

## ENABLING A LEVEL PLAYING FIELD IN BUSINESS WITH RESPECT FOR HUMAN RIGHTS

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### Summary

*A level playing field is enabled when business enterprises can freely compete in the market. However, they cannot compete freely if different rules apply to them. Therefore internationally accepted human rights have to be respected by all business enterprises, no matter their size, sector, ownership and the state of operations. The purpose of the paper is to identify three criteria by which it is possible to achieve a level playing field in business and to examine the criteria using respect for human rights as an example. Using a descriptive method and a method of analysis, the author argues that without the universal minimum standards of respect for human rights a level playing field in business cannot be possible. This will be feasible only with the adoption of a binding international instrument and imposing sanctions on the international level. Consequently, establishing of an international judicial mechanism with a power to sanction corporate human rights abuse is of vital importance.*

**Keywords:** *level playing field; corporate responsibility to respect human rights; UNGPs; binding international instrument; international judicial grievance mechanism.*

### 1 INTRODUCTION

Globalisation and its opening of the market have completely changed the business world. A market race has begun and it often leads to destruction of social values as business enterprises compete for market power and increasing profit. Often social goals are neglected at the expense of financial goals. Therefore it is essential to impose rules that regulate this situation (i.e. competition law). The goal is differentiation on

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the basis of effectiveness of products and services and not on the basis of exploiting workers and other stakeholders. Internationally accepted human rights have to be respected everywhere and hence appropriate rules are necessary. The responsibility to respect human rights is under the United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>1</sup> imposed on all business enterprises, no matter their size, sector, ownership and the state of operations, as otherwise it would not be possible to ensure all market participants a level playing field and fair competition would not be possible. The purpose of the paper is to identify three criteria by which it is possible to achieve a level playing field in business and to examine the criteria using respect for human rights as an example. Using a descriptive method and a method of analysis, the author argues that without the universal minimum standards of respect for human rights a level playing field in business cannot be possible. This will be feasible only with the adoption of a binding international instrument and imposing sanctions on the international level. Consequently, establishing of an international judicial mechanism with a power to sanction corporate human rights abuse is of vital importance.

Initially, the author theoretically defines the characteristics of a level playing field. On this basis the author identifies three criteria on which it is possible to achieve the level playing field in business – universal minimum standards, a binding international instrument and an international judicial grievance mechanism for abuses. Furthermore, the author aims to find how the level playing field in business can be enabled by the respect for human rights and studies the criteria set on the example of respect for human rights. Based on the prior receding theoretical research the author synthesizes the findings and provides several proposals as to how to meet the challenges and offers recommendations for further regulation.

## **2 LEVEL PLAYING FIELD IN BUSINESS**

The Black's law dictionary<sup>2</sup> defines the level playing field as “a situation in which different companies, countries etc. can all compete fairly with each other because no one has special advantages”. Or as the Business dictionary<sup>3</sup> states “»(e)conomic and legal environment in which all competitors, irrespective of their size or financial strength, follow the same rules and get equal opportunity to compete”. In other word it is a concept about fairness in a market race.

Appelman *et al.*<sup>4</sup> distinguish two types of the concept of a ‘level playing field’ that originate from two types of asymmetry - asymmetries in rules and asymmetries between enterprises’ characteristics. The first type of the level playing field focuses

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1 OHCHR Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its Resolution 17/4 of 16 June 2011.

2 Bryan A. Garner, ed., *Black's law dictionary*, 8th ed. (St. Paul, MN: Thomson/West, 2004).

3 “Level playing field,” Business dictionary, accessed May 1, 2021, <http://www.businessdictionary.com/definition/level-playing-field.html>.

4 Marja Appelman *et al.*, “Equal Rules or Equal Opportunities? Demystifying Level Playing Field,” CPB Document No. 34 (October 2003), accessed May 1, 2021, <https://www.cpb.nl/sites/default/files/publicaties/download/equal-rules-or-equal-opportunities-demystifying-level-playing-field.pdf>.

on the rules, whereas the second type focuses on different characteristics between enterprises.<sup>5</sup> It is essential for the rules-based level playing field that all types of government policy (the rules) are the same for all businesses in the market, while it is essential for the outcome-based level playing field that all businesses have the same expected profit.<sup>6</sup> In this article the author focuses on the first type.

Already in the year 1646 Grotius emphasised the importance of law, equal for all mankind.<sup>7</sup> A rules-based level playing field exists “if equal rules apply to all (different) firms in a market and the rules treat firms equal in equal situations (no discriminating effect)”, “market forces do the rest”.<sup>8</sup> Businesses have equal conditions, but not necessarily equal effects.<sup>9</sup> A rules-based level playing field generally enhances welfare and creates a fair competition, even though there are situations where asymmetric rules are desirable.<sup>10</sup>

A level playing field issue can be considered from a different perspective: the perspective of a municipal authority, a national authority, or a supranational body like the European Union.<sup>11</sup> In the international market problems exist due to different state regulations as commonly the market is larger than the jurisdiction of one state. Different policies of the various states involved can result in the asymmetry in rules and consequently unfair competition; businesses based in a state with less strict rules and environmental and labour standards have a cost (or competitive) advantage upon businesses in states with stricter rules.<sup>12</sup>

Appelman *et al.*<sup>13</sup> believe that the impact of asymmetry in rules can be small if businesses can switch between rules by moving their home base to another country. However this is not a good option as it remains a problem for those that stay. Looking from the workers perspective they have a right to demand a level playing field and the state has a responsibility to protect the welfare of their workers. The state is assigned to protect the competition and workers with a prohibition of slave or convict labour.<sup>14</sup>

A level playing field is enabled when business enterprises can freely compete in the market. Zabel inferred a legal definition of a market from various Slovenian provisions that is: “... the exchange of goods, services, capital, intellectual achievements and other material values based on the free will of market participants.”<sup>15</sup> The term competition is defined as an activity or a state of effort for achieving a certain goal by enabling superiority above others that want to achieve the same goal.<sup>16</sup> The Black’s

5 Appelman *et al.*, *Demystifying Level Playing Field*, 21.

6 Appelman *et al.*, *Demystifying Level Playing Field*, 83.

7 Hugo Grotius, *De iure belli ac pacis libri tres* (University of Michigan Library, 1704).

8 Appelman *et al.*, *Demystifying Level Playing Field*, 83.

9 Appelman *et al.*, *Demystifying Level Playing Field*, 21.

10 Appelman *et al.*, *Demystifying Level Playing Field*, 35.

11 Appelman *et al.*, *Demystifying Level Playing Field*, 19.

12 Appelman *et al.*, *Demystifying Level Playing Field*, 21.

13 Appelman *et al.*, *Demystifying Level Playing Field*, 19.

14 Raleigh Barlowe, “On a Level Playing Field,” *Land Economics* 69, no. 2 (1993): 192.

15 Bojan Zabel, *Tržno pravo: Teorija in praksa pravnega urejanja trga* (Ljubljana: Gospodarski vestnik, 1999), 65.

16 Judy Pearsall, ed., *The New Oxford Dictionary of English* (Oxford: Clarendon, 1998). Similar Zabel, *Tržno pravo*, 76.

law dictionary defines the term competition as a “struggle for a commercial advantage” or “effort or action of two or more commercial interests to obtain the same business from third parties”.<sup>17</sup> According to Zabel the legal term competition is a “synonym for a constitutionally guaranteed free market”.<sup>18</sup> Competition<sup>19</sup> has to be understood as “enforcement on the market for improving the market”, where the competition does not only represent actions of market participants but also relationships between them.<sup>20</sup> The essence of competition is to ensure an advantage over other market participants by using the allowed means as no participant has his market position permanently guaranteed.<sup>21</sup> Korže<sup>22</sup> states that competition can be labelled as independent efforts of businesses to enter into a contract with users or suppliers, where every entity is dependent on individual and collective practices of others in achieving business success – therefore competition only exists if an individual competitor adapts its behaviour to other competitors.

For a long time it was presumed that the market will take care of the level playing field and that the state cannot interfere with business operations and market operation. This system was labelled as a free market economy, i.e. economy in which the majority of business activities are organized via free market where participants trade in the frame of their own quantities and prices without state interference.<sup>23</sup> Smith<sup>24</sup> claims that what is in the interest of business enterprises is also in the interest of society. Friedman<sup>25</sup> states that the only corporate social responsibility is to use their means to maximise profit until they stay in the frame of the rules of the game, so they are were a subject of open and free competition, without fraud. Consequently already Friedman emphasized the meaning of free competition, yet disregarded that without the level playing field competition<sup>26</sup> is not possible. The Friedman’s “rule of the game” captured antitrust and anticorruption but nowadays they should include substantially more, especially respect for human rights.

Globalisation completely changed the international market operation and also domestic markets. Economic deregulation became “a mantra of a new millennium”.<sup>27</sup> States started to compete to gain advantage of foreign direct investments and in the desire to gain foreign direct investments developed countries started to lower regulations of international trade and institutions and forced developing countries to

17 Garner, *Black's law dictionary*.

18 Zabel, *Tržno pravo*, 78.

19 Slovenian legislation does not have any legal definition for it.

20 Zabel, *Tržno pravo*, 76, 350.

21 Zabel, *Tržno pravo*.

22 Branko Korže, *Pravna ureditev trženja* (Ljubljana: Ekonomska fakulteta, 2012), 15-16.

23 John Black, *A Dictionary of Economics*, 2nd ed. (Oxford: Oxford University Press, 2003).

24 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Indianapolis: Liberty Fund, 1981).

25 Milton Friedman, “The social responsibility of Business is to Increase its Profits,” *New York Times*, September 13, 1970.

26 Zabel, *Tržno pravo*, 78 argues that the term free competition is oxymoron as competition cannot exist if it is not free.

27 Beth Stephens, “The Amoral of Profit: Transnational Corporations and Human Right,” *Berkeley Journal of International Law* 20 (2002): 58.

do the same.<sup>28</sup> This led to low standards of business operations and consequently some businesses exploited this. In different countries different legal and social standards apply that disable the level playing field and thus fair competition became endangered.

According to the Mill's ethical principle "the competitive process should be governed by fairness so that a malicious intent to destroy competitors should be prohibited".<sup>29</sup> A competition policy should be set in a way that small and big businesses would have equal chances and a level playing field would be guaranteed.<sup>30</sup> "The right of businesses to be ensured a free competition on the market by the state originates from the human right to freedom and dignity and therefore cannot be exercised only as an economic freedom, independent of other rights, but in their connection and independence."<sup>31</sup> The goal of competition law is to protect competitors, competition and consumers.<sup>32</sup> The purpose of competition rules is in direct protection of competition and therefore prohibition of practices that limit or distort competition.<sup>33</sup> Fair competition is ensured mostly by prohibiting agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition; by prohibiting the abuse of a dominant position and by supervision of the aid granted by a state. States have national rules for competition protection and transnational communities as the EU have its common rules. The lack of common international minimum standards is the reason that the level playing field on the international level is hard to achieve. However it is not enough for ensuring the level playing field that universal minimum standards exist but that they are also honoured. This is possible only when an effective system of sanctions in the case of breaking rules exists.<sup>34</sup> Brooks<sup>35</sup> believes that legal standards without an enforcement mechanism are only an "empty theory", that does not offer appropriate protection to individuals.

As already indicated the level playing field can be seen from different point of views; in this article the author addresses it from the international view. For achieving the level playing field from the international view three criteria have to be fulfilled. Universal minimum standards have to be imposed, the binding international instrument ensuring universal minimum standards has to be adopted and the international judicial grievance mechanism on the international level for cases where minimum standards are violated has to be established.

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28 Stephens, *The Amoralty of Profit*.

29 Manfred Neumann, Jurgen Weigand, eds., *The International Handbook of Competition* (Cheltenham, UK and Northampton, MA: Edward Elgar, 2004), 3.

30 Neumann, Weigand, *The International Handbook of Competition*, 14.

31 Korže, *Pravna ureditev trženja*, 21.

32 Zabel, *Tržno pravo*, 129.

33 Zabel, *Tržno pravo*, 121.

34 For an overview of corporate accountability (criminal, civil, administrative) in different legal systems see Stephens, *The Amoralty of Profit*, 64–68.

35 Catherine Brooks, *Healing the blind eye? Using the United Nations Protect, Respect, Remedy Framework to achieve accountability for corporate complicity in human rights abuse* (PhD diss., University of Adelaide, 2011), 185.

### **3 ENABLING A LEVEL PLAYING FIELD BY ENCOURAGING RESPECT FOR HUMAN RIGHTS**

One of the necessary actions to guarantee the level playing field in business is encouraging respect for human rights.<sup>36</sup> When the international human rights regime was set up, states were designated as the sole duty-bearers, but now the subject of international human rights law is also non-state actors and among them business enterprises.<sup>37</sup> Corporate respect for human rights is about observing at least minimum standards for human existence.<sup>38</sup> Business enterprises have a direct responsibility to respect human rights throughout their operations, regardless of the national law or enforcement of such law as this constitutes a ‘necessary cost of doing business’ as Arnold<sup>39</sup> calls it. The responsibility of business entities to respect human rights applies to all internationally recognised human rights, since business enterprises can have a direct or indirect effect on virtually any human right.<sup>40</sup> In developed countries the majority of these rights are already enshrined in law (i.e. employment legislation, social protection legislation, criminal legislation, etc.), while in developing countries they have not yet been adequately enacted. The ambition is that business enterprises in every UN member state should be uniformly accountable for human rights abuses, regardless of the national legislation.

Numerous attempts have been made to secure the adoption of an international binding instrument that would impose a duty on business enterprises to protect human rights (e.g. the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>41</sup>) but so far every attempt to impose obligations has failed and only voluntary instruments such as the OECD Guidelines for Multinational Enterprises,<sup>42</sup> International Standard ISO 26000<sup>43</sup> and UNGPs have been successful. In 2011 adopted UNGPs are until now the most authoritative framework for the protection of human rights in the business context. According to these, the state has a duty to protect human rights from abuse by third

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36 Throughout this article, ‘human rights’ is used in the sense of human rights and fundamental freedoms.

37 Economic and Social Council, ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, E/CN.4/2006/97 (February 22, 2006), para 9.

38 Sally Wheeler, “Global production, CSR and human rights: the courts of public opinion and the social licence to operate,” *The International Journal of Human Rights* 19 (2015): 764.

39 Denis G. Arnold, “Transnational Corporations and the Duty to Respect Basic Human Rights,” *Business Ethics Quarterly* 20 (2010): 384.

40 United Nations: Office of the High Commissioner for Human Rights, *The Corporate Responsibility To Respect Human Rights: An Interpretive Guide*, HR/PUB/12/02 (June 2012), 10.

41 E/CN.4/Sub.2/2003/12/Rev.2 (August 26, 2003).

42 *OECD Guidelines for Multinational Enterprises*, OECD (May 25, 2011), accessed May 15, 2021, [www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm](http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm).

43 *ISO 26000 – Guidance on social responsibility*, International Organization For Standardization (November 1, 2010), accessed May 15, 2021, <https://www.iso.org/iso-26000-social-responsibility.html> 2010.

parties, and business enterprises have a responsibility to respect human rights, which includes avoiding infringing the human rights of others and addressing adverse human rights impacts.

In the following chapters the previously mentioned criteria for enabling the level playing field is examined on the example of respect for human rights.

### **3.1 Universal Minimal Standards of Respect for Corporate Human Rights**

The market can operate optimally only if it is engaged in broader social and legal norms, rules and institutional practices.<sup>44</sup> The market needs this for its survival and success, while the society needs this to handle the negative effects of market dynamics and to create public goods that the market lacks.<sup>45</sup> The market represents the biggest threat to itself and the society when it neglects social goals and starts caring only for economic goals.<sup>46</sup> For this reason it is necessary to ensure minimal standards of social goals, among others the human rights protection. It is essential that universal minimal standards of respect for human rights are ensured to all businesses, because only then the level playing field is possible. If human rights are not respected, the moral principle of fair play is violated.<sup>47</sup>

Globalization is the reason for many problems in this area. Before the globalization all businesses competed against businesses from the same state, therefore the same rules applied to everyone. Due to the globalization businesses started operating everywhere and became subject to legal rules of different states that differentiate one from another resulting in a non-level playing field. The need for universal minimal standards for achieving the level playing field was created. Only with accepting the universal minimal standards of respect for human rights in business the market will start to operate effectively and a level playing field will be enabled.

Universal minimum standards of respect for human rights help ensure that businesses are not competing for investments with lowering or in maintaining low standards or permitting (or even cooperating) harmful business conduct.<sup>48</sup> Universal minimum standards prevent relocation of business operations from the countries with high standards to the countries with low standards for the purpose of avoiding higher standards.<sup>49</sup> It is necessary to ensure universal minimum standards of operations globally as this will limit the run of businesses into developing countries where currently human rights are not respected. In Held's<sup>50</sup> opinion the resistance of businesses to

44 John Gerard Ruggie, *Just Business: Multinational Corporations And Human Rights* (New York and London: Norton, 2013), 201.

45 Ruggie, *Just Business*, 201.

46 It was historically shown that unbalances between the market scope and the ability of society to protect and promote key social values are not sustainable. More about this see Economic and Social Council (Interim Report, *item* 18).

47 Arnold, *Transnational Corporations*, 389.

48 Jernej Letnar Černič, "Corporate Human Rights Obligations: Towards Binding International Legal Obligations?" *Dignitas* 49-50 (2011): 69.

49 Similar Stephens, *The Amoralty of Profit*, 59.

50 David Held, "Globalization, Corporate Practice and Cosmopolitan Social Standards,"

follow human rights standards is conditioned mostly by the fact that they change the rules of the game only in one country and put businesses from this state in the worst competing condition compared to businesses from the countries that are not subject to these standards. By imposing universal minimum standards the level playing field is enabled and competitive advantages of businesses that declined to respect human rights limited.<sup>51</sup> The business world needs universal minimum standards applying to all to disable unjustified competitive advantage.<sup>52</sup>

It is crucial for the levelling playing field that businesses recognize that they have a responsibility to respect human rights.<sup>53</sup> Responsible businesses should welcome universal minimum standards of respect for human rights, as they already respect human rights while their competitors do not. As Nicholas Howen, ex Secretary-General of the International Commission of Jurists, said: “Those genuinely committed to respecting rights should have nothing to fear from international standards. But when rules are voluntary, the best companies lose out to competitors who make no investment in compliance with human rights. When clear minimum standards exist, those that do more than the minimum can rightly claim to be even more socially responsible.”<sup>54</sup>

A good starting point is a quick and broad adoption of key recommendation of the UNGPs regarding corporate human rights responsibilities. The UNGPs have set a universal minimum standard which can contribute to enabling a level playing field instead of fragmented standards of operation by which clear expectations will be set regarding business operations and consequently contribute to predictability.<sup>55</sup> The challenges that the states face regarding the UNGPs’ implementation (i.e. fear of deterring foreign investment) can be beaten if the same minimum standards for all would apply as consequently the playing field would remain levelled across the world.<sup>56</sup> One of the organizations that encourages universal minimum standards is the European Commission that dissuades business enterprises from developing their own code of conduct and advises them to accede to the existing international standards formed by UN, International Labour Organization (ILO) and Organisation for Economic Co-operation and Development (OECD).<sup>57</sup>

While universal minimum standards are recommended and wanted it is not

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*Contemporary Political Theory* 1 (2002): 71.

- 51 Letnar Černič, *Corporate Human Rights Obligations*, 69. Similar Changrok Soh, “Extending Corporate Liability to Human Rights Violations in Asia,” *Journal Of International And Area Studies* 20 (2013): 25; Nina Seppala, “Business and the International Human Rights Regime: A Comparison of UN Initiatives,” *Journal of Business Ethics* 87 (2009): 411.
- 52 Marko Jaklič, *Poslovno okolje podjetja* (Ljubljana: Ekonomska fakulteta, 2005), 278.
- 53 Brooks, *Healing the blind eye?*, 124.
- 54 Nicholas Howen, *Business, human rights and accountability – Speech by Nicholas Howen* (September 2005), accessed March 1, 2020, [http://www.ihrb.org/pdf/Business\\_Human\\_Rights\\_and\\_Accountability.pdf](http://www.ihrb.org/pdf/Business_Human_Rights_and_Accountability.pdf).
- 55 Ruggie, *Just Business*, 126.
- 56 European Parliament: Directorate-General for External Policies, “Implementation of the UN Guiding Principles on Business and Human Rights” (European Union, 2017) 58.
- 57 Aurora Voiculescu, “Challenges and innovation in the legal discourse: Achieving corporate responsibility for human rights,” *Society and Business Review* 6 (2011): 282.



permissible to comprehensively regulate the protection of human rights because of the need to harmonise the protection with cultural, historical, social, economic and other conditions as there is a possibility to limit and reduce the level of human rights protection. Therefore modern instruments on human rights protection adopted on the national or international level include provisions that prevent interpretation of any provision in a way that would limit or reduce the already achieved level of human rights protection.<sup>58</sup> A complete unification of legal standards in the area of human rights protection would lead to a harmful reduction of the achieved level of protection in the countries that adopted higher standards than minimum.<sup>59</sup> Contrary, the requirement to harmonise the minimum level of human rights protection is not problematic and also not a rise above the minimum standards while maintaining specifics of each state.<sup>60</sup>

### **3.2 Binding International Instrument for the Respect of Corporate Human Rights**

As previously mentioned one of the conditions for a level playing field is that all businesses equally meet the minimum standards on human rights. In Rabet's<sup>61</sup> opinion it is utopian to expect that businesses will voluntarily observe the minimum standards on human rights as they would lower their competitiveness and profitability by for example imposing the right to fair enumeration. Since the market does not guarantee it, binding international rules are necessary to harmonise regulations on human rights and business. De La Vega, Mehra and Wong<sup>62</sup> claim that creation and implementation of a binding international instrument would create a level playing field in different cultures and circumstances and accordingly universal minimum standards will be imposed on all business enterprises.

The legal systems covering human rights are distinctly different in regions and countries. In comparison to other parts of the world Europe has substantially higher legal standards on human rights and therefore European businesses are, in short-term, often put in a competitively worse situation compared to the competitors from other continents that follow only economic goals. Various states believe that improving social and environmental standards imposes costs on businesses and economy and with that undermines their development and the development of employment strategies in their country.<sup>63</sup> Businesses from developing countries often see regulation as a form of protectionism of developed countries that reduces their competitiveness in the

58 Ciril Ribičič, *Evropsko pravo človekovih pravic: izbrana poglavja* (Ljubljana: Pravna fakulteta, 2007), 229.

59 Ribičič, *Evropsko pravo človekovih pravic*, 228.

60 Ribičič, *Evropsko pravo človekovih pravic*, 228.

61 Delphine Rabet, "Human Rights and Globalization: The Myth of Corporate Social Responsibility?", *Journal of Alternative Perspectives in the Social Sciences* 1 (2009): 469.

62 Connie De La Vega, Amol Mehra, Alexandra Wong, *Holding Businesses Accountable for Human Rights Violations – Recent Developments and Next Steps* (Friedrich Ebert Stiftung, July 2011), 11.

63 Scott Jerbi, "Business and Human Rights at the UN: What Might Happen Next?", *Human Rights Quarterly* 31 (2009): 320.

international market.<sup>64</sup> This sort of thinking directly prevented formulating binding international minimum standards of respect for corporate human rights.

No binding international instrument on corporate human rights respect has yet been adopted as the countries have very different interpretations of human rights standards.<sup>65</sup> Due to the UNGPs voluntary universal minimum standards as the basis for global action were accepted. The requirements from the UNGPs became the minimum standard that can apply to all enterprises. On its basis it is possible to establish a coherent regulation that can clearly define tasks of a state and business enterprises under its jurisdiction. The benefits of harmonizing legal systems on human rights will be considerable in the long-term. The problems of business enterprises in finding out under which national law they are responsible to act will be remedied, what is especially important for multinationals and other subjects that carry out activities in a host state.<sup>66</sup> Minimum standards will be unified in all states and consequently businesses will not be in the dilemma how to act. With adopting the universal international minimum standard also the resistance of countries to impose standards of human rights protection that was avoided because of the fear of reducing their competitiveness or fear before retaliations of states that otherwise would not be capable or prepared to adopt human rights protection would be overcome.<sup>67</sup>

Some businesses have already found that binding international standards on human rights that apply to all businesses are more in their interest than the voluntary ones that apply only to some businesses. Kinley and Chambers<sup>68</sup> emphasize that voluntary standards are only used to punish businesses that make an effort, accept and implement voluntary standards as they do not operate in the same conditions as their competitors and create a non-level playing field. Under such conditions the binding international standards on human rights have clear advantages over the voluntary standards from a corporate perspective because they create predictability and a degree of fairness.<sup>69</sup>

An increasing number of states is also becoming aware of the importance of binding international standards on human rights. Already in 2013 Great Britain stated in their action plan for the implementation of the UNGPs that it was essential for the success of Britain's businesses to work on guaranteeing a level playing field, regardless of the state of operation.<sup>70</sup> With clear demands on mandatory human

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64 Seppala, *Business and the International Human Rights Regime*, 414.

65 Seppala, *Business and the International Human Rights Regime*, 406.

66 See Stephens, *The Amorality of Profit*, 54.

67 Seppala, *Business and the International Human Rights Regime*, 411.

68 David Kinley, Rachel Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law," *Human Rights Law Review* 6 (2006): 447.

69 Wesley Cragg, "Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework," *Business Ethics Quarterly* 22 (2012): 30.

70 HM Government, *Good Business - Implementing the UN Guiding Principles on Business and Human Rights* (September 2013), accessed May 15, 2021, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236901/BHR\\_Action\\_Plan\\_-\\_final\\_online\\_version\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf).

rights due diligence states could facilitate a level playing field.<sup>71</sup> The implementation of requirements from the UNGPs in the national legislation and consequently the development of a harmonized legal system on human rights is a reality as legislation in many countries is following the requirements contained in the UNGPs.

In the desire to regulate business activities the UN is developing a legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights. It started in June 2014 when the UN Human Rights Council's open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights was established.<sup>72</sup> After a few years of hard work in July 2018, the UN Human Rights Council's open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) released the Zero Draft<sup>73</sup> of the legally binding instrument and in July 2019, August 2020 and August 2021 the Revised Drafts were published. The draft of the legally binding instrument follows the language of the UNGPs and applies to all business activities and to all human rights. The procedure of accepting this instrument will not happen overnight and patience will be necessary. Nevertheless, it is a good sign that states are showing their readiness to adopt such a legal instrument and businesses are supporting them.

### ***3.3 Ensuring a level playing field by establishing an international judicial grievance mechanism***

Even if businesses are operating optimally human rights abuses can occur consequently and an effective grievance mechanism plays an important role in fulfilling the state's duty to ensure human rights protection and corporate responsibility to respect human rights.<sup>74</sup> With the help of grievance mechanisms an effective human rights protection is ensured which is otherwise weakened. Therefore the task of the state and business enterprises from the UNGPs is also ensuring access to effective remedies to victims of business-related human rights abuse through judicial and non-judicial grievance mechanisms. Unfortunately, international judicial grievance mechanisms are not planned under the UNGPs, even though national judicial mechanisms for business-related human rights abuse are often ineffective. The

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71 *Amnesty International, Comments on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises: Draft Guiding Principles and on post-mandate arrangements* (IOR 50/002/2010, December 2010), accessed May 1, 2021, <http://www.amnesty.org/en/library/asset/IO50/001/2010/en/71401e1e-7e9c-44a4-88a7-de3618b2983b/ior500012010en.pdf>.

72 A/HRC/26/L.22/Rev.1.

73 OEIGWG, *Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (16 July 2018), accessed May 1, 2021, <https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf>.

74 *ISO 26000 – Guidance on social responsibility*, International Organization For Standardization, chapter 6.3.6.1.

International Commission of Jurists<sup>75</sup> believes that the promise of universal human rights protection will be hard to fulfil until victims of human rights abuse have access to an effective remedy on the international level because on the national level there are too many cases where the state is not capable or willing to ensure a remedy or these remedies are ineffective. Kamatali claims that unavailability of national legal means in some countries and incapacity of economically weaker states to create an independent and unbiased judicial system that examines cases against business enterprises causes that some states cannot appropriately fulfil their duty to protect human rights against business-related abuses.<sup>76</sup> This mechanism is primarily meant for human rights abuse victims and through it also a level playing field can be established as businesses are punished for not complying with the rules. The author argues that the constitution of an international judicial grievance mechanism is not only useful but urgent for improving human rights protection and with that the level playing field.

The idea of constituting an international judicial grievance mechanism for human rights is not new as it originates in the year 1947, when Australia tabled a motion to constitute a world court of human rights.<sup>77</sup> With the rejection of the motion the idea ceased but never died.<sup>78</sup> On the initiative of the Swiss government Kozma, Nowak and Scheinin compiled a draft Statute of the World Court of Human Rights in 2011. The Court would have jurisdiction for deciding in case of any human rights abuses, written in one of the 21 UN treaties regarding human rights (Art 5 of the WCHR Consolidated Draft Statute).<sup>79</sup> Even though the constitution of the World Court is seen by many as a radical and utopian idea (e.g. Alston,<sup>80</sup> Trechsel<sup>81</sup>), the draft Statute received support from the Association of Human Rights Institutes, experts (e.g. Kirkpatrick,<sup>82</sup> Ulfstein<sup>83</sup>) and some states (e.g. Norway), but within the UN the draft is still rejected.<sup>84</sup>

75 *International Commission of Jurists, Towards a World Court of Human Rights: Questions and Answers*, Supporting Paper to the 2011 Report of the Panel on Human Dignity (December 2011), accessed May 1, 2021, <https://www.icj.org/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf>.

76 Jean-Marie Kamatali, "The new guiding principles on business and human rights' contribution in ending the divisive debate over human rights responsibilities of companies: is it time for an ICJ advisory opinion?", *Cardozo Journal of International & Comparative Law* 20 (2012): 448.

77 More about historic development of the idea see International Commission of Jurists, *Towards a World Court*, 3-4.

78 See International Commission of Jurists, *Towards a World Court*, 4-5.

79 Panel on Human Dignity, *Protecting Dignity: An Agenda for Human Rights*, 2011 Report (2011) 47-48.

80 Philip Alston, *Against a World Court for Human Rights, Ethics & International Affairs* 28 (2014): 197.

81 Stefan Trechsel, "A World Court for Human Rights?", *Northwestern Journal of International Human Rights* 1 (2004): 19.

82 Jesse Kirkpatrick, "A Modest Proposal: A Global Court of Human Rights", *Journal of Human Rights* 13 (2014): 230.

83 Geir Ulfstein, "Do We Need a World Court of Human Rights?", in: *Law at War: The Law as it Was and the Law as it Should Be*, eds. Ola Engdahl, Pål Wrangé (Leiden: Martinus Nijhoff, 2008), 261-262.

84 Manfred Nowak, "The Right of Victims of Human Rights Violations to a Remedy: The Need

Under the draft Statute the World Court would have jurisdiction also for accepting appeals from appellants who would claim they are victims of human rights abuses by third parties, including international organizations and business enterprises (Art 7 of the WCHR Consolidated Draft Statute).<sup>85</sup> It is proposed that the court should assess the responsibility of non-state actors for human rights abuses if they explicitly accepted the court jurisdiction in connection to all or certain UN treaties in accordance with the proposed Art 51 of the Statute. The fact that businesses must accede to the Statute contradicts the author's finding that businesses are direct bearers of responsibility to respect human rights. The development will have to lead to a binding jurisdiction, not only to a voluntary one. Moreover, contrary to the author's finding that businesses have to respect all internationally accepted human rights is the proposed solution that under the Statute businesses can exclude the jurisdiction of a certain UN treaty. It is also evident from the draft Statute that the tasks of businesses are not formed in alignment with the UNGPs as they do not differentiate between the state duty to protect human rights and corporate responsibility to respect human rights. In spite of the mentioned weaknesses of the draft Statute regarding corporate responsibility it still represents a massive step forward.

Quite a few legal experts considered also an idea to constitute a special international judicial mechanism just to consider business-related human rights abuses. Already Ruggie wondered during his mandate as the Secretary General if there was a need for an international court of human rights in case of business-related abuses.<sup>86</sup> Ruggie who declined the idea of constituting an international judicial grievance mechanism shares the view that for the effective judicial protection it is necessary to enhance a national judicial and non-judicial grievance mechanism that should be more effective and accessible to the victims.<sup>87</sup> The author does not share his view as she believes that an international judicial grievance mechanism for businesses would be useful for the development of human rights protection. The international mechanism for human rights protection would be used only if the internal mechanisms were exhausted and if the national grievance mechanism failed. The victim would have to primarily use the national grievance mechanism, but only in case the mechanism failed, it would have a possibility to recourse to the international mechanism. This solution turned out as extremely effective for human rights protection under the regional ECHR which is enforced by the ECHR. The danger of implementing the grievance mechanism only on a national level is especially evident in the countries with a lower level of respect for human rights. A similar view is shared by Letnar Černič who argues that an appropriate international mechanism should be established for ensuring effective international protection or authorise the existing international tribunals for assessing business-related human rights abuses.<sup>88</sup> De La Vega, Mehra

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for a World Court of Human Rights", *Nordic Journal of Human Rights* 32 (2014): 3; Manfred Nowak, "World Court of Human Rights: Utopia?", *Global View* (2012): 6.

85 Panel on Human Dignity, *Protecting Dignity*, 48.

86 Ruggie, *Just Business*, 56.

87 Human Rights Council, "Business and human rights: Towards operationalizing the "protect, respect and remedy" framework," A/HRC/11/13 (22 April 2006), item 87-98.

88 Jernej Letnar Černič, "Mednarodnopravna odgovornost multinacionalnih družb za kršenje

and Wong emphasize the need for an international judicial mechanism that would offer an effective help to the victims of business-related human rights abuses and ensure a civil and criminal corporate accountability as they believe that a non-state mechanism provided by businesses and sectoral associations cannot and should not be a replacement for an independent international judicial mechanism.<sup>89</sup> The creation of the international court that would address business-related human rights abuses is supported also by Monshipouri, Welch Jr. and Kennedy.<sup>90</sup> Stephens shares the view that a unified international judicial mechanism would prevent businesses to avoid consequences of their actions by avoiding countries with a more effective grievance mechanism.<sup>91</sup> Creating a supranational judicial grievance mechanism would have an important effect on an efficient procedure leading in case of a human rights abuse at a national court and this would have not only repressive but also important preventive effects in term of general prevention of business and human rights as only moral and economic sanctions are not enough.

In spite of the arguments relating to the need to create an international judicial grievance mechanism for human rights protection in business-related human rights abuses it is not possible to expect the creation of such a mechanism anytime soon. The first step in this way should be made by constituting the World court of human rights where individuals could address appeals regarding human right abuses by state and non-state actors, including business enterprises.<sup>92</sup> The current system of sanctioning abuses under the UN international treaties on human rights is ineffective for victims (and competitors).

Other alternatives are also possible for sanctioning human rights abuses. Rees<sup>93</sup> defends the role of a global ombudsman who could help levelling a playing field<sup>94</sup> between businesses that voluntarily respect human rights and those who do not as he could consider any appeal regarding human rights against any business entity in the world. Rees<sup>95</sup> also supports the idea that the International Arbitration Court at ICC and Permanent Court of Arbitration should expand their jurisdiction by including mediation or arbitration into disputes between businesses and groups of civil society regarding corporate respect for human rights. Wilde<sup>96</sup> takes a position that

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temeljnih človekovih pravic," *Pamfil* (2003): 27.

89 De La Vega, Mehra and Wong, *Holding Businesses Accountable for Human Rights Violations*, 9-10.

90 See Mahmood Monshipouri et al., "Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities," *Human Rights Quarterly* 25 (2003): 984-985.

91 Stephens, *The Amoralty of Profit*, 82.

92 The extending of court jurisdiction on businesses also should be proposed to European Court of Human Rights.

93 Caroline Rees, *Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps*, Corporate Social Responsibility Initiative, Working Paper No. 40, John F. Kennedy School of Government, Harvard University, Cambridge (MA) (2008), 40-41.

94 Similar on the role of ombudsman Seppala, *Business and the International Human Rights Regime*, 414.

95 Rees, *Grievance Mechanisms for Business and Human Rights*, 41.

96 More Ralph Wilde, "Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International

the jurisdiction of the International court of Justice is extended to the assessment of human rights abuses.<sup>97</sup> High Commissioner for human rights defends the idea on constituting a single contracting authority for human rights protection<sup>98</sup> that all UN contracting authorities for human rights protection could operate as a single authority instead of being divided. De Jonge suggests interconnection of regional authorities for human rights into an international net under the leadership of the UN Council for Human Rights in order to increase effectivity of the international system of human rights.<sup>99</sup> Ideas on expanding the jurisdiction of the International criminal court on corporate responsibility for most severe form of human rights abuses also appeared. According to the author's opinion these are possible alternatives that can contribute to improving the human rights protection but none could be as effective as establishing the World Court of human rights as experience showed that nonjudicial mechanism do not offer any sufficient human rights protection. The author also believes that only by establishing an international judicial mechanism it would be possible to guarantee corporate respect for human rights as nowadays it is difficult to prevent abuses without a threat of a sanction. Kirkpatrick emphasizes that establishing the World Court of human rights would help ensure the level of unity and consistency across regions and countries.<sup>100</sup> The author agrees with him as regional courts are not powerful enough to ensure the protection of human rights written in fundamental treaties and therefore a material scale of jurisdiction forming non-balance variates through regions regarding the rights that have judicial protection.<sup>101</sup> Also the ECHR that is seen as an example of human rights protection, regulates only civil and political rights, while neglecting economic, social and cultural rights that are considered crucial to ensure a level playing field in the international market between businesses. As Kirkpatrick<sup>102</sup> argues, only a unified international judicial mechanism would lead to the goal of universality of human rights and an equal access to remedy could become a reality. This is the only way a level playing field would be possible.

#### 4 CONCLUSION

A level playing field is necessary for a fair competition between market participants. The level playing field between businesses is possible only if the conditions under which businesses operate are the same. In the conditions of globalisation this is a great challenge as states have different legislations. To achieve universal minimum standards of business operations there is always a great tendency for harmonisation

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Human Rights Law Treaties," *Chinese Journal of International Law* 12 (2013): 639.

97 Author believes that extension of jurisdiction of ICJ to sanction human rights abuses is not appropriate option as the access to court is possible only to states and not to individuals.

98 UN General Assembly, *In larger freedom: towards development, security and human rights for all: Report of the Secretary-General. A/59/2005/Add.3* (26 May 2005), item 147.

99 Alice De Jonge, "Transnational corporations and international law: bringing TNCs out of the accountability vacuum," *Critical perspectives on international business* 7 (2011): 82.

100 Kirkpatrick, *A Modest Proposal*, 243-244.

101 Kirkpatrick, *A Modest Proposal*, 243.

102 Kirkpatrick, *A Modest Proposal*, 243.

of legal regulation<sup>103</sup> in the areas where this is possible. This also applies to the area of human rights protection, which is one of the most important fields of establishing a level playing field in business.

Business enterprises have to respect human rights, yet many enterprises avoid it. In the article the author analyses three criteria for achieving corporate human rights respect - universal minimum standards, a binding international instrument to ensure minimum standards and international judicial grievance mechanism for violations.

The analysis of the theoretical literature showed that all businesses will operate under non-equal conditions until they respect human rights and businesses that do not respect human rights increase profit in short-term at the expense of other market participants and workers. For establishing a level playing field it is primarily necessary to adopt minimum human rights standards. This was done by adopting the UNGPs that are an instrument of legally non-binding nature that provides universal recommendations in the area of human rights and business. It depends on the implementation of requirements of the UNGPs into national legal systems if the respect for human rights will be ensured to all businesses. The second step is adopting a binding international instrument that would harmonise regulation of human rights and business and impose minimum standards on all UN countries. Such an instrument was not yet adopted but the UN is developing a legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The third step is establishing an international judicial grievance mechanism that ensures appropriate sanctioning of violators. One of the possibilities is the creation of the World Court that would have jurisdiction also for human rights abuses by business enterprises.

The author has confirmed in the article that a level playing field between business enterprises cannot be enabled without these criteria of respect for human rights. Universal minimum standards have to be accepted, an international binding instrument on them adopted and an international judicial grievance mechanism established. At present, only the first stage is completed. There are universal minimum standards in the form of UNGPs. As they are voluntary, the adoption of the international binding instrument is needed and it is in progress. The greatest challenge will be the establishment of an international judicial grievance mechanism. In spite of various ideas and proposals it is unlikely that this will happen anytime soon. The development depends on the society if a social goal is taken into consideration or is neglected. As long as the last step remains unfulfilled, the non-level playing field will exist.

It is also important to bear in mind that solely harmonisation of legal systems in the area of human rights does not ensure any further development of human rights and therefore it is essential to demand more from business enterprises than only complying with the rules. Actions that exceed the minimal standards are a competitive advantage that does not affect the level playing field. The international community has to continue developing measures for human rights and business to ensure promotion and protection of human rights.<sup>104</sup> Obviously, national legislation is crucial. Only by

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103 For example EU adopts directives with which it harmonises regulation of member states.

104 De La Vega, Mehra and Wong, *Holding Businesses Accountable for Human Rights Violations*, 13.



introducing sanctions and an effective system of sanctioning of business enterprises in the case of human rights abuses in their internal relationships and relationships with their business partners it will be possible to achieve human rights protection.

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Sažetak

## OMOGUĆAVANJE JEDNAKIH UVJETA U POSLOVANJU UZ POŠTOVANJE LJUDSKIH PRAVA

Jednaki su uvjeti omogućeni kada se svi poslovni subjekti mogu slobodno natjecati na tržištu. Međutim, sloboda tržišnog natjecanja ugrožena je, ako se na različite poslovne subjekte primjenjuju različiti propisi. Stoga bi međunarodno prihvaćena ljudska prava trebali poštovati svi poslovni subjekti bez obzira na njihovu veličinu, vrstu gospodarske djelatnosti, vlasništvo i državu djelovanja. Svrha je ovog rada identificirati tri kriterija prema kojima je se mogu postići jednaki uvjeti poslovanja te ih ispitati iz vizure poštovanja ljudskih prava. Koristeći deskriptivnu metodu i metodu analize autorica tvrdi da bez općih minimalnih standarda poštovanja ljudskih prava jednaki uvjeti u poslovanju nisu mogući. Također konstatira kako bi to bilo izvedivo samo uz usvajanje obvezujućega međunarodnog instrumenta i mogućnosti nametanja sankcija na međunarodnoj razini, te je posljedično uspostava međunarodnoga pravosudnog mehanizma s ovlastima za sankcioniranje korporativnih kršenja ljudskih prava od vitalne važnosti.

***Ključne riječi:*** *jednaki uvjeti; korporativna odgovornost za poštovanje ljudskih prava; UNGP; obvezujući međunarodni instrument; međunarodni pravosudni žalbeni mehanizam.*

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