

# GLOBALISATION WITH A HUMAN FACE AND THE ROLE OF THE UNITED NATIONS

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*A large portion of modern-day human rights challenges stems from non-typical situations such as economic and financial crises, or environmental degradation. The rise of globalisation that goes hand in hand with the increasing impacts of business operations on people's lives and their basic needs, from clean water to communication, certainly adds to this list. The regulatory model offered by the "Washington Consensus" has further fuelled this phenomenon. The utility provider who violates the right to water, the mining or extraction operations that endanger the right to health, or the digital platform that infringes on the freedom of speech and information all have detrimental impacts on the enjoyment of human rights. The paper explores this human rights challenge along with the historical path of international legal regulation, as well as the current regulatory attempts and treaty-making process to clarify State duty to protect human rights and responsibility in the context of business and human rights.*

**Keywords:** *international human rights; economic globalisation; Washington Consensus; second human rights revolution; UNGPs; treaty on business and human rights.*

## 1. INTRODUCTION: THE CHALLENGE

One of the areas of public international law that attracted the attention of the late Professor Emeritus Vladimir-Đuro Degan was international human rights.

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Therefore, when I was kindly invited to an international conference that aimed to commemorate Professor Degan, I selected a human rights question that reveals a relevant and timely challenge.

This year marks the 75<sup>th</sup> anniversary of the Universal Declaration of Human Rights that not only opened a new chapter in the history and development of international law but has also had a significant effect on the general and dominant way of thinking and discourse.<sup>1</sup> Human rights and human rights adjudication have come a long way during these 75 years and achieved many results, but have also been subject to criticism. Furthermore, since the world has changed since the end of the Second World War, human rights adjudication has faced novel and increasingly complex challenges, among which is the rapidly increasing portion of human rights challenges that stem from non-typical situations. The impact on human rights of economic or financial crises, environmental degradation, globalisation, and digitisation has been growing over the past half century and raises increasingly complex issues. Examples, like the one below, are proliferating.

At the beginning of the 2000s, the city government of the largest town and former capital of Tanzania, Dar es Salaam, decided to privatise the operation of its water and sewage system. The main rationale of this privatisation was to remedy the infrastructural and efficiency problems and, at the same time, to improve water quality and access to water. Private sector participation was a condition for the structural aid and credit the World Bank provided.<sup>2</sup> To this end, the city water consortium was comprised of the British company, Biwater, Gauff Engineering from Germany, and a local undertaking called Superdoll. However, the project did not go as originally planned as the price of water soared, and the expected investments in the pipelines and the quality improvements were not realised. Consequently, as a result of the privatisation, access to water even deteriorated and the government decided to take back control of

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<sup>1</sup> In her famous book, Mary Ann Glendon refers to the Universal Declaration of Human Rights as a document that “made the World new”. See, Glendon, M. A., *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House Trade Paperbacks, New York, 2002. At the same time, Robert P. George points out that the dominant discourse today is that of human rights which has become the “*lingua franca*” of almost every discussion of justice, of the boundaries of individual liberties and the contours of the common good, and of the responsibilities one has to others in society. See Sándor, L., *Constitutional Journey in the United States*, MCC Press, Budapest, 2021, pp. 114-116.

<sup>2</sup> See World Bank Document, Report and Recommendations on the Programmatic Structural Adjustment Credit for Tanzania, P-7376-TA, <https://documents1.worldbank.org/curated/en/240571468339588291/pdf/multi-page.pdf> (accessed 1 July 2023).

the operation of the services. The case was finally brought before an international investment tribunal.<sup>3</sup>

The case does not stand alone as there are similar and increasing situations around the world, from the infamous Bolivian water war<sup>4</sup> to the Cajamarca gold mine,<sup>5</sup> and so forth. The growing scope and strength of transnational business operations since the 1970s pose two fundamental questions. On the one hand, the question can be raised as to what legal or non-legal responsibilities corporations have to host countries and local communities under international human rights law. The other relevant question is what legal duties States have to protect their communities against harmful transnational business operations that have growing impacts on many aspects of people's lives as well as on the environment.

These questions have become increasingly pertinent with the collapse of the centrally planned economic models along with the Soviet Union. The transition of the former socialist economies expanded the geographical scope of economic globalisation and, at the same time, set the stage for the rapid expansion of transnational business operations. It was also fuelled by the then prevailing economic theory, the "Washington Consensus", which encouraged States to liberalise their markets, to privatise services, including public services, and to introduce extensive deregulation. Using an apt description, the late Lord Jonathan Sacks expressed a common experience of the times when he pointed out that "[w]e have now no idea where the world is going, except that it's going there very fast".<sup>6</sup> This accurately reflects the widening gap between the scope and impact of economic forces along with transnational business activities and the capacity of societies and governments to manage these forces and their adverse impacts.<sup>7</sup>

International economic regulations, including trade and investment law especially, reflect the economic theory of the "Washington Consensus" that aims to restrict the power of the State to control and regulate private commercial property. Based on this theoretical framework, the agreements founding the legal

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<sup>3</sup> ICSID, *Bivater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Case No. ARB/05/22, <https://www.italaw.com/cases/157> (accessed 1 July 2023).

<sup>4</sup> See, for example, <https://www.ucpress.edu/blog/58831/how-bolivians-fought-for-and-won-water-access-for-all/> (accessed 1 July 2023).

<sup>5</sup> Ruggie, J. G., *Just Business. Multinational Corporations and Human Rights*, W.W. Norton & Company, New York – London, 2013, pp. 26-42.

<sup>6</sup> Available, for example, at <https://quotefancy.com/quote/1396781/Jonathan-Sacks-We-have-no-idea-where-the-world-is-going-except-that-it-s-going-there-very> (accessed 20 July 2023).

<sup>7</sup> Ruggie, J. G., *Just Business...*, *op. cit.*, pp. 33-36, 81-82.

order of the World Trade Organization (hereinafter: WTO) regime and its dispute settlement mechanisms are committed to promoting liberalisation and free trade with no or little respect for the societal or human rights requirements.<sup>8</sup> The then proliferating bilateral investment treaties and their institutional framework of dispute settlements are designed to provide an exceptionally powerful and extensive adjudicative review of sovereign conduct of the host countries to protect the interests of businesses that are considered to be foreign investors. At the same time, however, neither these investment treaties nor their arbitration mechanisms can ensure adequate protection of societal and human rights.<sup>9</sup> Subsequently, international economic treaties and law can create business and market opportunities for States but at the same time they constrain the States' economic regulatory discretion by controlling their sovereign right to impose restrictions on trade and investment at their border and within their economy and require them to adhere to certain standards of transnational economic regulation.<sup>10</sup>

In light of this economic and regulatory theory that has become dominant, Bruno Simma observed that public international law has not developed in a symmetrical way with regard to transitional economic activities and business operations.<sup>11</sup> While, as a precondition and also a consequence of economic globalisation, corporations with transnational business operations have been provided with the most powerful and uniquely enforceable mechanism in public international law, their responsibilities and duties have long largely been ignored or neglected in the international legal arena. Recognising this has raised awareness of the need for reforms and new proposals in this area of the law.

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<sup>8</sup> See, for example, Joseph, S., Human Rights and International Economic Law, in: Bungenberg, M.; Herrmann, C.; Krajewski, M.; Terhechte, J. P. (eds.), *European Yearbook of International Economic Law 2016*, Springer, Cham, 2016, pp. 461-476.

<sup>9</sup> Krajewski, M., Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty Making Practice, School of law, University of Erlangen-Nurnberg Germany, 15 April 2018, <https://ssrn.com/abstract=3133529> (accessed 1 July 2023).

<sup>10</sup> Among these widely recognised substantive standards are national treatment, most-favoured-nation treatment, fair and equitable treatment, or full protection and security of foreign investments.

<sup>11</sup> Simma, B., Foreign Investment Arbitration: A Place for Human Rights?, *International and Comparative Law Quarterly*, vol. 60 (2011), no. 3, pp. 573-596.

## 2. A SECOND HUMAN RIGHTS REVOLUTION?

The increasing influence of non-State actors and especially transnational business operations on fundamental human rights led Douglass Cassel, a University of Notre Dame professor in the 1990s, to publish his seminal article on the need for a “second human rights revolution”.<sup>12</sup> Cassel believed that the major goal of such a revolution was to remedy inefficient protection against human rights violations by corporations (or other non-State actors) who were increasingly involved in such conduct.

The idea refers to the “first human rights revolution” when the human rights conduct of governments became a concern of international law with the adoption of the Universal Declaration of Human Rights (hereinafter: UDHR) in the aftermath of the Second World War, which was followed by the conclusion of international human rights treaties as well as the establishment of their control mechanisms. For historical reasons, the advent of human rights as an area of international attention was accompanied by changes in the idea of the sovereignty of nation-States. The main focus of human rights was on the control of the exercise of sovereign conduct *vis-à-vis* private entities that gave rise to a common misconception that human rights, and especially civil and political rights, do not require positive State action. In other words, the tripartite obligations of States in human rights law were not fully recognised under this misconstruction of the role of sovereignty.<sup>13</sup> With the rise of economic globalisation, however, transnational corporations have become in many ways more influential than some States and have a robust impact on, among other things, fundamental human rights. Based on the observation of John Ruggie that even though transnational corporations barely exist in the eyes of international law as they are generally not recognised as a subject of law and thus do not have international legal personality, they are nevertheless characterised by power, authority, and relative autonomy. These characteristics make them global institutions. Even though they consist of many dozens or even many hundreds of separate legal entities

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<sup>12</sup> Cassel, D., *Corporate Initiatives: A Second Human Rights Revolution?*, *Fordham International Law Journal*, vol. 19 (1995), no. 5, pp. 1963-1984.

<sup>13</sup> The obligations of States under international human rights law generally have three layers: to respect, to protect, and to fulfil human rights. To respect human rights means simply not to interfere with their enjoyment and thus includes a negative obligation. The State duty to protect human rights includes positive measures to ensure that third parties, including corporations, do not interfere with their enjoyment. The fulfillment of human rights means to take steps progressively to realise a given right, in other words to either facilitate or provide for the given right.

that are subject to the laws and regulations of the particular jurisdiction in which each of them is incorporated, they operate as one company under the unity of command and a single global vision and strategy, optimising worldwide operations for efficiencies, market share, and profit.<sup>14</sup> This disjuncture between business reality and legal convention is the single most important contextual framework shaping the global institutional status of multinationals that has led to the creation of a governance gap.

However, largely due to the above-mentioned misunderstanding of the role of sovereignty as well as of the tripartite obligations of States in human rights law, the negative impacts of transnational business operations on human rights increased. Therefore, a “second human rights revolution” would both raise and address the question of the State’s duty to protect human rights through regulation and institutions and would also confront the question of the responsibility of transnational corporations under international human rights law. The attempts to adopt regulations to address this issue look back to the post-war era and have been made in various waves and stages throughout the past half century. These regulatory attempts have taken various forms, from mandatory treaty-based regimes to voluntary self-regulation or co-regulation, and have followed different paths and have placed emphasis either on the duty of the State to safeguard and regulate business-related violations or potential responsibility, including the international responsibility of business entities for such violations. The next section will explore these different stages and show their major characteristics.

### 3. “IT’S A LONG WAY TO TIPPERARY”

The way economic globalisation has unfolded was foreseen early on in the years following the Second World War. The first regulatory attempt was the proposal to establish the International Trade Organization (hereinafter: ITO) alongside the International Monetary Fund and World Bank during the Bretton Woods international conference at the end of the Second World War.<sup>15</sup> The draft Havana Charter in 1948 would have set standards and limitations on the

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<sup>14</sup> Ruggie, J. G., *Multinationals as Global Institution: Power, Authority and Relative Autonomy, Regulations & Governance*, vol. 12 (2017), no. 3, pp. 3-4.

<sup>15</sup> Bronz, G., *The International Trade Organization Charter*, *Harvard Law Review*, vol. 62 (1949), no. 7, pp. 1090-1092.

operation of businesses, such as labour standards or competition rules.<sup>16</sup> The main idea of the establishment of the ITO was driven by the economic consideration to provide more balanced international commercial and investment relations. However, the Charter was not ratified by the United States Senate, and global trade relations were regulated in the framework of the General Agreement on Tariffs and Trade.

Efforts to regulate the then emerging transnational corporations resurfaced within the framework and structure of international law at the beginning of the 1970s with the adoption of the universal human rights treaties as well as of the New International Economic Order (hereinafter: NIEO). The NIEO adopted as a declaration by the UN General Assembly was designed to limit transnational business operations in order to protect the economic sovereignty of the newly independent colonies.<sup>17</sup> Driven by these new ideas, the UN Centre on Transnational Corporations was established in 1975 with the objective to adopt a draft international treaty to regulate the rights and obligations of transnational corporations.<sup>18</sup> The negotiations centred on the balance between the protection of foreign direct investments and the limitation of transnational business operations. However, by the time the text of the draft treaty was completed, the centrally planned economic model had collapsed and the “Washington Consensus” was already gaining strength. As a result of the shift with regard to the dominant economic model, bilateral investment treaties designed to protect the rights of transnational corporations proliferated while no compromise was found with respect to their obligations.<sup>19</sup> Since its draft treaty was not adopted, the UNCTC dissolved and its competences were taken over by the United Nations Conference on Trade and Development (UNCTAD) in 1994.

The next attempt to devise a binding international norm on transnational business operations began under Secretary-General Kofi Annan and in the

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<sup>16</sup> The finalised text of the Havana Charter is available at [https://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/havana_e.pdf) (accessed 30 July 2023).

<sup>17</sup> See Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, pp. 238-242.

<sup>18</sup> Pope, P., Transnational Corporations – The United Nations Code of Conduct, *Brooklyn Journal of International Law*, vol. 5 (1979), no. 1, p. 130; Sprote, W., Negotiations on a United Nations Code of Conduct on Transnational Corporations, *German Yearbook of International Law*, vol. 33 (1990), pp. 332-334.

<sup>19</sup> Sauvart, K. P., The Negotiations of the United Nations Code of Conduct on Transnational Corporation: Experience and Lessons Learned, *Journal of World Investment and Trade*, vol. 16 (2015), no. 1, pp. 11-87.

framework of the UN Commission on Human Rights. The major driving force of this treaty-making process was the rapid increase of foreign investments around the world. As result of the drafting process, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter: Draft UN Norms) were presented in August 2003. The Draft UN Norms constituted an ambitious proposal as they recognised transnational corporations as subject to international law, providing them with international legal personality, and they also recognised their direct obligations under international law. While the Draft UN Norms preserved the primacy of State responsibility for human rights, they would have introduced the idea that business entities have a secondary obligation to observe international human rights and would have established a compulsory control mechanism to enforce these obligations.<sup>20</sup> On the other hand, the scope of the Draft UN Norms was devised to embrace the entirety of a company's supply chain, including its contracting partners.<sup>21</sup> This provision responded to the reality of business operations in a globalised economy where whole supply chains rather than individual companies compete on price, costs, and efficiency. Another important element of the Draft UN Norms is the introduction of an independent, transparent and periodic review or monitoring process that would have provided victims with an individual complaint avenue to remedy rights violations.<sup>22</sup> Based on these important characteristics, the Draft UN Norms were designed to overcome the soft-law approach. However, largely due to these ambitions, the business sector, as well as capital exporting countries, opposed the adoption of the Draft UN Norms as a binding international treaty. As a result, the UN Commission on Human Rights declared the Draft UN Norms to be of a non-binding nature.<sup>23</sup>

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<sup>20</sup> See paragraphs A) and E) of the Draft UN Norms: Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement> (accessed 25 July, 2023).

<sup>21</sup> Articles 15 and 29 of the Draft UN Norms. See also Weissbrodt, D.; Kruger, M., Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, *The American Journal of International Law*, vol. 97 (2003), no. 4, pp. 910-911.

<sup>22</sup> Articles 16-18 of the Draft UN Norms. The remedy could include reparations, restitution, compensation and rehabilitation for any damage done or property taken, which shall be prompt, effective and adequate.

<sup>23</sup> UN Commission on Human Rights (CHR), Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, Dec. 2004/116, UN Doc. E/CN.4/DEC/2004/116, 22 April 2004, [https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=9780](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=9780) (accessed 20 July 2023).



The fourth and current effort to conclude a legally binding instrument on business and human rights began in 2014. Based on the initiative of Ecuador and South Africa and supported by a number of NGOs,<sup>24</sup> the UN Human Rights Council established an Open-Ended Inter-Governmental Working Group (hereinafter: OEIGWG) to elaborate an international legally binding instrument to regulate, in international human rights law, the operations of business enterprises.<sup>25</sup> Even though the harmful impacts of business operations on human rights are beyond dispute, the need for and structure of an international treaty are the subject of lively academic and also political debate.<sup>26</sup> The possible regulatory concepts show remarkable diversity, from direct to indirect international regulations of transnational corporations, along with the allocation of responsibility for their violations of human rights.<sup>27</sup>

The so-called “Elements Paper” outlined the first regulatory concept in 2017.<sup>28</sup> This version was a very ambitious document that includes the direct obligations of transnational corporation and a proposal for the establishment of the International Court on Transnational Corporations and Human Rights. Under this regulatory concept, the newly established international court would provide a venue for human rights adjudication in business-related violations.<sup>29</sup> The “Elements Paper” also declares the priority of human rights obligations of States over trade and investment obligations.<sup>30</sup> Because of its ambitious

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<sup>24</sup> See Muchlinsky, P. T., *Advanced Introduction to Business and Human Rights*, Edward Elgar Publishing Ltd., Cheltenham, 2022, pp. 160-161.

<sup>25</sup> On 26 June 2014, the Human Rights Council adopted Resolution 26/9 by which it decided “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.

<sup>26</sup> The argument against the need for a binding international treaty is the previous experiences of the failed treaty-making processes as well as the potential negative effects on the developing soft-law instruments. See Taylor, M., *A Business and Human Rights Treaty? Why Activists Should be Worried*, Institute for Human Rights and Business, 4 June 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-why-activists-should-be-worried> (accessed 25 July 2023).

<sup>27</sup> Cassel, D.; Ramasastry, A., *White Paper: Options for a Treaty on Business and Human Rights*, *Notre Dame Journal of International & Comparative Law*, vol. 6 (2016), no. 1, pp. 3-50.

<sup>28</sup> The “Elements Paper” is available at [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf) (accessed 20 July 2023).

<sup>29</sup> See paragraph 9 of the “Elements Paper”.

<sup>30</sup> Paragraph 1.2 of the “Elements Paper”.

provisions, especially its commitment to direct corporate responsibility under public international law and to the establishment of supranational institutions, the “Elements Paper” was harshly criticised by academics and was later rethought and substantially revised.<sup>31</sup>

The “Zero Draft” and the subsequent three revised draft treaties took a more cautious approach than the “Elements Paper”, as they leave the States in the driver’s seat and propose the legally binding but indirect regulation of business operations mainly through the concept of the State’s duty to protect human rights without establishing a separate supranational court or commission. The draft treaty texts follow the framework of the United Nations Guiding Principles on Business and Human Rights (hereinafter: UNGPs) by adopting mandatory Human Rights Due Diligence (hereinafter: HRDD) and by establishing direct liability for the human rights abuses of businesses, and indirect liability for the abuses of business partners.<sup>32</sup> States are also required to provide criminal measures under domestic law to ensure corporate liability for human rights abuses that amount to criminal offences.<sup>33</sup>

Beyond reinforcing State duty to protect against human rights violations, the treaty drafts aim to facilitate access to remedies for victims of business violations of human rights, as well as to create an international institutional structure to develop business and human rights norms. As far as effective remedies are concerned, the important novelties include provisions that overcome the doctrine of *forum non conveniens* that may not be used by the court to dismiss legitimate proceedings.<sup>34</sup> The drafts also require the recognition of universal jurisdiction for human rights violations that amount to the most serious crimes.<sup>35</sup> In addition, the draft treaties aim to facilitate the enforcement of judgments by requiring recognition for them under the jurisdictions of States parties.<sup>36</sup> As for the institutional structure, even though the draft treaties do not propose a supranational control mechanism, they would still introduce limited cooperation through the establishment of an expert committee elected by the States parties. The main

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<sup>31</sup> Ruggie, J. G., *A UN Business and Human Rights Treaty?*, Harvard University’s Kennedy School of Government, January 2014, <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/UNBusinessandHumanRightsTreaty.pdf> (accessed 20 July 2023).

<sup>32</sup> Articles 6 and 8.1 of the Third Revised Draft.

<sup>33</sup> Articles 8.8 to 8.10 of the Third Revised Draft.

<sup>34</sup> Articles 9.3 and 7.3 of the Third Revised Draft.

<sup>35</sup> Article 10.1 of the Third Revised Draft.

<sup>36</sup> Article 7.6 of the Third Revised Draft.

tasks of this committee are to make general comments and recommendations based on periodic reports and information from States parties and other stakeholders.<sup>37</sup>

Throughout the treaty negotiations, views remained divided on whether a treaty-based approach within the framework of the UN was the best or most suitable way forward in business and human rights. The negotiations process has been greatly influenced by the fundamental structure and provisions of the UNGPs set out below, but disagreement remains over the adoption of a binding international treaty.<sup>38</sup> With opposition from the major capital-exporting countries, including the US, UK, Japan, China and India, long discussions can be expected.

#### 4. THE ART OF COMPROMISE: THE UNGPs

As an alternative to the numerous but nevertheless challenging and less successful treaty-making attempts, the soft-law approach offered a remarkable way forward. Within the UN system and under the leadership of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie, it was after the failure of the Draft UN Norms that this path was taken.<sup>39</sup> Instead of polarising debates over the extent of mandatory and norm-based business obligations under international human rights law, the basic approach of John Ruggie was to systematise the already existing international human rights law in the context of business operations. John Ruggie wanted to avoid the failures of previous treaty-making attempts but at the same time sought to overcome the limitations of international law in developing norms applicable to corporate entities. Instead of public legal control that follows a top-down approach, the UNGPs prefer to alter and improve internal business behaviour to be able to respond to external regulatory requirements. The document expresses the important role corporate actors play in upholding human rights in an age of economic globalisation.<sup>40</sup> Accordingly, in the preparatory phase of the

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<sup>37</sup> Article 15 of the Third Revised Draft.

<sup>38</sup> Muchlinsky, P. T., *Advanced Introduction to Business...*, *op. cit.*, pp. 168-170.

<sup>39</sup> UN Commission on Human Rights (CHR), Resolution 2005/69, Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. E/CN.4/2005/L.87, 15 April 2005, [https://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=10980](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=10980) (accessed 20 July 2023).

<sup>40</sup> Deva, S., Guiding Principles on Business and Human Rights: Implications for Companies, *European Company Law*, vol. 9 (2012), no. 2, pp. 101-102.

work, Ruggie identified three pillars of a theoretical framework of business and human rights.<sup>41</sup> The UNGPs were not designed to create new international law, but instead to apply the existing and already accepted legal framework of human rights to corporate abuses. This framework consists of “State duty to protect” as the first pillar, “corporate responsibility to respect” as the second pillar, which are both reinforced by the third pillar, “access to remedy”. As a result of this universal consensus-seeking effort, the UNGPs were adopted unanimously by the Human Rights Council in 2011.<sup>42</sup>

“State duty to protect” is based on the traditional concept of public law regulation that attributes the legal responsibilities to uphold human rights to States.<sup>43</sup> This requires positive State actions, including the adoption of preventive measures, as well as the necessary institutional and regulatory framework to investigate and redress violations of human rights. States must act in accordance with a “standard of conduct” and will breach this legal obligation if they fail to take appropriate steps to regulate against human rights abuse of businesses.<sup>44</sup> The second pillar is “corporate responsibility to respect” which is the major innovation of the UNGPs.<sup>45</sup> Instead of binding legal duties, this pillar focuses on the business inner or intra decision-making process. The underlying idea is that corporations ultimately need a “social licence to operate” or a “social contract” in the communities where they do business. The core element of this pillar is to require businesses to apply HRDD to assess the adverse impacts on human rights arising out of either their operations or business relationships. Due diligence is expected to integrate human-rights-compliant behaviour into their business operations. Responsibility to respect is a standard of expected business conduct that covers the avoidance and mitigation of human rights risks. The first two pillars are reinforced by the third one that provides access to remedy and

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<sup>41</sup> Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement> (accessed 20 July 2023).

<sup>42</sup> UN Human Rights Council, Resolution 17/4, Human Rights and Transnational Corporations and other Business Enterprise, A/HRC/17/L.17/Rev.1, 6 July 2011, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement> (accessed 20 July 2023).

<sup>43</sup> Paragraphs 1-10 of the UNGPs.

<sup>44</sup> Muchlinsky, P. T., *Advanced Introduction to Business...*, *op. cit.*, pp. 62-66.

<sup>45</sup> Paragraphs 11-24 of the UNGPs.

applies both to States and businesses.<sup>46</sup> This includes both legal and non-legal, State-based and non-State-based remedial avenues, including corporate-based grievance mechanisms or other alternative dispute settlement mechanisms. Another important innovation of the UNGPs is to demand consistency and policy coherence with regard to the international legal obligations of States. In terms of international economic agreements, this requires States to maintain adequate regulatory space for meeting human rights obligations.<sup>47</sup>

In the words of John Ruggie, the Human Rights Council's "endorsement establishes the guiding principles as the authoritative global reference point for business and human rights".<sup>48</sup> Indeed, similarly to the Universal Declaration of Human Rights, the UNGPs have also begun to become a reference point or an "important compass" in the field of business and human rights in the past ten years. From this perspective, it is worth highlighting the unique and complex web of connections the UNGPs created within this field of international law. While they were inspired by the general comment of the Human Rights Committee,<sup>49</sup> the UNGPs have recently begun to influence the case law of some of the human rights control mechanisms, especially the Inter-American and the African systems<sup>50</sup> and have infiltrated the dispute settlement mechanisms of international economic courts. They also play a role in "gradual legalisation" and standard setting, as the UNGPs have begun to define the framework of the current treaty-making process. On the other hand, based on the call of the UN Human Rights Council, the UNGPs serve as the basis of national policy making and legislation efforts in this field through their increasing implementation.<sup>51</sup> This continuous "dialogue" is necessary to overcome the widespread and persistent conflict of interests characterised by business and human rights.

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<sup>46</sup> Paragraphs 25-31 of the UNGPs.

<sup>47</sup> Paragraph 9 of the UNGPs.

<sup>48</sup> See <https://news.un.org/en/story/2011/06/378662> (accessed 15 January 2023).

<sup>49</sup> UN Human Rights Committee (HRC), General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, <https://www.refworld.org/docid/478b26ae2.html> (accessed 20 July 2023).

<sup>50</sup> See Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015 (Merits, Reparations and Costs) and UN Guiding Principles on Business and Human Rights, p. 10. The Impact of the UNGPs on Courts and Judicial Mechanisms (Debevoise & Plimpton LLP, 2021), paragraphs 727-733.

<sup>51</sup> The UN Human Rights Council calls for the adoption of "National Action Plans" to implement the UNGPs. See Resolution 26/22, Human Rights and Transnational Corporations and other Business Enterprises A/HRC/RES/26/22, 15 July 2014, [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/2](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/2) (accessed 20 July 2023).

Therefore, a unique interaction has been unfolding between the human rights control mechanisms, the soft-law approach, and the treaty-making process. The consensus-driven UNGPs are at the centre of this interaction and have gradually gained gravitational force. A similar tendency can be seen regarding the UDHR that is now 75 years old. It enjoys State practice followed by a sense of legal obligation (*opinio juris*). It remains to be seen whether some of the elements or principles of the UNGPs will become part of customary international law.

## 5. CONCLUSION

Increasing economic globalisation along with the intensification of transnational business operations have led to a “race to bottom”<sup>52</sup> where companies compete to operate in the most lax and lenient regulatory environment. This has consequently contributed to an increase in business-related human rights violations around the world. Furthermore, the recent spread of a platform-based business model has created dominant businesses that have negative impacts on human rights.<sup>53</sup> These phenomena have led to recognition of the need for a “second human rights revolution” that can protect against business-related rights violations. From this perspective, instead of protecting business operations, human rights must aim to widen the regulatory scope of States. The challenges to create an accepted regulatory framework are difficult to meet, but for the past two decades, the field of business and human rights has gone a long way and has created an established regime based on the acceptance of the UNGPs. The road to globalisation with a human face will continue to be difficult and challenging, but it is essential to take this road if local communities are to reap the benefits and make globalisation a common success of humanity. The UNGPs have clearly taken the first steps and moved beyond the difficult beginnings.

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<sup>52</sup> Zerk, J., *Multinationals and Corporate Social Responsibility*, Cambridge University Press, Cambridge, 2006, p. 154.

<sup>53</sup> Khan, L. M., Amazon’s Antitrust Paradox, *The Yale Law Journal*, vol. 126 (2017), no. 3, pp. 755-783.

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### **Sažetak:**

## **GLOBALIZACIJA S LJUDSKIM LICEM I ULOGA UJEDINJENIH NARODA**

*Velik dio suvremenih izazova zaštite ljudskih prava proizlazi iz netipičnih situacija kao što su ekonomske i financijske krize ili degradacija okoliša. Povrh toga, svakako treba navesti uspon globalizacije koji je tijesno povezan sa sve većim utjecajem poslovnog sektora na živote ljudi i njihove osnovne potrebe, od čiste vode do komunikacije. Regulatorni model »Washingtonskog konsenzusa« dodatno je potaknuo ovaj fenomen. Pružatelj komunalnih usluga koji krši pravo na vodu, djelatnosti rudarstva i crpljenja podzemnih izvora koje ugrožavaju pravo na zdravlje ili digitalna platforma koja narušava slobodu govora i informiranja, imaju štetan utjecaj na ljudska prava. Autor istražuje ove izazove zaštite ljudskih prava zajedno s povijesnim razvojem međunarodne pravne regulative, kao i suvremenim regulatornim inicijativama i procesom sklapanja međunarodnih ugovora kako bi razjasnio obvezu i odgovornost države za zaštitu ljudskih prava u kontekstu odnosa poslovnog sektora prema ljudskim pravima.*

**Ključne riječi:** *međunarodna ljudska prava; ekonomska globalizacija; Washingtonski konsenzus; druga revolucija ljudskih prava; UNGP; međunarodni ugovor o poslovanju i ljudskim pravima.*