CATCH 22:

A BINDING TREATY ON BUSINESS AND HUMAN RIGHTS

Vildan DRPLJANIN[1]

drpljaninvildan@gmail.com

Irma Masovic – Muratovic[2]

i.masovic@uninp.edu.rs

Abstract

Arguments can be found that the ever-growing power and influence of transnational corporations, which often greatly exceeds the resources and the capacities of many states, have repeatedly resulted with abuses of human rights and violations of basic principles of national and international law with unwilling and/or weak state governance to counter this. In June 2014, the UN Human Rights Council for the first time took formal steps to elaborate an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises with respect to human rights. This article acknowledges the utmost need to hold businesses accountable for human rights abuses and provides an overview on the meaning of a binding treaty on business and human rights from a legal, economic and policy perspective to test whether this approach strengthens the protection of human rights. The scope of the article is limited to exploring the feasibility of the idea of a binding treaty by providing a general overview of the discussion related to the status i.e. the legal subjectivity of corporations under international law, as well as to analysis of the applicability of international human rights law to corporations. This scrutiny with regards to the role of transnational corporations in the context of human rights shows that currently the matter stands in a way that any solution proposed from the perspective of international law appears as a futile approach from which there is no escape because of mutually conflicting or dependent conditions like the ones presented in Catch-22, the novel written by Joseph Heller. The article points out the shortcomings of a binding convention within the belief that rather than despair, this should lead us to organize better to ensure that the amorality of profit does not prevent the rise of the emerging need of a new human rights dialogue

Keywords: transnational corporations, human rights abuses, binding treaty, legal subjectivity, international law, business and human rights, international human rights law.

---

[1] Vildan Drpljanin is an attorney at law in North Macedonia. He graduated cum laude and was an honours student at Utrecht University, where he specialised in Human Rights as part of the master's program in Public International Law (LL.M.). He also earned a Double Master's Degree in Intellectual Property Law (LL.M.) at a programme organized by the University of Strasbourg, where he wrote on the conflict between copyright enforcement and freedom of expression and received top of the class honours.

[2] Irma Mašović Muratović, Doctor of Economics, is a professor of economic group of subjects at the International University of Novi Pazar in Novi Pazar, Serbia. She specializes in the areas of corporations and business and management and has authored many scientific papers on these matters.

INTRODUCTION

The power and resources of transnational corporations often greatly exceed those of states (Speir, 2012). This not only makes corporations powerful on the global level, but it also puts them in a position where they can influence governance and makes states increasingly unable and/or unwilling to regulate their conduct. Nonetheless, it presently remains impossible for transnational corporations to be held accountable for violations of human rights under the international law regime.

Arguments can be made regarding transnational corporations' complicity in human rights violations perpetrated by states, whereby the corporation participates in state conduct that violates human rights (Hazenberg, 2016). This could be the case, for instance, when a tech-transnational corporation passes over information concerning the identity of social media users to authoritarian governments (Dann and Haddow, 2008). Furthermore, corporations have been accused of directly violating human rights in zones of weak governance where the state does not perform its legal human rights duties. Operating in a context of weak governance through degrading work conditions as the *de facto* principal authoritative actor, it can be said that transnational corporations are not only complicit in state violations but actively violate human rights themselves (Hazenberg, 2016). The numerous cases that have been so far unsuccessfully brought before American courts under the Alien Tort Claim Act (ACTA), are an example of the necessity of the arguments presented in this article when a transnational corporation is involved in direct human rights violations (Enneking, 2012).

The third revised draft of the proposed binding treaty on business and human rights, that was discussed from 25 to 29 October 2021 in Geneva, comes just over eight years after the Human Rights Council (HRC) adopted a resolution calling for the establishment of a working group. The group was tasked to 'elaborate an international legally binding instrument to regulate, in international human rights law (IHRL), the activities of transnational corporations and other business enterprises' (A/HRC Res. 26/9/2014). The previous eight years represent one of the latest attempts from the international community to come together on this issue, and to try to address violations of international human rights obligations by corporations (De Schutter, 2016).

This article acknowledges the utmost need to hold businesses accountable for human rights abuses and provides an overview on the meaning of a binding treaty on business and human rights from a legal, economic and policy perspectives (Stephens, 2017) to test whether this approach strengthens the protection of human rights (Westaway, 2011). To begin, this article situates the whole discussion into the general context of the various means capable to regulate transnational corporate conduct in the domain of human rights (Weissbrodt & Kruger, 2017) against the background of various other relevant treaties. Primarily, it asks questions regarding the feasibility of the idea by providing a general overview of the discussion related to the status of corporations under international law (IL). Then, through analysis of the applicability of international human rights law to corporations, it inquires whether the idea manages to strengthen the protection of human rights obligations or not.

For this article, transnational corporations (TNCs) or multinational corporations (MNCs) are understood to be companies that operate in at least more than one country (Skinner, 2020). On the other hand, the process regarding the binding treaty is defined to refer to the discussions, materials and the eight sessions of the intergovernmental working group.

STATUS OF TRANSNATIONAL CORPORATIONS UNDER INTERNATIONAL LAW

The traditional treatment of the question of subjects of international law has been causing academic debates for many years now (Klabbers, 2003), and unlike in national laws, there is still no definite list as to who is considered a subject of international law (Clapham, 2006). However, few, if any, would disagree that international law has been, and still is, a state-centric system, product of the 1648 Westphalia Peace which regulates relations between states, by states, and for the benefit of states (Bartelson, 1995). As such, international law is mainly built around the concept of the modem sovereign state and it is crafted in a way that accommodates states (Crawford, 2012), and any other form of a non-state actor would have to fit in the required shape to utilize international law (Shaw, 2008). Consequently, transnational corporations, as one such non-state actor, would certainly struggle to ascertain their status under international law and currently range between being subjects with limited legal status (Clapham, 2006) and not being considered as subjects at all (Brownlie, 2003). This current standing indicates that transnational corporations have limited to no liability under international law and in contexts of unwilling and/or weak state governance could very well mean that corporations are not held accountable by any law for inflicted violations of human rights.

Although it can be argued that the notion of subjects and personality is largely a descriptive one (Cutler, 2001), as rights and obligations do not flow automatically from a grant of personality (Klabbers, 2002), a binding treaty for businesses would inevitably raise the question of the political and legal status of corporations under international law (Nwapi, 2014). Hence, the uncertain status of corporations poses a risk that could make the treaty fragile (De Schutter, 2016) from the very beginning since the negotiation process (Crawford, 2012), the accession criteria (Shaw, 2008), the implementation (Brownlie, 2003), and the enforcement of the treaty, could not be based on the subjectivity of the actors and thus would require a high level of improvisation. Even though international organizations are also recognized as actors with treaty-making power, the situation is quite different with regards to corporations and individuals as they are drastically less engaged on the international plane. Furthermore, regardless of the proposed solutions whether to include corporate representatives in the negotiations, questions of legitimacy may always arise as treaties in international law mostly base their sine qua non on the sovereignty of states. Knowing that even enforcement of regular treaties faces many obstacles and is not always satisfactory, a treaty of this kind bears the risk of creating a half-system that could breed additional problems with regards to enforcement without addressing the ones that already exist and giving corporations a carte blanche to cover their misdoings.

Therefore, given that human right protections from businesses are already duties of the state (Liste, 2016), an improvised approach would create an overlap between the obligations owed by the state and the businesses, and eventually could allow both actors to try to pass on the responsibility and avoid action (Teubner, 2006). On the other hand, the international community could aim to achieve the goal envisioned by the treaty, with substantially less risk, if they were instead to offer assistance to less developed states, encourage legislation to allow for universal civil jurisdiction on a ‘necessity basis’, and increase cooperation between stakeholders on this matter. Assistance could include trainings, financial help, monitoring, or any other resources that would help balance the position of the developing states against the position of powerful corporations operating within their territory (Kaeb & Scheffer, 2013). Jurisdiction and cooperation may depend on the region in question, but one example to follow in this direction is the European Union.

Even if the provisions were to somehow manage to provide protection against the risk of overlap and its consequences, the treaty could remain frail due to the strong division between states as to its necessity and plausibility. For example, in the Resolution A/HRC Res. 26/9 from 26 June 2014, out of the 47-members-large HRC, 27-member-states did not vote in favour for the establishment of a working group on this issue, 14 were against and 13 abstained. The lack of a consensus means that the treaty would be unable to address prevention of human rights abuses by transnational corporations if there is no cooperation between the different states where a certain corporation conducts its activities. As this is the core of the problem, the attempt of the binding treaty to strengthen the protection of human rights could remain futile. Nonetheless, considering argumentation from authors who say that this approach is formalistic blindness (Duruigbo, 2007), and that focusing on subjects of international law is a distraction (Alvarez, 2011), the idea of a binding treaty potentially also struggles from a viewpoint of applicability of IHRL to corporations. Even though the argumentation presented with regards to the formal part of international law suffices, this article wants to show that if there is a strong will to bypass the whole system of international law, all these shortcomings could be resolved, albeit it is another topic whether this should be an aim to strive for or not.

It is important to note that this article does not focus on the international investment regime because it consists of nearly 3000 bilateral investment treaties (BITs) and regional free trade agreements with investment chapters (FTAs), that makes it a very specific part of international law with very little in common with the topic of this article. This article will neither get into a discussion about the specifics of Trade Law and the way that segment might be influenced by such a treaty, but there is likewise a solid case to be built on this base.

APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW TO CORPORATIONS

Namely, the academic literature defines international human rights law as the law which deals with the protection of internationally guaranteed rights of individuals and groups against violations by governments (Knox, 2008). As such, it places duties on states to respect, protect and fulfil the rights of individuals and groups, take for example the wording of ICCPR and ICESCR and the case law of the Human Rights Committee, which means that IHRL is mostly aligned vertically (Ruggie, 2007). However, to respect, protect, and fulfil human rights, it is not enough for states only to abstain from violations of human rights obligations, but they also need to make sure that these human rights are protected from third parties, and this means that indirectly IHRL applies horizontally as well (Clapham, 2006). The binding treaty on business and human rights would seek to transform these indirect obligations owed by corporations to the state, to direct obligations corporations owe to the international community. Although this idea sounds noble, and it seems like it provides a unified protection of human rights, there are several reasons that suggest that these norms would not be any more effective than the existing system of indirect duties (Steinhardt, 2005).

Primarily, under the current system, states are required to report to the United Nations (UN) about their compliance with the human rights obligations and they are supposed to explain what measures they are undertaking to respect, protect and fulfil the rights guaranteed under international law, including the ones most often abused by corporations. This system is by no means perfect, states frequently turn in reports late, if at all; vigorously oppose proposals for rapporteurs directed at them; and refuse to cooperate with rapporteurs at all (Knox, 2008).

However, expanding this system even more by including corporations and monitoring their behaviour on an international level would drastically decrease the already low effectiveness of the whole reporting system. The binding treaty would involve at least several thousands of transnational corporations, and thus would require massive machinery of resources to just go through all the reports. Even with the assumptions that corporations are willing and know how to report about their compliance with human rights obligations, which are not very plausible assumptions, the treaty would be unable to ensure compliance simply because it would lack the required resources to do so (Gilbert, 2011).

Secondly, the character of transnational governance and the conduct of multinational corporations make the protection of human rights especially challenging and almost impossible to resolve with a single treaty. Cases like Kiobel v. Royal Dutch Petroleum Co., can serve as a good example how corporations implicated in grave human rights abuses can go unpunished when the remedy is not locally available to the victims and when they need to depend on third parties to protect their basic human rights (Menon, 2006). The Shell Petroleum Development Company of Nigeria, Ltd., one of the respondents in this case, operated oil production facilities in the Ogoniland region of Nigeria (USSC, 2013). Esther Kiobel and the other petitioners were Nigerian nationals who alleged that they, or their relatives, were killed, tortured, unlawfully detained, deprived of their property, and forced into exile by the Nigerian government (USSC, 2013). The petitioners maintained that the respondents, including the Shell Petroleum Development Company were complicit with the Nigerian government's human rights abuses (USSC, 2013). Nevertheless, the United States Supreme Court decision in this case found that the Alien Tort Claims Act presumptively does not apply extraterritorially. This example goes to show that the further the adjudicating authority from the places of alleged abuses, the less likely they are to take action and deliver justice unless significant reforms are initiated.

The ideas of conducting due diligence processes to detect potential risks to human rights (Taylor, 2009), using soft law to motivate businesses to voluntarily undertake obligations to protect human rights (Davarnejad, 2011), and setting private standards to protect brand recognition (Murphy, 2004), also take much longer than ever desired and could not be considered satisfactory steps in the right direction. On the other hand, a failed treaty that is not adhered to in practice may give countries and corporations an excuse not to take any other action to protect human rights from violations by corporations. Furthermore, it could absolve states from obligations to take any measures as corporations would become the main subjects in this regard (Cleveland, 2014). Even though a limited one, the current system allows states that do not have any link with the human rights abuses to serve as a forum for the victims.

Lastly, the UN Guiding Principles (UN, 2011) show that when attempts for protection come from the standpoint of the international community, they tend to be formulated in very vague and general terms so that they can be as comprehensive as possible. However, this weakens the protection from its very start and makes it hard to measure its implementation. On the contrary, local bottom-up solutions take much more detailed approach (Ruggie, 2014) and contribute more towards the protection of human rights abuses from corporations in the long term. (Nolan, 2014).

CONCLUSION

Finding the right approach to hold businesses accountable for human rights abuses under international law is an incredibly difficult task. The international human rights law is yet to see what the most successful solution is and currently there are numerous proposals as to how to strengthen the protection of human rights. Nevertheless, a binding treaty on business and human rights that would grant transnational corporations legal subjectivity on the international plane should not be one of the accepted proposals because the legal and policy perspective clearly points out that this will not strengthen the protection of human rights. This is primarily because the uncertain status of corporations under international law makes the whole idea unfeasible as it eventually creates overlap between the obligations owed by the state and the businesses, thus leading both actors to try to pass on the responsibility and avoid action. The lack of consensus does not help the case of the binding treaty neither as cooperation between states where a certain corporation is conducting its activities is necessary to address the core of the problem. Finally, resource constraints, the conduct of transnational corporations and the character of transnational governance add to inapplicability of international human rights law to corporations and build an array of problems arising from a binding treaty on business and human rights that would grant transnational corporations legal subjectivity on the international plane.

REFERENCES

1. Alvarez, J. E. (2011). 'Are corporations' "subjects" of international law?'. Santa Clara J. Int'l L., 9, 1, pp. 1-36.
2. Bartelson, J. (1995). A genealogy of sovereignty (Vol. 39). Cambridge University Press, Cambridge.
3. Brownlie, I. (2003). Principles of Public International Law. Oxford University Press, Oxford. 6th ed.
4. Clapham, A. (2006). Human rights obligations of non-state actors. Oxford University Press, Oxford.
5. Cleveland, S. H. (2014). After Kiobel. Journal of International Criminal Justice, 12(3), pp. 551-577.
6. Crawford, J. (2012). Brownlie's principles of Public International Law. 8th edition, Oxford University Press, Oxford.
7. Cutler, A. C. (2001). Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy. Review of International Studies, 27(2), pp. 133-150.
8. Dann, G. E., & Haddow, N. (2008). Just doing business or doing just business: Google, Microsoft, Yahoo! and the business of censoring China's Internet. Journal of business ethics, 79(3), pp. 219-234.
9. Davarnejad, L. (2011). In the shadow of soft law: The handling of corporate social responsibility disputes under the OECD Guidelines for Multinational Enterprises. J. Disp. Resol., pp. 351-385.
10. Duruigbo, E. (2007). Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges. Nw. UJ Int'l Hum. Rts., 6, 222.
11. De Schutter, O. (2016). Towards a new treaty on business and human rights. Business and

Human Rights Journal, 1(1), pp. 41-67.
12. Enneking, L. F. (2012). Foreign Direct Liability and Beyond-Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability, Eleven International Publishing.
13. Gilbert, D. U., Rasche, A., & Waddock, S. (2011). Accountability in a global economy: The emergence of international accountability standards. Business Ethics Quarterly, 21(1), pp. 23-44.
14. Grear, A., & Weston, B. H. (2015). The betrayal of human rights and the urgency of universal corporate accountability: Reflections on a post-Kiobel lawscape. Human Rights Law Review, 15(1), pp. 21-44.
15. Hazenberg, J.L.J. (2016). Transnational Corporations and Human Rights Duties: Perfect and Imperfect. Hum Rights Rev 17, 479–500.
16. Human Rights Council HRC, (2014) 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC Res. 26/9.
17. Kaeb, C., & Scheffer, D. (2013). The paradox of Kiobel in Europe. American Journal of International Law, 107(4), pp. 852-857.
18. Klabbers, J. (2003). recognition: subjects doctrine and the emergence of non-State actors. Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi. Martinus Nijhoff, Leiden/Boston, pp. 351-369.
19. Klabbers, J. (2002). An Introduction to International Institutional Law. Cambridge University Press.
20. Knox, J. H. (2008). Horizontal human rights law. American Journal of International Law, 102(1), pp. 1-47.
21. Liste, P. (2016). Geographical knowledge at work: Human rights litigation and transnational territoriality. European Journal of International Relations, 22(1), pp. 217-239.
22. Menon, J. A. (2006). The Alien Tort Statute: Blackstone and Criminal/Tort Law Hybridities. Journal of International Criminal Justice, 4(2), pp. 372-386.
23. Murphy, S. (2004) 'Taking Multinational Corporate Codes of Conduct to the Next Level' 43 Columbia Journal of Transnational Law, pp. 389-433.
24. Nolan, J. (2014). Refining the rules of the game: The corporate responsibility to respect human rights. Utrecht J. Int'l & Eur. L., 30, pp. 7-23.
25. Nwapi, C. (2014). Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor. Utrecht J. Int'l & Eur. L., 30, 24, pp. 24-42.
26. Ruggie, J. G. (2007). Business and human rights: the evolving international agenda. American Journal of International Law, 101(4), pp. 819-840.
27. Ruggie, J. G. (2014). Global governance and "new governance theory": Lessons from business and human rights. Global Governance, 20(1), pp. 5-17.
28. Shaw, M. (2008). International Law. 6th edition, Cambridge University Press, Cambridge.
29. Skinner, G. L. (2020). Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy. Cambridge University Press.
30. Speir, I. (2012). Corporations, the Original Understanding, and the Problem of Power. Geo. JL & Pub. Pol'y, 10, pp. 115-147.
31. Steinhardt, R. G. (2005). Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria. in P. Alston (ed), Non-State Actors and Human Rights (2005), pp. 177-227.

32. Stephens, B. (2017). The amorality of profit: Transnational corporations and human rights. In Human rights and corporations. Routledge, pp. 21-66.
33. Taylor, M. B., Zandvliet, L., & Forouhar, M. (2009). Due diligence for human rights: a risk-based approach. Harvard.
34. Teubner, G. (2006), "The anonymous matrix: Human rights violations by 'private'transnational actors." The Modern Law Review 69.3, pp. 327-346.
35. United States Supreme Court, (2013) the case of Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659.
36. Weissbrodt, D., & Kruger, M. (2017). Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. Globalization and International Investment. Routledge, pp. 199-220.
37. Westaway, J. A. (2011). Globalisation, Transnational Corporations and Human Rights-A New Paradigm.

Legislation

1. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
2. Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official Journal No. L 248 of 6 October 1993, 15-21.
3. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal No. L 77 of 27 March 1996, 20-28.
4. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal No. L 167 of 22 June 2001, 10-19.
5. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Official Journal No. L 195 of 2 June 2004, 16-25.
6. End of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869, United Nations, Treaty Series, vol. 299, 33 I.L.M. 1197, 1994.
7. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
8. Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982.
9. Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969.
10. UN Educational, Scientific and Cultural Organisation (UNESCO), Universal Copyright Convention (as revised on 24 July 1971 and including Protocols 1 and 2), 6 September 1952, U.N.T.S. No. 13444, vol. 943, pp. 178-325.
11. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.
12. UN General Assembly, International Convention for the Protection of Performers,

Producers of Phonograms and Broadcasting Organizations, 26 October 1961, 496 United Nations, Treaty Series, vol. 43, U.K.T.S. 1964, p. 38.
13. UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
14. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
15. UN General Assembly, International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.
16. UN General Assembly, Universal Declaration of Human Rights adopted by General Assembly Resolution 217 A(III) of 10 December 1948.
17. United International Bureaux for the Protection of Intellectual Property, Geneva, Berne Convention for the Protection of Literary and Artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.
18. World Intellectual Property Organization, WIPO Copyright Treaty (WCT), done at Geneva on December 20,1996.