Special Issue Editorial

Business and Human Rights: Legal Aspects

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The relationship between business and human rights is a very material issue in the field of human rights law, both at the level of international law as well as national law. Ten years have passed since the adoption by the UN Human Rights Council of the *‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’* (hereinafter the UNGPs). They were developed by Professor John Ruggie, Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises. He annexed the UNGPs to his final report to the UN Human Rights Council, which also included an introduction to the UNGPs and an overview of the process that led to their development. The UN Human Rights Council unanimously endorsed the UNGPs in its resolution 17/4 of 16 June 2011.¹

The passage of a decade since the adoption of the UNGPs gives rise to questions concerning both their implementation to date, as well as their perspectives for the future. The ‘UNGPs: Next Decade | 10+’ project currently being undertaken by the UN is an effort, informed by wide-ranging stakeholder

1 Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31 (21 March 2011). See Surya Deva, “Guiding Principles on Business and Human Rights: Implications for Companies”, 9(2) *European Company Law* (2012) pp. 101–109.

consultations, that will take stock of achievements to date, assess existing gaps and challenges, and lead, most importantly, to the development of an ambitious vision and roadmap for implementing the UNGPs more widely and more broadly between now and 2030.² This is therefore a very special moment to address the problem of the relationship between business and human rights both in the context of the UNGPs as well as other international documents, including international agreements. It is also important to look at the creation process of new regulations, including the Convention on business and human rights being elaborated by the UN.

The authors of the individual articles are academic scholars dealing with human rights, including heads of university human rights departments (Professor Bożena Gronowska, Professor Elżbieta Karska and Professor Marcin Wiącek) and public international law departments (Professor Karol Karski). Some of the authors also combine academic activity with practical work in international institutions for the protection of human rights. Professor Surya Deva is the Chair-Rapporteur of the UN Working Group on human rights and transnational corporations and other business enterprises (also referred to as the UN Working Group on Business and Human Rights),³ and Dr Jelena Aparac is the Chair-Rapporteur of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (also referred to as the UN Working Group on the use of mercenaries).⁴ The mandate of this Working Group also covers issues related to particular forms of business entities, such as private military and security companies.⁵ In turn, Professor Elżbieta Karska is the Vice-Chair and the former Chair-Rapporteur of the UN Working Group on Business and Human Rights, and in the past she was the Chair-Rapporteur of the UN Working

2 United Nations Human Rights, Office of the High Commissioner, *Next Decade | 10+ UN Guiding Principles on Business and Human Rights at 10: Business and human rights: towards a decade of global implementation*, <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx> [accessed 30.06.2021].

3 United Nations Human Rights, Office of the High Commissioner, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> [accessed 30.06.2021].

4 United Nations Human Rights, Office of the High Commissioner, *Working Group on the use of mercenaries*, <https://www.ohchr.org/en/issues/mercenaries/wgmercenaries/pages/wgmercenariesindex.aspx> [accessed 30.06.2021].

5 United Nations Human Rights, Office of the High Commissioner, *About the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, <https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/About.aspx> [accessed 30.06.2021].

Group on the use of mercenaries. These groups operate within the scope of the Special Procedures of the UN Human Rights Council. She is also a Member of the Management Board of the European Union Agency for Fundamental Rights (FRA) and a Member of the European Commission against Racism and Intolerance (ECRI), an independent body operating within the framework of the Council of Europe. Professor Surya Deva is also Editor-in-Chief of the *Business and Human Rights Journal* (Cambridge University Press). Professor Karol Karski, MEP is a Member of the Sub-Committee on Human Rights of the Foreign Affairs Committee in the European Parliament.⁶ The authors also work to protect human rights at the national level. Professor Marcin Wiącek, for example, is the Polish Commissioner for Human Rights (Ombudsman).

A significant and, at the same time, a very current test for the relationship between business and the protection of human rights is the COVID-19 pandemic. In the article “COVID-19, Business, and Human Rights: A Wake-Up Call to Revisit the ‘Protect, Respect and Remedy’ Framework?” Professor Surya Deva ponders whether the UNGPs constitute sufficient grounds for the introduction of transformative changes in order to overcome deeply-embedded socio-economic problems, which have been revealed by this pandemic. The answer is not positive. For it turns out that ‘realising human rights fully would not only require harnessing the potential of states’ tripartite obligations, but also move beyond limiting the responsibility of businesses to respect human rights’. These three pillars of the UNGPs are: (1) The state’s duty to protect human rights; (2) The corporate responsibility to respect human rights; and (3) Access to remedy for victims of business-related abuses. One must fully agree with Professor Surya Deva that

The pandemic should be taken as a wake-up call to make fundamental and transformative changes to how we conceive the role of business in society. [...] In addition to complement fully states’ tripartite obligations, businesses should have a responsibility (in fact, obligations) to not only respect but also protect and fulfil human rights.

In the article “Transnational Corporations and Human Rights: Is it Really a Gordian Knot?” Professor Bożena Gronowska and Dr Julia Kapelańska-Pręgowska point to the necessity of enforcing the liability of multinational corporations. The authors consider whether it is possible to make a step forward in this respect. They argue that the mechanisms related to the obligations of

⁶ European Parliament, *Committees: Subcommittee on Human Rights*, <https://www.europarl.europa.eu/committees/en/droi/home/highlights> [accessed 30.06.2021].

the state regarding the protection of human rights would have been effective, had they been properly utilised with respect to the particular economic and legal entities of this kind. There is a lack, however, of a uniform approach of states to this issue and current action, at the international level, basically consists in invoking the morals and professional ethics of the persons involved in the particular actions of a corporation. This is because the UNGPs arise from a resolution of the UN Human Rights Council, which is not a legally binding document, although it strives to reconstruct certain rules resulting from general human rights protection standards and to adapt them to the specific nature of business enterprises. The authors identify the lack of an international legally binding instrument, which would define the obligations and liability of the said entities, as one of the missing factors of success. Maybe this would be the sword that cuts the Gordian knot?

Professor Elżbieta Karska also supports the adoption of a treaty that would set out the scope of the obligations of corporations in this context. She indicates that numerous violations of human rights perpetrated by transnational corporations all over the world have met with sanctions rather sporadically. In her article “Drafting an International Legally Binding Instrument on Business and Human Rights: The Next Step Towards Strengthening the Protection of Human Rights”, she points out that changing economic and social relations usually force a change in the law including international law. In the area of interest to us, this work is being conducted within the mandate of the UN *Open-ended intergovernmental working group for the elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights*. The solutions that are to be incorporated therein are not to create new rights and freedoms but new mechanisms for their implementation and enforcement. This is particularly important in view of the fact that national systems of protection of human rights are presently rather ill-adapted to violations perpetrated especially by transnational economic entities.

The article authored by Dr Jelena Aparac “Gaps in Corporate Liability: Limited Investigations of Corporate Crimes in Armed Conflicts” touches upon the extremely interesting problem of the responsibility of corporations for human rights violations during armed conflicts. In present times, a classical differentiation into obligations arising from international humanitarian law (that apply during a period of war) and those resulting from international human rights protection law (that apply exclusively in times of peace) is becoming an anachronism. The provisions of international criminal law, which secure the rights stemming from both types of regulations, are superimposed on them. Dr Jelena Aparac points to the gaps in fact-finding procedures that cause

transnational corporations to escape control in this respect. One must agree with the author that the UN limits considerably the perspectives of corporate liability and hinders the process of justice in the transitional period. It might be added, by the way, that the work of the Nuremberg Tribunal determined that it is possible in fact not only to enforce liability regarding natural persons, but also with respect to collective entities, including national legal persons.

The activity of business enterprises should be looked at not only through the prism of their liabilities and obligations, but also by considering their rights. International human rights law recognises them also as entities entitled to protection. Professor Karol Karski and Dr Bartosz Ziemblicki, in “Commercial Companies as Applicants before the European Court of Human Rights”, point to an extremely interesting situation where in the light of certain conventions and procedures falling within the scope of international human rights law, including that of the European Court of Human Rights (ECHR), there is an anthropomorphisation of legal persons. They become not only entities that benefit from rights and freedoms, but also have the right to pursue them through international bodies. The scope of protection for companies constantly increases through jurisprudence. The authors note, however, the fact that the European Convention on Human Rights of 1950⁷ gives national legal persons, though not all, the right to file complaints against the state with the ECHR, but does not provide for the possibility of filing complaints against them. This is the case in situations where some transnational corporations have a greater economic, and sometimes social and political, capability than many states. Whilst states are responsible for them, they do not always have the possibility to enforce liability.

Professor Marcin Wiącek also points to the rights and freedoms of legal persons. In the article “Legal position of Administrative Courts in Poland: Commercial and Financial Cases Perspective” he points to Principle 25 of the UNGPs, pursuant to which states must take appropriate steps to ensure, through judicial means inter alia, that when business-related human rights abuse occur those affected have access to effective remedy. This means that each state is obliged to organise its judicial system in a way that complies with the right of access to the courts and with fair trial standards in business-related cases. Professor Marcin Wiącek’s analysis starts from the point of view of national law, referring in this context to the provisions of the Polish Constitution of 1997,⁸ which guarantees the freedom of economic activity. The author subsequently discusses the functioning of the Polish administrative

⁷ ETS No. 005, as amended.

⁸ Journal of Laws of 1997, No. 78, item 483, as amended.

judiciary in terms of the complaints brought by economic entities. He also presents the scope of competencies of the Economic and Financial Chambers of the Supreme Administrative Court and considers selected legal issues in the case-law of administrative courts in economic and financial cases. He notes that these solutions meet the standard specified in Principle 25 of the UNGPs.

The individual articles discuss material issues concerning the relationship between business and human rights. They contain not only the authors' reflections *de lege lata*, but also their conclusions *de lege ferenda*. Taking into consideration the involvement of the editors and authors in the work of the various bodies, including international and national institutions, it is necessary to note that that the views expressed in this Special Issue of the ICLR are solely an expression of their academic research activity and their individual opinions.