporations have, or should have, direct obligations under human rights law²². Bilchitz pointed out, that the man-

¹⁸ D. Weissbrodt, *op.cit.*, p. 63; D.G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, "Business Ethics Quarterly" 2010, v. 20, № 3, p. 3–4. Available at SSRN, see: <<http://ssrn.com/abstract=1612296>> and <<http://www.unglobalcompact.org/AboutTheGC/index.html>>.

¹⁹ See J.H. Knox, *Horizontal Human Rights Law*, "The American Journal of International Law" 2008, № 1, p. 1–3.

²⁰ Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003); see: <<http://www1.umn.edu/humanrts/links/NormsApril2003.html>>.

²¹ D.G. Arnold, *op.cit.*, p. 9. See also K.M. Leisinger, *op.cit.*, p. 2.

²² J.H. Knox, *The Ruggie Rules, Applying Human Rights Law to Corporations*, in *The UN Guiding Principles on Business and Human Rights, Foundations and Implementation*, ed. R. Mares, Boston 2012, p. 51. Available also at: <http://www.globalgovernancewatch.org/docLib/20110829_Ruggie_Rules.pdf>.

date of the SRSG arose from the failure by the HRC a year earlier to adopt the above mentioned Norms, as many of the states was on the opinion that BHR issues deserve further investigation. The SRSG was initially appointed for a two year period and was provided with a broad mandate that defined the terms of reference for his activities²³. The HRC endorsed unanimously Ruggie's reports, first in 2008 and finally in 2011. As Mares assessed, "While the Norms chose a more direct path to corporate accountability, to a large extent relying on international treaties and monitoring, and national regulations, the SRSG conceived a broader and less centralised template aimed at leveraging the responsibilities and roles of various social actors and relying on legal and other rationalities to move markets towards a more socially sustainable path"²⁴.

As a result of the SRSG's activity, there is now greater clarity about the respective roles and responsibilities of governments and business with regard to protection and respect for human rights. Most prominently, the emerging understanding and consensus have come as a result of the UN "Protect, Respect and Remedy" Framework on human rights and business, which was elaborated by the SRSG. On 16 June 2011, the UN HRC endorsed Guiding Principles on Business and Human Rights for implementing the UN "Protect, Respect and Remedy" Framework (hereinafter: the Framework), providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity²⁵. Along with the Framework, also Guiding Principles were issued to assist governments and corporations in the implementation.

The Framework rests on three pillars. The first is the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the state duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse²⁶.

²³ D. Bilchitz, *The Ruggie Framework, An Adequate Rubric for Corporate Human Rights Obligations?*, "SUR International Journal on Human Rights" 2010, v. 7, № 12, p. 199–201. See: <<http://www.surjournal.org/eng/contendos/pdf/12/miolo.pdf>>.

²⁴ R. Mares, *Business and Human Rights After Ruggie, Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, in *The UN Guiding Principles on Business and Human Rights, Foundations and Implementation*, Boston 2012.

²⁵ See: <<http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>>.

²⁶ Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, 21 March 2011.

2. Actions of the EU for enhanced corporate social responsibility

The European Commission adopted a new CSR strategy in 2011, and encourages enterprises to base their approach to corporate social responsibility on internationally recognised CSR guidelines and principles²⁷. This is especially the case for larger enterprises and for enterprises seeking to adopt a more formal approach to CSR. For companies seeking a formal approach to CSR, especially large companies, authoritative guidance is provided by internationally recognised principles and guidelines, in particular the updated OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights. This core set of internationally recognised principles and guidelines represents an evolving and recently strengthened global framework for CSR. European policy to promote CSR should be made fully consistent with this framework. As Erkollar and Oberer evaluated the EU's CSR strategy: "The European Commission was a pioneer in developing a public policy to promote corporate social responsibility, defining in their 'European Alliance' (2006) the support of multistakeholder CSR initiatives, research and education on CSR, and the support of small and medium-sized companies in their CSR activities, as priority areas for the European Union to focus on, accompanied by an applicable legislation and collective agreements between social partners. With its new strategy on CSR (2011) the European Commission emphasized the need for the establishment of sector-based platforms for enterprises and stakeholders to make commitments and jointly monitor progress, the improvement and tracking of levels of trust in businesses, the creation of guidelines for the development of future self- and co-regulation initiatives and the improvement of company disclosure of social and environmental information"²⁸.

The BHR issues are involved into (or subordinated to) the broader CSR strategy at EU level and has to date no overarching character. The European Commission has published practical human rights guidance for enterprises in three business sectors (employment and recruitment agencies, oil and gas, information and communication technology). These guides are the outcome of an intensive multistakeholder process, and are consistent with the UN Guiding Principles on BHR. They take particular account of the experience of EU companies, but aim to be as globally applicable as possible. The guides are not intended to be legally binding²⁹.

²⁷ European Commission, An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles, March 2013; see: <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf>.

²⁸ A. Erkollar, B.J. Oberer, *Responsible Business, The European Union is Driving Forward the European Strategies on Corporate Social Responsibility*, "Journal of EU Research in Business" 2012. See: <<http://www.ibimapublishing.com/journals/JEURB/2012/360374/360374.html>>.

²⁹ See: <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm>.

III. Bottom up approach – constitutional feedbacks

The system of international human rights protection may be criticized more harshly from a perhaps somewhat partialist and instrumentalist approach. It must keep in mind that beyond the trends of globalisation, universalism and constitutional convergence, also “reverse globalisation”³⁰, particularisation and constitutional divergence processes can also be observed in the global world. Donnelly pointed out that internationally recognised human rights create obligations for states, and international organisations call upon states to account for their fulfilment. If everybody has the right to *x*, in contemporary international practice it means: every state is authorized to and responsible for the application and protection of the right to *x* in its own territory. The Universal Declaration of Human Rights is the common standard of achievements for all peoples and nations – and for the states representing them. Covenants create obligations only for states and the international human rights obligations of states exist only in relation to persons falling under their jurisdiction. Although human rights legal norms have internationalized, their transposition has remained almost exclusively national. Contemporary international and regional human rights regimes are supervisory mechanisms monitoring the relationship between states and individuals. They are not alternatives to the essentially state concept of human (fundamental) rights³¹. For example, in Europe (within the framework of the Council of Europe) the European Court of Human Rights [ECtHR] examines the relationship between states and citizens or residents on the basis of subsidiarity. The position of the Inter-American Court of Human Rights is the same³². The central role of states in contemporary international human rights structures is also indisputable with respect to the content of recognized rights. The most important participatory rights are typically (though not generally) limited to citizens. There are several obligations – e.g. in the area of education and social safety – which may be undertaken only with respect to residents and they apply to aliens only if they fall under the jurisdiction of the state. Foreign states do not have an internationally recognized human right obligation, for instance, to protect victims of torture in another country. They are not free to go beyond the means of persuasion in the case of foreign victims of torture. Contemporary norms of sovereignty prohibit states from applying means of coercion abroad against torture or any other human right violation³³.

For the success of the BHR concept, which does not even belong to the international soft law to date, it is necessary to shift focus on non-state actors, NGOs and corporations

³⁰ For the term, see S. Benhabib, *Another Cosmopolitanism, with the Commentaries by Jeremy Waldron, Bonnie Honig, Will Kymlicka*, Oxford 2006.

³¹ J. Donnelly, *The Relative Universality of Human Rights*, “Human Rights Quarterly” 2007, v. 29, № 2, p. 281–306.

³² See also N.Z. Tévar, *Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations*, “Cuadernos de Derecho Transnacional” 2012, v. 4, № 2, p. 403.

³³ J. Donnelly, *Universal Human Rights in Theory and Practice*, New York 2003.

as – at least – secondary subjects of international law. From this perspective was the Ruggie Framework criticized by Bilchitz, because considering the limits of international human rights law enforcement, corporations should have binding obligations for the realisation of fundamental rights. Non-binding instruments – such as the Framework – do not assist in the development of customary international law in the area of BHR and may even hamper progress. Corporations should not only respect human rights, i.e. avoid their violation, but also actively contribute to the realisation of human rights (positive duties)³⁴. Corporate accountability also cannot be effectively dealt with through existing methods; as Vega, Mehra and Wong stated, “While [the Framework and the Guiding Principles] contain positive elements, they fall short of creating an effective mechanism for addressing the many corporate human rights violations that continue by not providing a remedy in the international arena when national systems are unavailable or ineffective”³⁵.

Even in the European Union, which has an intensively evolving fundamental rights framework³⁶, are significant obstacles that hamper the efficient application of the UN Framework for BHR. A conference on CSR was organised during the Swedish EU presidency in November 2009, where remarkable conclusions were drawn about the problems with the functioning of the UN Framework. In respect of the states’ obligation to protect human rights, the incoherence of the Member States legislation (e.g. on issues of trade, investment, overseas development and corporate law) was seen as presenting a fairly uneven playing field within the Union of 27 states even before relations with other states, such as Brazil, Russia, India or China. The accountability mechanisms relating to the overseas operations of EU-domiciled companies was also mapped, and cited as an important first step in understanding some of the state-based gaps that might exist. In the field of corporate responsibility to respect, business requires states to play their appropriate role in order to help create additional demand. The issue of avoiding complicity in the human rights abuses perpetrated by others was also seen as being key feature here. As to the remedies, it was concluded that greater awareness of and adherence to existing international human rights mechanisms and greater access to effective remedies, both legal and non-legal is needed³⁷.

It can be added that also the national constitutions and constitutional jurisprudence should be more open to consequences of the global world order by giving up the regulative and applicative models related to and rooted in the traditional concept of state sovereignty. In the following three major questions of constitutional design – the third

³⁴ D. Bilchitz, *op.cit.*, p. 199.

³⁵ C. de la Vega, A. Mehra, A. Wong, *Holding Businesses Accountable for Human Rights Violations – Recent Developments and Next Steps. Dialogue on Globalisation*, 2011; see: <<http://library.fes.de/pdf-files/iez/08264.pdf>>.

³⁶ N. Chronowski, *Integration of European Human Rights Standard – the Accession of EU to the ECHR*, [in:] *Efektywność europejskiego systemu ochrony praw człowieka*, Toruń 2012, p. 957–975.

³⁷ Ministry for Foreign Affairs Sweden, *Protect, Respect, Remedy – a Conference on Corporate Social Responsibility (CSR)*, Stockholm 10–11 November 2009, Conference Report, p. 5–8, available at: <http://www.ihrb.org/pdf/Protect_Respect_Remedy_Stockholm_Nov09_Conference_Report.pdf>.

party effect, the application of international law and the extraterritorial jurisdiction of the courts – will be discussed which should re-evaluated or even revisited for enhanced realisation of businesses' responsibility for human rights violations.

1. Third party effect (Drittwirkung)

Constitutions of the democratic states governed by the rule of law traditionally contain fundamental rights catalogue in line with international human rights law. These rights shall be normative and effective, i.e. enforceable before the courts of law. The effect of fundamental rights can be vertical or horizontal. The vertical effect of the fundamental rights stems from the historical function of the rights, which is to protect the individuals against the state organs and limit the public power³⁸. The international human rights law, as well as the UN BHR Framework relies on the states to guarantee the effective fundamental rights protection; and claims against the states can be brought to international human rights courts after exhausting the domestic remedies, i.e. if the given state fails to protect the rights. The horizontal effect of fundamental rights means that they prevail also between individuals; and influence or determine the legal relations of private actors. This horizontal or third party effect can be direct or indirect.³⁹ According to the theory of indirect horizontal effect, the fundamental rights norm of the constitution is not applicable directly in private law relations; it is only used as an interpretative guide to determining private law relations among individuals *inter se*. Thus, indirect horizontal effect exists when private law obligations are interpreted with regard to fundamental rights. It is the duty of the state, i.e. the legislator to create the rules of private (trade, investment, etc.) law in compliance with the constitutional and also international human rights so as the principles of the civil code to transmit the idea of human rights (dignity, equality, freedom, privacy, etc.); and thus the courts of law can interpret the private law regulation in the light of the constitutional (and international human rights) values. The theory of direct horizontal effect represents that the fundamental rights enshrined in the constitution are applicable in the private relations of the individuals. This results that private or labour law contracts infringing fundamental rights are invalid⁴⁰. Direct horizontal effect implies that an individual has, in his action against another private party, a claim based directly on a constitutional right, which overrides an otherwise applicable rule of private law⁴¹. This idea would however convert the private law claims into human rights disputes, and the private law regulation would lose its function⁴². Thus the most

³⁸ J. Petrétei, *Az alkotmányos demokrácia alapintézményei*, Basic Institutions of Constitutional Democracy, Budapest–Pécs 2009.

³⁹ E. Engle, *Third Party Effect of Fundamental Rights (Drittwirkung)*, "Hanse Law Review" 2009, v. 5, № 2, p. 165–166.

⁴⁰ J. Petrétei, *op.cit.*, p. 441.

⁴¹ O.O. Cherednychenko, *Fundamental rights and private law, A relationship of subordination or complementarity?* "Utrecht Law Review" 2007, v. 3, № 2, p. 4–5.

⁴² J. Petrétei, *op.cit.*, p. 441.

widely used and followed concept in practice is the idea of the indirect horizontal effect of constitutional rights. Without contesting the concerns on the direct horizontal effect it must not be born in mind that MNEs and TNCs are very special, powerful and influential private actors, thus with regard to their overwhelming dominance over the individuals and even the states the application of direct horizontal effect of fundamental rights would be reasonable to their relations.

2. Application of international law by national courts

The national constitutions usually contain provisions on international law and international community, reaffirming the acceptance and respect of internationally agreed values, amongst the international human rights norms. Thus these kinds of constitutional provisions preliminarily commit and restrain the national governments for and by the common international values⁴³. However, the constitutional declaration in itself does not guarantee that the international human rights law is applied and enforced effectively in a given country, because the enforcement depends on and is influenced by the way of implementation (monist or dualist approach), the level and effectiveness of protection of the relevant constitutional provisions (by constitutional court or courts of law with constitutional review powers) and the exact content of those provisions (e.g. they refer to international law in general, or distinguish the sources of international law, firmly express the rank of the international law in the domestic legal system etc.), and finally the general attitude of the courts of law to the application of international treaties, international courts' judgments, universal customary international law, peremptory norms (*ius cogens*) and general principles of law recognized by civilized nations. Or as Cram explained: "When considering the migration of human rights norms into the judicial sphere, two initial observations may be made. The first is that while some constitutions oblige national courts to engage with norms in international human rights law, the precise status that is given to these norms varies considerably from constitution to constitution. Second, by comparison with explicit constitutional references to international human rights laws, there is a conspicuous lack of any equivalent constitutional exhortation to give effect to / consider / take account of national human rights norms"⁴⁴.

The judicial dialogue – i.e., considering and applying international and foreign court decisions, drawing the consequences of international courts' judgments by national courts – may support the international BHR principles as well. The question is whether the international and national courts do really have a dialogue, or they continue their parallel monologues?⁴⁵

⁴³ T. Ginsburg, S. Chernykh, Z. Elkins, *Commitment and Diffusion, Why Constitutions Incorporate International Law*, "University of Illinois Law Review" 2008, p. 101–137; see: <http://works.bepress.com/zachary_elkins/1>.

⁴⁴ I. Cram, *Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases*, "Cambridge Law Journal" 2009, № 68(1), p. 119.

⁴⁵ N. Chronowski, E. Csatlós, *Judicial Dialogue or National Monologue? – the International Law and Hungarian Courts*, forthcoming "ELTE Law Journal" 2013.

Dialogue is when two (or more) participants in equal position, are seeking agreement by exchange of views, generally in order to achieve some joint outcome. The precondition of the dialogue is the near identical or similar position of the participants, which primarily occurs on the level of powers and influence, and from this perspective, assumes identical weight. The dialogue is actually a specific form of debate; therefore it shall be distinguished from the general discussion and consultation as well. As a specific form of the debate, some criteria may be outlined that characterise the dialogue and without this framework the parties would misunderstand each other. First, the dialogue assumes a common goal, or if you prefer, a common subject on which the dialogue is going on. The dialogue may never end in itself. Second criterion is the commitment to the common goal. All the participants want to achieve the common goal, which is to eliminate or reduce the conflict, and the debate or the individual interests shall be subordinated to this goal. Regularity is also an important feature of the dialogue. The dialogue is rarely a single exchange of views, because the interests of the participants are usually complex. The fourth characteristic in a dialogue is that the parties strive to be conclusive and effective. All of them are interested in the conflict resolution, and therefore they are willing to "sacrifice", i.e., to give up some parts of their own interests in order to reach a mutual compromise outcome, because this is usually more preferable for everyone than enforcing their individual interests. Finally the mutuality must be mentioned, which should characterize all of the participants. The mutuality covers also concession, empathy, tolerance, etc. The meaning of a dialogue is not overcoming each other, but to achieve a common goal. A focal question is, whether and to what extent do the national courts consider the judgments of international or foreign courts. Do they just simply refer them, or do they reflect on them by overruling their own, former jurisprudence? The latter would prove the existence of judicial dialogue and contribute to the efficiency of international human rights law, the former, however, is not enough to satisfy the criteria of the dialogue.

Applying the general features of the dialogue to the courts, one can conclude that the basic condition – the equal position – is given if we consider the powers and status of e.g. the ECtHR, the constitutional courts and ordinary courts of last instance. As to the common goal and the commitment to that – first and second specific conditions – it may be supposed that the analyzed courts are to protect fundamental rights and common constitutional values, but these are very far and abstract common goals. The concrete goal of each court is to solve a given case, safeguard the ECHR or the constitution in line with its function, and the way they reach this goal is influenced by the circumstances of the given case, the references of the parties concerned, and the presumption of the judges regarding *the ratio decidendi*. The latter also interferes with the regularity, because the national courts usually refer to international sources only if it supports the reasoning or has stronger convincing force than the purely domestic legal based argumentation. Fourthly, the courts have no conflict with each other, thus – although they respect each others statements and rulings – they need not to be conclusive and effective in this respect. Sometimes the domestic courts seem to be rather

careful or reticent with the interpretation of international treaties as they may try to avoid a potential future conflict with the international court interpreting the given treaty authentically. Of course if all role-players – i.e. courts – agree that the conflict can be traced back to a given piece of domestic law infringing a normative international commitment, and the procedural conditions are available (their procedures were initiated, at least one of them has power to eliminate the concerned norm, they have appropriate procedural ties among each other), the international and domestic courts may cooperate effectively by referring each others' decisions. Finally, in the 'dialogue' of the courts, the mutual respect can be observed and rivalry is really rare phenomenon, but it is also true, that courts are not compelled to mutual concessions. Thus, as a final conclusion, it can be stated that the domestic courts apply the international law if they have to or they want to decorate their reasoning with it, but it is still far from a constructive dialogue, and organic inclusion of international law, principles and practices into the jurisprudence.

3. The problem of extraterritoriality

The problem of extraterritoriality related to the rule that international law holds states responsible for human rights violations, and not MNEs or TNCs. The states as duty bearers have to guarantee that business enterprises do not infringe the human rights in the territory where they operate. First and foremost the host state (where the MNE operates or the potential human rights violation occurs) should establish guarantees against the human rights violations by their national laws and law enforcement mechanism. However, because of the dominance and mobility of the MNEs, as well as the needs, means, economic interests or state of development of the given country, the offered human rights guarantees are often insufficient in the host state. E.g. it is very typical in developing countries that the governments fail to take actions against MNEs for human rights violations, because they need foreign investment, jobs, technical enterprise or they simply do not have resources (financials, legal procedures, non-corrupt judiciary, etc.) to sanction human rights abuses although would be willing to do so.⁴⁶ For these reasons, it is a logical step on the side of the victims of human rights violations caused by MNEs that they – seeking for redress and compensation – try to sue corporations for their activities performed abroad in the home states, i.e. in the country where the given business enterprise is domiciled. Home States are not currently liable in international human rights law for failing to prevent, punish, or otherwise regulate the delinquencies of their TNCs' overseas operations, but the home states have high human rights records, developed procedures, non-corrupt and functioning court system, and international law also "recognises the right of home states to exercise extraterritorial jurisdiction over their nationals committing wrongs

⁴⁶ M. Weschka, *op.cit.*, p. 628–629; S. Joseph, *op.cit.* p. 9–10; N.Z. Tévar, *op.cit.*, p. 399–401.

abroad⁴⁷. Thus the national courts have the chance to rule on MNEs' overseas human rights abuses, and enforce human rights norms "horizontally". Numerous suits were filed mainly in common law countries, before United States, Canadian, Australian and United Kingdom courts against parent companies⁴⁸. The most successful legal instrument for transnational human rights litigation seemed to be undoubtedly the US Alien Tort Statute (ATS) 1789 that had been dormant for nearly two centuries before lawyers began creatively using it in the 1980s to bring international human rights cases in US courts. The ATS grants jurisdiction to federal courts to hear tort claims by aliens alleging violations of the "law of the nations"⁴⁹. However, the ATS itself cannot help to solve the problem of liability of the MNEs, because courts take several features into consideration in respect of transnational litigation, such as the doctrine of separation of powers, the state action doctrine, the political question, sovereign immunity and international comity considerations, the "corporate veil" as well as "forum non conveniens"⁵⁰. In the recent landmark *Kiobel* decision the US courts greatly restricted the scope of ATS and limited the US courts jurisdiction in foreign human rights cases⁵¹. US Court of Appeal for the Second Circuit ruled that the ATS is inapplicable to corporations because corporate liability is not a discernible norm of customary international law. The Supreme Court heard arguments over whether the Alien Tort Statute could apply to corporations, and later expanded the case to consider whether the law could be invoked in similar cases against anyone. The judgment finally was controlled by the "presumption against extraterritoriality", which means that the Congress is presumed not to intend its statutes to apply outside the US unless it provides a "clear indication" otherwise. However, so long as at least some portion of the relevant conduct occurred within the US, ATS cases may still be sustainable. Altogether, this decision makes it far more difficult for the human rights activists to sue US corporations based on the corporation's overseas activities⁵².

⁴⁷ M. Weschka, *op.cit.*, p. 629; S. Joseph, *op.cit.*, p. 11–12.

⁴⁸ S. Joseph, *op.cit.*, p. 15; O. De Schutter, *Transnational Corporations and Human Rights, An Introduction*, Global Law Working Paper 01/05, Symposium – Transnational Corporations and Human Rights, NYU School of Law 7.

⁴⁹ N.Z. Tévar, *op.cit.*, p. 408; S. Joseph, *op.cit.*, p. 10, 17.

⁵⁰ M. Weschka, *op.cit.*, p. 629–631; N.Z. Tévar, *op.cit.*, p. 409.

⁵¹ *Kiobel v. Royal Dutch Petroleum Co.*, Decided April 17, 2013. Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute, alleging that respondents – certain Dutch, British, and Nigerian corporations – aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". 28 U.S.C. § 1350. The District Court dismissed several of petitioners' claims, but on interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability.

⁵² Rich Samp, Supreme Court Observations, *Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*; see: <<http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>>.

IV. Conclusions

To sum up, BHR is still a policy instead of a legal framework, although by further development a really efficient instrument could be as response to the challenges of globalisation on human rights. The limits of the United Nations' BHR concept are on the one hand the deficiencies of international human rights enforcement mechanisms, and on the other hand some constitutional dogmas on direct third party effect of human rights, the rigid and unimaginative application of international law by national courts, and excluding extraterritorial jurisdiction in human rights cases. Thus, for the success of "principled pragmatism"⁵³ of UN BHR Framework and policy, some paradigms of national constitutional law should be changed, or at least the domestic courts should make a better use of the constitutional convergence.

⁵³ For the term, see 'Just Business' – Ruggie on Business and Human Rights at the UN; see: <<http://businesshumanrightsireland.wordpress.com/2013/05/13/just-business-ruggie-on-business-and-human-rights-at-the-un/>>.