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TEN YEARS OF THE UNGPS – BUSINESS WORLD AND HUMAN RIGHTS ON A COLLISION COURSE

INTRODUCTION

One of the defining features of the past half century or more is the growing impact of business on people's daily lives, working conditions, health, environment, information, expression of opinions worldwide, and thus on almost the entire spectrum of their fundamental rights.[1] Through the utilisation of resources, including job creation, investment, infrastructure improvement and innovation, economic and business activities make a significant contribution to the fullest possible realisation and enjoyment of human rights. On the other hand, however, the relationship between business operation and human rights has become more complex and contradictory as a result of the transnational nature of business operations that has become prevalent in the economic globalisation since the 1970s and also as a result of the emergence of platform-based businesses in the last decade. With the rise of the principle of shareholder primacy,[2] profit maximisation became predominant. Following the era of the "Washington Consensus"[3] that began to take shape in the 1980s, weakening state regulation and the privatisation of public-interest or public-purpose activities the original aim of which is

1 McBeth 2010: 150.

2 This is the principle of corporate law that was declared by the Michigan State Supreme Court in the case of Dodge v. Ford Motor Company [204 Mich. 459, 170 N.W. 668 (Mich. 1919)].

3 The "Washington Consensus", reflecting the ideas of the International Monetary Fund, the World Bank and the United States of America, encouraged developing countries and those leaving behind the centrally planned economic system to liberalise capital movements, to privatise more of their public assets and to reduce state regulation of the economy (see Sornarajah 2010: 49, 66; Örlős 2008: 24–26).

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to enhance the enjoyment of fundamental rights became characteristic worldwide.[4] As a result, human rights violations committed by or with the complicity of the business world also increased, which in recent decades has drawn attention to the need for responsible and human rights-respecting behaviour by big and especially transnational business and the need for more effective enforcement of states' human rights obligations. To use an analogy that fits the theme of this monograph: the business world and human rights often find themselves on a "collision course".

Following numerous unsuccessful attempts and extensive preparatory work, the Guiding Principles on Business and Human Rights (hereinafter: UNGPs), unanimously adopted by the UN Human Rights Council in June 2011, can be considered the first universal standard aimed at preventing and remedying the international human rights violations that are committed in connection with business operations. The UNGPs, celebrating their tenth anniversary this year, have become a benchmark in defining the limitations imposed on business operations in regards to human rights and in shaping the direction of international legal development since their inception. The UNGPs, which have three different normative pillars, expect both states and business actors to protect human rights. This paper, in tribute to the ten-year-old UNGPs, presents a retrospective overview of the circumstances of their development, the requirements they encompass, as well as the challenges they face moving forward. In doing so, it will first outline the distinctive features of business operations, in particular transnational and platform-based business operations, and their restrictive impacts on human rights (see section *Transnational and platform-based business operations and human rights*). The paper then describes the main stages of the journey leading to the creation and adoption of the UNGPs, as well as their structure and operating mechanism (see section *Circumstances and characteristics of the creation of the UNGPs*). It then looks at the dilemma surrounding its implementation, paying particular attention to the case law of the Inter-American Court of Human Rights (hereinafter: the Inter-American Court), and the possible impact of the UNGPs on Hungary's room for

[4] For example, the privatisation of water services, which led to international legal disputes in many countries (see Fuente 2003: 98–100).

manoeuvre and sovereignty, and how it can be placed in the relationship between the United States and China (see section *Implementation of the UNGPs*). Last but not least, the paper takes stock of the challenges and perspectives for the development of international law in the next decade, based on the last ten years.

TRANSNATIONAL AND PLATFORM-BASED BUSINESS OPERATIONS AND HUMAN RIGHTS

The freedom to establish corporations and the recognition of the members' limited liability only became widespread during the 19th century. However, their acquisition of shares in other corporations remained restricted for a longer period, as evidenced by an 1869 decision from a Georgia state court,[5] due to fears of increasing their market, economic and political influence. It was not until the 19th century that the ban was first lifted in the U.S. state of New Jersey, and from then on the first groups of companies were formed.[6] At the same time, the first truly transnational companies began to emerge.[7]

Although transnational business corporations had already appeared in the last decades of the 19th century and the first decades of the 20th century, they only became popular and widespread after the development of international trade, financial and investment protection networks and institutional systems in the 1970s.[8] The 'golden age' of economic globalisation came after the collapse of the centrally planned economic systems in the second half of the 1980s and the consolidation of international trade and investment protection rules, during which transnational corporations became stronger,

5 Central R.R. v. Collins, 40. Ga. 582, 625, 630.

6 Blumberg 1993: 52–54.

7 One of the first transnational companies was the American sewing machine manufacturer Singer, which built a manufacturing plant in Glasgow, England, in 1882 (Mulschlinski 2007: 10–11).

8 The Bretton Woods Conference in 1944 was the birthplace of the International Monetary Fund and the World Bank, while the General Agreement on Tariffs and Trade was concluded in 1947. The investment protection regime started to develop in the 1970s and spread worldwide in the 1990s.

both in terms of their numbers and scale of operations, and in their influence on the shaping of public and economic policies.[9] Alongside the expansion of the regulatory framework for international economic relations, the rapid development of communication and transport also contributed significantly to the "transnationalisation" of business, and in particular labour-intensive production.[10]

The consolidation of international trade and investment protection relations provides an opportunity for large companies to outsource some or all of their business operations to countries where they can produce or supply at lower cost, either because of cheaper labour force or a more permissive general regulatory environment. Thus, ensuring cost competitiveness on the global market represents the primary incentive for establishing transnational business operations.[11] Transnational business relations take on multifaceted forms, involving increasingly specialised units of production and service activities spread across multiple regions and countries.[12] These units are interconnected by various contractual ecosystems, forming what are known as global supply chains, which essentially constitute the backbone of economic globalisation.[13]

A distinctive characteristic of transnational supply chains, and also the key to their competitiveness, is their ability to strategically combine operational locations in the most cost-effective manner within relatively short periods

9 According to a UNCTAD survey, while in the early 1990s there were about 37,000 transnational companies and 170,000 subsidiaries, by the early 2000s there were nearly 80,000 transnational companies and more than 770,000 subsidiaries worldwide (see United Nations 2007).

10 For example, the invention of the seemingly simple container revolutionised maritime transport (see PLS Logistics 2015).

11 Pager–Priest 2020: 2441.

12 Apple used nearly 800 suppliers from 31 different countries to produce the popular iPhone in 2014. Walmart has 20,000 suppliers in China alone, while Nike has 8,000 suppliers in more than 51 countries. The French Total has nearly 900 subsidiaries and 16,000 outlets in 110 countries (Bird–Soundararajan 2020: 390).

13 Global supply chains account for 80% of world trade, 60% of production and more than 450 million jobs (see Bird–Soundararajan 2020: 384–388; United Nations 2013: 135). One in every seven jobs worldwide is connected to a global supply chain (see International Labour Organization 2015).

of time. Thus, in the context of transnational business, cost savings and their exploitation become almost the sole prerequisite for competitiveness in the global market.[14] However, in many cases, cost-minimisation efforts are pursued at the expense of public interest regulations, such as labour, environmental, competition or human rights legislation, resulting in a "race to the bottom" between capital-importing countries to acquire transnational business operations.[15] A number of serious human rights violations – such as the cases of Union Carbide in Bhopal, India[16] or Royal Dutch Shell[17] in Nigeria – can be linked to business operations with a transnational character. Corporate control over global supply chains, which constantly seek to reduce costs, is diminishing. Consequently, their operations potentially have adverse implications for human rights protection, while addressing violations – due to the transnational nature of business operations – often faces jurisdictional hurdles *(forum non conveniens)*.[18]

Over the past decade, platform-based business operations, while taking an ever larger slice of communication and trade activities, have fundamentally reshaped the way we access and consume information, communicate and buy.[19] A specific characteristic of platform-based businesses is that they are players in bilateral markets that seek not simply to compete in the market, but rather to shape, organise and manage competition.[20] One of the main reasons for this is that the value of a product in terms of its utility

[14] Interview conducted by the author in June 2021 with Professor Robert Handfield (Sándor 2021c). According to a recent survey, 70% of import purchasing decisions are based on price (Moul 2020).

[15] The phrase "race to the bottom" was first used by Louis Brandeis, an Associate Justice of the U.S. Supreme Court, to describe the competition between state regulations, which lowers the level of public interest protection. [New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1932), and Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)] (see Pager 2020: 2438–2444; Szabó 2020: 47–48).

[16] Mandavilli 2018.

[17] African Commission 2001, or see Marinkás 2014: 137–141.

[18] The difficulties of extraterritorial remedies for human rights violations are exemplified by the decisions of the U.S. Supreme Court in the cases of Kiobel v. Royal Dutch Petroleum Co. [569 U.S. 108 (2013)], and Jesner v. Arab Bank [PLC 584 U.S. (2018)].

[19] See for example Rosen 2018.

[20] Pasquale 2018.

increases with the number of users or consumers it attracts, a concept known as the "network effect". In case of two-sided markets or networks, this is complemented by the fact that the wider the consumer base using the services of a platform-based company in an intermediary position is, the more space it can offer to traders or advertisers, and vice versa. Through this vicious circle, an indispensable infrastructure – a kind of 21st century railway – is created that forces other market players, and possibly its own competitors, to become dependent on it.[21] As in the case of transnational business operations, cost and pricing play a key role for platform-based companies, but the main objective is not to improve competitiveness but to achieve market dominance or monopoly.[22]

Due to these distinctive characteristics, platform-based business enterprises seek to acquire a regulatory role in the market. Leveraging their acquired market dominance, they exercise a form of "functional sovereignty", taking on regulatory tasks such as dispute resolution and others from the state, which can impact fundamental human rights.[23] Platform-based "digital public spaces" and "digital marketplaces" also affect human rights in other ways. Through their vertical integration efforts, they are able to influence the supply of several different markets, for example, Amazon's operation has a significant impact not only on trade but also on the book market, which in turn has a restrictive effect on the freedom to inform or educate.[24] The automated public spaces of social media, due to the customisation and fragmentation of information, disrupt the process of forming public opinion and hinder the freedom of public discourse.[25] Finally, it is also worth mentioning that digital

21 Khan 2018: 326, 331–332.

22 In platform-based markets, the demand for growth often exceeds even the demand for profitability. Dominant market position is achieved by large technology companies like Amazon or Facebook through predatory pricing below cost on the one hand, and vertical integration on the other (see Khan 2017: 710–805).

23 Pasquale 2018.

24 Khan 2017: 713.

25 Interview conducted by the author in May 2021 with Professor Frank Pasquale (Sándor 2021a).

intermediary companies are hosting on their platforms applications that are complicit in serious human rights violations.[26]

It can be seen that both the transnational business operations that have been growing since the 1970s and the platform-based business models that have gained ground in the last decade, although with different operational characteristics, have a negative impact on the enjoyment of human rights or the fulfilment of the states' human rights related obligations. The following section gives an overview on the international efforts to prevent and remedy human rights violations in the context of business operations.

CIRCUMSTANCES AND CHARACTERISTICS OF THE CREATION OF THE UNGPS

Recognising the impact of transnational business operations on human rights, a multilevel international legislative effort began in the 1970s aimed at identifying the human rights related constraints of business operations and at implementing and enforcing those constraints. On the one hand, international treaty-drafting efforts were launched in several waves. The United Nations Committee on Transnational Corporations (UNCTC)[27] began its work in 1975, focusing on transnational corporations. By 1990, the Committee had prepared a draft international treaty that aimed to regulate the rights and obligations of both transnational corporations and the states hosting them.[28] However, following the collapse of the centrally planned economic systems and the resulting change in the global economic

[26] Filmed in 2019, the documentary *Silicon Valley's Online Slave Market* explores how applications available on Google and Apple platforms are facilitating modern-day slavery in Saudi Arabia and Kuwait (Pinnell–Kelly 2019, and the documentary on the subject, see BBC 2019).

[27] The United Nations Committee on Transnational Corporations (UNCTC) was established by Resolution 1913 (LVII) of the United Nations Economic and Social Council on 5 December 1974 (United Nations Economic and Social Council 1974).

[28] The working committee was chaired by Swedish international lawyer Sten Niklasson and the draft treaty covered the treatment of transnational corporations, intergovernmental cooperation and the implementation of the rules of conduct in separate chapters.

environment, the initial compromise surrounding the draft treaty disintegrated.[29] The next treaty-preparation attempt began in 1998 within the framework of the Commission on Human Rights. As a result of this preparatory work, the document known as the *Draft UN Norms,* presented in 2003, imposed direct international legal obligations on transnational corporations and encompassed entire supply chains.[30] However, due to resistance from the business world and the lack of sufficient compromise between states, the *Draft UN Norms* were not adopted as a binding international legal norm.[31] But despite the failed attempts to conclude a binding international treaty, the issue has remained on the agenda of the international community. In June 2014, the Human Rights Council adopted a resolution to draft an international treaty on regulating the relationship between transnational business activities and human rights,[32] based on the initiative of South Africa and Ecuador, and work is still ongoing.[33]

On the other hand, as an alternative to the unsuccessful international treaty-making efforts, international organisations have produced *soft law* documents on issues related to the relationship between the business world and human rights. Among these documents, notable are the OECD Guidelines adopted in 1976, which aim to protect investments and regulate the operations of multinational enterprises.[34] The OECD Guidelines, following their revision in 2000, now have a separate chapter on human rights related corporate obligations, which include the introduction of a human rights impact assessment and an obligation to provide remedy in the event of a violation.[35] The OECD Guidelines, although voluntary, are

29 Sauvant 2015: 56–62. After the states failed to adopt the draft international treaty, the UNCTC's powers were taken over by UNCTAD in 1994.

30 United Nations 2003.

31 United Nations Commission on Human Rights 2004.

32 United Nations Human Rights Council 2014a.

33 See United Nations Human Rights Council s. a.

34 The Guidelines set minimum requirements for, among other things, transnational companies' labour relations and their activities affecting the environment and human health, and explicitly cover the relationship between the business world and human rights (OECD 1976).

35 OECD 1976: II. Section 2.

complemented by a strong and complex control mechanism. On the one hand, the *OECD Committee on International Investment and Multinational Enterprises* (CIME) determines the content of the Guidelines by examining specific cases, and on the other hand, since 1979, *National Contact Points* have been in place to provide a forum for remedy and assist in the transposition of the Directive.[36]

Following unsuccessful efforts to conclude a treaty and the development of soft law in international law, the UN Secretary-General appointed a Special Rapporteur in 2005 to define international human rights standards applicable to the business world, identify associated governmental regulatory and dispute resolution obligations, and develop human rights impact assessment methods for corporate operations.[37] The mandate of the Special Rapporteur accordingly did not involve preparing new international treaties but rather encompassed a comprehensive review of current international legal standards to systematise the responsibility of corporations for human rights violations. UN Secretary-General Kofi Annan appointed Harvard Professor John G. Ruggie to carry out these tasks.[38]

In terms of timing, the preparatory work led by John G. Ruggie can be divided into three main parts. The first phase of this work provided an overview of current legislation and challenges around the relationship between the world of business and human rights.[39] The second phase of the work resulted in a recommendation on the theoretical framework for the relationship between the business operations and human rights. This framework, based on international human rights conventions, rests on three basic pillars. The first pillar is the state's international legal duty to protect against human rights violations by business enterprises, primarily through its legislative and dispute resolution activities. The second pillar is the responsibility of business enterprises to respect human rights throughout

36 This is why Roel Nieuwenkamp, former chair of the OECD Working Party on Responsible Business Conduct, formulated that the OECD Guidelines are "soft law with hard consequences" (see Nieuwenkamp 2013: 171).

37 United Nations Commission on Human Rights 2005.

38 United Nations Commission on Human Rights 2005.

39 United Nations Office of the High Commissioner s. a.; Ruggie 2007.

their operations based on a standard or duty of care *(due diligence obligation)*. Finally, the third pillar is the provision of providing remedy in case of violation, which is an obligation for both the state and the corporate sector.[40] In the third phase of the work, the Special Rapporteur elaborated the theoretical framework in detail and made it operational. This resulted in the creation of the UNGPs, which was unanimously endorsed by the Human Rights Council on 16 June 2011.[41]

It is important to underline that the UNGPs did not create a new international legal obligation, but rather a system of provisions contained in existing human rights instruments, such as the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, applicable in the business context.[42] The UNGPs, consisting of 31 principles in total, are also divided into three main parts, following the three-pillar structure of the previous framework. In relation to the existing duty of the states to protect fundamental rights, the UNGPs stipulate that this is a standard of conduct under which states may be held liable under international law for failing to establish the regulatory environment or to take the public authority measures necessary to prevent, investigate, remedy or punish violations committed by business enterprises. Different and stricter rules apply to states when they participate in the business operation as owners of a business enterprise. In this case, they must carry out human rights due diligence, where possible, to prevent human rights abuses by businesses with which they have any tie or connection.[43] Economic globalisation is facilitated by the rules governing international economic relations. However, in many cases, these rules hinder and restrict the ability of states to create and adopt regulations that protect public interests necessary for the safeguarding of human rights. Moreover, the

40 Ruggie 2008.

41 United Nations Human Rights Council 2011.

42 UNGPs, Principle 12.

43 UNGPs, Principle 4. In the UNGPs' reading, the relationship or connection between the state and a business enterprise may be established not only by the existence of ownership or control, but also by the existence of substantial state support to the enterprise, such as export credits, insurance services or other support.

difference between the strength and effectiveness of international economic and human rights protection mechanisms gives *de facto* primacy to international economic obligations at the expense of human rights requirements.[44] It is therefore an important provision of the UNGPs that states must draft treaties governing their international economic relations, such as trade, investment protection or financial relations, in such a way that they can continue to enforce their human rights obligations without hindrance.[45]

The second pillar sets out the content of the responsibility of business enterprises to respect human rights, also in line with the human rights conventions in force,[46] and is a key step in promoting responsible business conduct.[47] One of the biggest innovations of the UNGPs is the stipulation that business enterprises have a responsibility to respect human rights regardless of whether or not states have fulfilled their duty to protect, and in substance, it means that they must refrain from committing human rights violations in the course of their business operations and must remedy the adverse impacts of their operations on human rights.[48] To this end, the UNGPs essentially outline a process for enterprises to follow to demonstrate respect for human rights. At the heart of this is the human rights due diligence, the essential function of which is to enable business enterprises to identify, prevent, mitigate and account for how they address their impacts on human rights or those of others in their supply chains. This represents a continuous obligation, or 'vigilance' if you will, aimed at protecting human rights by striving to integrate the perspectives of not only the shareholders but also the stakeholders affected by business operations, such as contractual partners, employees and local communities, into corporate decision-making.[49]

Finally, the third pillar provides for the requirement of remedy, which is a key aspect of business and human rights, because the protection and respect

[44] Joseph 2016: 473–474; Szabó 2019: 225, 228.

[45] In the context of international investment protection law, this is pointed out by Van Harten 2013: 158–164.

[46] UNGPs, Principles 11–24.

[47] Rasche–Waddock 2021: 236–237.

[48] UNGPs, Principle 11.

[49] Ruggie et al. 2021: 186–189.

of rights means little without the possibility of redress for violations.[50] This obligation, in addition to being a fundamental right recognised in human rights conventions by itself, is linked to both the first and second pillars of the UNGPs, as it is a requirement for both the state and business actors.[51] The core of the requirement for effective remedy is state-based judicial dispute resolution, but according to the UNGPs, this should be supplemented and supported by a variety of non-judicial remedy mechanisms, both state-based and non-state-based, forming what is referred to as a 'bouquet of remedies'. To borrow Joseph M. Wilde-Ramsing's apt analogy from human anatomy, the judicial path is the backbone of remedy, while the various non-judicial remedial avenues are more like the sensing fingers: without a backbone, the stability of the remedial system is broken, but the sensing ability of the fingers is also essential for a remedial system that can flexibly and smoothly recognise and creatively address injustice.[52] The advantages of non-state complaint mechanisms, typically run by business enterprises, their industry associations or even the OECD National Contact Points,[53] include the fact that they offer remedy while relieving the burden on state courts, are flexible to the cultural specificities of a country or region, protect the reputation of the company concerned and provide important feedback for the fulfilment of the human rights related duty of care (standard of conduct) as per the second pillar.

IMPLEMENTATION OF THE UNGPS

The UNGPs are a significant milestone, rather than an end result, in the evolution of the law governing the relationship between the world of business and human rights.[54] Consequently, simultaneous implementations on several levels play a key role not only in their enforcement but also in the

50 Deva 2012: 107–108.
51 UNGPs, Principles 25–31.
52 Wilde-Ramsing 2018: 82–84.
53 Rasche–Waddock 2021: 236–238.
54 Deva 2021: 350.

consolidation of this soft law document into an international legal obligation. Implementation is taking place in parallel within the UN framework, at state level and through the case law of certain human rights monitoring mechanisms. This paper briefly touches on the first two, while for the latter it goes into more detail on the progressive understanding developed by the Inter-American Court.

In 2011, the Human Rights Council established a working group of five experts whose main tasks include monitoring the implementation of the UNGPs.[55] It has also institutionalised an annual forum that serves as a global platform for discussing the practical and theoretical challenges and difficulties surrounding the implementation of the UNGPs.[56] Among numerous other challenges, the B-Tech project deserves mention here for exploring implementation issues related to digital innovations.[57] Although not strictly related to transposition, it is worth noting that the drafts developed in the course of the international treaty preparation work from 2014 onwards make use of many of the solutions and idea that have been recognised and adopted in the UNGPs, and in this sense many authors in legal literature consider the UNGPs the starting point for an international treaty on business and human rights.[58]

The implementation at state level, mainly based on the call by the Human Rights Council in 2014, primarily proceeds through the creation of National Action Plans (NAP).[59] NAP is a public policy document in which states set out the strategy and the means by which they will meet the obligations of the first and third pillars of the UNGPs. Its main purpose is to identify gaps in the protection of rights in business operations and to offer an effective, coherent, state-specific and monitorable implementation strategy.[60]

55 United Nations Human Rights Council Resolution 17/4. The mandate of the working group has been extended by the Human Rights Council on several occasions.

56 See United Nations Human Rights 2011.

57 United Nations Human Rights 2019.

58 Deva 2021: 13–15.

59 United Nations Human Rights Council 2014b.

60 See United Nations Working Group on Business and Human Rights 2016.

Currently, more than twenty countries have developed and adopted NAPs, with a significant number of them being EU Member States.[61]

So far, the Czech Republic, Poland, Lithuania and Slovenia have adopted NAPs in the Central European region. The implementation of the UNGPs essentially sets a framework for the development of rules for the economic and business sphere of a given country. In a certain sense, it reduces the regulatory space and sovereignty of a given country as the rules and regulation of the world of business necessarily become less flexible due to the imposition and enforcement of human rights requirements: the actors of the business world enjoy less freedom. It can affect the competitiveness of both the country and its domestic companies. Hungary, like other Central European countries, may be affected by the creation and implementation of the UNGPs in two main ways: as a capital importer, i.e. as a country hosting the supply chain of many large companies, and as a capital exporter, i.e. because of the regional expansion ambitions of domestic companies. In both cases, when implementing the UNGPs and preparing the NAP, the country should strive to minimise the reduction of its room for manoeuvre and thus its competitiveness as much as possible. On the one hand, as a capital-importing country, it must enforce human rights standards that protect its population without losing its attractiveness and appeal in the competition for foreign direct investment. On the other hand, Hungary has also emerged as a capital-exporting country in recent decades, which is clearly visible in the regional expansion efforts of large companies such as OTP and MOL, among others. In this respect, Hungary has an interest in ensuring that the UNGPs requirements are implemented in a way that does not impose excessive cost increases on its companies, does not jeopardise their competitiveness and the realisation of their regional ambitions, and does not put them at a competitive disadvantage vis-à-vis companies of countries where the UNGPs are not or not fully implemented. In this light, while the implementation of the UNGPs reduces the country's room for manoeuvre in some respects, the smart and streamlined design of the NAP,

61 See United Nations Working Group on Business and Human Rights 2016.

tailored to the country, can mitigate this reduction in room for manoeuvre in the short term and even ensure benefits in the longer term.

From a broader perspective, however, it must be taken into account that, on the one hand, the Central European countries, including Hungary, are members of the single European internal market and, on the other hand, the UNGPs are on the way to becoming a universal norm of international law, whether through treaty, customary law or judicial development, and to be enforced worldwide. However, due to the combined effect of these two factors, Hungary's overall foreign economic room for manoeuvre may even increase. Indeed, the implementation of UNGPs has a mitigating effect on the "race to the bottom" phenomenon mentioned earlier. In practice, this may mean that transnational supply chains will realise smaller cost benefits from outsourcing production and services to countries with much weaker public interest protection regulations, typically developing, low-cost countries (LCCs). This may lead them to relocate some or all of the outsourced production back to a region closer to the home country *(nearshoring)*,[62] where transport costs, risks, administrative burdens and lead times are lower and where the implementation of the UNGPs may mean less change and cost increases. Hungary can provide a competitive location for Western European production chains returning to the European market, thanks to its skilled but cost-competitive workforce, excellent academic ecosystem and sufficient infrastructure. All this can increase the country's overall foreign economic room for manoeuvre and development potential.

In connection with the development and adoption of the NAP, it is worthwhile to discuss the relationship between the world of business and human rights in the context of the United States and China, two influential players in the modern global economy. Both countries are significant exporters and importers of capital and also political and economic rivals. First, it is necessary to note that both the United States and China were members of the UN Human Rights Council, which unanimously supported the UNGPs,[63] and show a commitment to the recognition of the negative impact of business on human rights and the need to provide remedy in case

62 Kearney 2021.

63 See United Nations Human Rights Council 2022.

of violation. This is evidenced by the fact that on the occasion of the tenth anniversary of their adoption, both countries have committed themselves to the importance of the spirit of the UNGPs.[64] However, it is noteworthy that while the United States is already preparing to revise and update the NAP adopted in 2016,[65] China has not yet adopted such a document at all. It is in an extraterritorial context, i.e. in its role as a capital exporter, that China is most open to the enforcement of the human rights requirements of the business operations.[66] In view of this, and also in the light of the often voiced – not entirely well-founded – criticism that human rights are mostly tied to the thinking of the Western world, or even a product of it,[67] from a geopolitical perspective, the question is whether and how regulatory efforts surrounding the relationship between the business world and human rights can play a role in the U.S.–China great power competition. In the commemoration of the U.S. State Department quoted earlier, there is an indirect reference to this.[68] Moreover, historical experience going back to Woodrow Wilson shows that U.S. foreign policy has never been averse to promoting and actively spreading a specific form of governance, as well as weakening governments that deviate from this form.[69] Simultaneously, China and the Chinese Government are facing a number of human rights-related criticisms. Will regulatory efforts regarding the relationship between the world of business and human rights inevitably force the United States

64 The U.S. Department of State issued a solemn press release to mark the occasion (U.S. Department of State 2021). The Chinese position will be presented at a conference to mark the tenth anniversary of the UNGPs (Chinese Stakeholders Consultation Seminar 2021).

65 See National Action Plans on Business and Human Rights s. a.

66 China's controversial relationship with the business world and human rights is examined in detail by Cernic 2016: 135–159; see also Rosser et al. 2020.

67 This is discussed in detail by Glendon 2002.

68 In the commemoration of the U.S. State Department quoted earlier, there is a reference to this: "We know that companies thrive and economies prosper when there is strong rule of law and adherence to human rights and fundamental freedoms […]."

69 For instance, U.S. President Woodrow Wilson made the recognition of a government conditional on the government that had come to power on dubious constitutional grounds demonstrating, by referendum or free elections, that it enjoyed the support of a majority of the population.

and China onto a collision course? The answer to this question is not yet known with absolute certainty, but the current and upcoming decades of UNGPs implementation, and in particular the related state practices, will be revealing in this respect.

In addition to the NAP, the broader implementation of the UNGPs includes legislation that specifically seeks to prevent or remedy human rights violations related to the operations of transnational corporations or their supply chains. The earliest roots of this trace back in the United States to the Alien Tort Statute, adopted approximately 250 years ago in 1789, which allows foreign nationals to bring civil lawsuits in U.S. federal courts for violations of international law.[70] However, since the adoption of the UNGPs, the number of such national laws has multiplied. In California, one of the first such modern laws, the *California Transparency in Supply Chains Act*[71] was passed in 2010, followed by the U.K. *Modern Slavery Act* in 2015, the French *Loi de Vigilance* in 2017[72] and the *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*[73] in Germany in 2021.

While every international human rights monitoring mechanism has faced dilemmas concerning the relationship between the business world and human rights in its jurisprudence, only the Inter-American Court has thus far developed a progressive and leading approach in this regard. It explicitly invokes the UNGPs for addressing such challenges, and its case law plays an innovative role in their interpretation and development. As early as the 1980s, the Inter-American Court recognised and required the right to a remedy in cases where business actors violate the provisions of the Inter-American Convention on Human Rights.[74] In addition, the Inter-American system of legal protection also recognises the horizontal

70 28 U.S. Code § 1350.

71 See Bonta s. a.

72 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1).

73 The text of the adopted law is available at Beschlussempfehlung und Bericht.

74 Inter-American Court, Velásquez Rodríguez v. Honduras, 26 June 1988, paragraph 91. It confirmed the positive duty of the state to protect: Inter-American Court, González and Others v. Mexico, 16 November 2009, Series C, No. 205, paragraph 284.

effect of the rights guaranteed by the Convention, i.e. the responsibility of non-state actors to respect human rights.[75] Over the past decades, particularly in the South American region, the increase in foreign investments related to raw material extraction and mining has led Inter-American human rights forums to examine multiple times the dilemma of human rights constraints within the business world, acknowledging the correlative impact between the two.[76] This is reinforced by the fact that within the framework of Inter-American human rights mechanisms, a special rapporteur has been appointed to address these issues.[77] Their report released in January 2020 scrutinises questions related to the relationship between the world of business and human rights, such as privatisation of public services and information technology.[78]

The decision in Kaliña and Lokono Peoples v. Suriname, related to the Suralco mining concession, specifically referenced the UNGPs. The ruling elevated the rehabilitation of the affected area to a "shared obligation" between the host state and the company being involved in the operation.[79] Based on the UNGPs, the Inter-American Court emphasised that the state must conduct an impact assessment prior to the establishment of a mining concession, for which it is liable, and that companies must operate in a manner that respects and protects human rights and must be accountable for any negative impacts on human rights.[80] In the most recent case law, a concurring opinion by Judge Patricio Freire pointed out that the UNGPs have become part of the interpretation of the law by the Inter-American Court.[81]

In addition to its case law, the Inter-American Court, in its Advisory Opinion OC-23/17 issued in 2017, stated in principle that states are required to follow the provisions of the UNGPs to protect and safeguard human

75 Gonza 2016: 358.
76 See Working Group on Mining and Human Rights in Latin America 2014.
77 See OAS 2014.
78 See CIDH 2019.
79 Inter-American Court, Kaliña and Lokono Peoples v. Suriname, 25 November 2015, paragraphs 224–226, 290.
80 Mondragón 2016: 55–57.
81 Inter-American Court, Spoltore v. Argentina, 9 June 2020.

rights in relation to business entities. It also emphasised that companies must prevent or mitigate, as well as be accountable for the negative human rights impacts of their business operations.[82] In addition, the Inter-American human rights system implicitly accepts and applies certain parts of the UNGPs in dozens of its decisions. This includes human rights impact assessments prior to investments and developments, opportunities for participation by affected local populations in investment decisions, and the significance of both state and non-state grievance mechanisms.[83] Generally speaking, the UNGPs are seen as a minimum expectation, a starting point, in the reading of the Inter-American human rights system.

CONCLUSIONS: PERSPECTIVES FOR THE UNGPS AND THE DEVELOPMENT OF INTERNATIONAL LAW

The recognition of the negative impacts of business operations on human rights has been a long and challenging journey spanning several decades, culminating in the creation of the UNGPs. These universal principles reflect a compromise and serve as a common platform for states, businesses and civil society organisations. While they were essentially a response to the failure of international legislation and treaty-making efforts to bridge a significant regulatory gap, the past decade has shown that the work of hardship and compromise has paid off. Not only because of the vibrant and intense legislative and legal development that has taken place in the area of regulating the relationship between the business world and human rights, but also because the gravitational pull of the ten-years old UNGPs is clearly visible in both international law and state legislative and legal development efforts. Like the Universal Declaration of Human Rights of 1948, the UNGPs of 2011 have become a point of reference or benchmark

82 Inter-American Court Advisory Opinion OC-23/17, 15 November 2017 (Series A, No. 23), paragraphs 154–155.

83 Debevoise & Plimpton 2021: paragraph 716.

and, if the practice and public perception of states so justifies, can begin the process of becoming customary international law.[84]

Accordingly, the central and inescapable role of the UNGPs in the development of international law can be seen at several points. They have had an important formative influence on the interpretation and development of other soft law documents regulating restrictions on business activities from a human rights perspective, such as the OECD Guidelines.[85] Furthermore, the UNGPs also serve as a starting point in the ongoing preparations for the international treaty making process, demonstrated by the fact that the main direction of the drafts, supported by academic circles advocating for the UNGPs,[86] is evolving in accordance with the main points and requirements of the UNGPs. In other words, it prepares the ground on which an international treaty with sufficient consensus among states can be built. The UNGPs also has a significant impact on the case law and general legal interpretation of universal and regional human rights control mechanisms, with the Inter-American Court shaping the most progressive and leading interpretation in this regard.

In addition, the UNGPs have been instrumental in the reform of international economic relations, including the regulation of investment protection treaties, and the law of international trade and financial organisations, in particular the World Trade Organization and the World Bank. By becoming part of these international economic treaties, the UNGPs can integrate the human rights considerations and requirements that they seek to enforce in their interpretation, thus regulating or taming economic globalisation.[87]

[84] Kovács 2009: 64.

[85] For example, the OECD has incorporated the UNGPs into its Guidelines.

[86] For example Ruggie 2014.

[87] Reform efforts toward incorporating human rights can be observed, for example, within the frameworks of UNCITRAL (investment rules) and UNCTAD, as well as in certain bilateral investment protection agreements, such as the 2016 agreement between Morocco and Nigeria, and during the creation of the Pan-African Investment Code. Some authors in the legal literature have explicitly called for the incorporation of the UNGPs, for example Krajewski 2018. On the reform efforts and the establishment of an internal investigative committee in the context of the World Bank, see Szabó 2019: 237.

Lastly, through its soft law nature and via the NAPs, the UNGPs inspire state legislative efforts, which over time could influence a cohesive state practice and public perception necessary for certain parts of the UNGPs to solidify into customary international law. This is also supported by the fact that many large companies recognise the UNGPs as an integral part of their corporate policy and so-called corporate social responsibility. One well-known example of this is Facebook, which, among other considerations, assessed the U.S. President's behaviour related to the 6 January 2021 events in Washington, D.C., in accordance with the UNGPs.[88] If business enterprises consistently adhere to human rights norms in their market operations, governmental legal regulations will, in turn, respond accordingly. Over time, similar to developments observed in other legal domains, this could potentially pave the way for the crystallisation of international legal norms.[89] This shows that the UNGPs intersect with the ecosystem regulating the human rights constraints of business operations at numerous junctures. It also has the gravitational force of being seen as a reference point for new regulatory efforts in this field.

The business operations of transnational and platform-based corporations are on a collision course with internationally recognised human rights. But this could also widen the foreign economic room for manoeuvre of Central European countries, including Hungary. Given their geographic location and EU membership, these countries can provide a competitive production location for Western European supply chains, which are also being restructured by the UNGPs. Finally, from a geopolitical perspective, it is necessary to note that regulatory efforts surrounding the relationship between the world of business and human rights may also play a role in the U.S.–China big power competition. One of the intriguing questions of the decade could be whether the regulatory efforts surrounding the world of business and human rights, which are already on a collision course, will also force the United States and China into a clash in this area. Monitoring

88 See, for example, Sándor 2021b.

89 Johnson 1998: 340–351. For more details see also Sándor 2018: 313–329.

and evaluating state practice in this area can therefore be interesting not only in the context of the development of customary international law, but also in the context of great power rivalry.

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