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Item Type	Conference proceedings
Authors	Bernatt, Maciej
Publisher	ISBEE
Rights	With permission of the license/copyright holder
Download date	2026-06-24 12:06:45
Link to Item	<a href="http://hdl.handle.net/20.500.12424/188696">http://hdl.handle.net/20.500.12424/188696</a>

# **HUMAN RIGHTS AS A SOURCE FOR GLOBAL ETHICAL STANDARDS IN BUSINESS**

Maciej Bernatt

University of Warsaw, **Faculty of Management**, Poland

## **Summary**

Human rights are universal moral rights of fundamental character. They may be perceived as the source of universal values that are applicable to business activity. Thus companies should be deemed obliged by the human rights' standards. Despite this it is difficult to construct international legal system that would refer these values in the form of hard law to companies and would build an effective system of companies liability for human rights violations. However, lack of effective legal system shall not be deemed as an obstacle for claiming that, when it comes to companies, human rights are the source of ethical norms. The paper analyses these issues. Firstly the application of human rights values to business activity is examined. This is made mainly by analysing international sources of companies human rights obligations. Afterwards the article answers the question whether an effective system of liability of companies for human rights violations have been built. The negative answer to this question serves as an argument for claiming that companies should have an objective due diligence policy so as to avoid adverse human rights impacts being caused by its activity.

**Keywords list: ethical standards, business values, human rights, Corporate Social Responsibility, corporate liability for human rights' violations, business and human rights**

## **1. Introduction**

Multinational companies play an important part in the economies of most countries and in international economic relations. Through international direct investment and other means such companies bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labour. Within the framework of development policies established by governments, they can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly. On the other hand, the advances made by multinational companies in developing countries pose often doubts as to the observance of human rights when pursuing their business activity abroad<sup>1</sup>.

The aim of this paper is firstly to analyse to what extent human rights obligations may be referred to companies. The application of human rights values to business activity is examined. This is made mainly

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<sup>1</sup> See more on that in: J.L. Cernic, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights*, Europa Law Publishing, 2010; D. E. Lee, E.J. Lee, *Human Rights and the Ethics of Globalization*, Cambridge University Press, 2010; A. Voiculescu, H.Yanacopoulos (eds.), *The Business of Human Rights: An Evolving Agenda for Corporate Responsibility*, Zed Books 2011; D. Kinley (eds.), *Human Rights and Corporations* (The International Library of Essays on Rights), Ashgate 2009; K. Buhmann, L. Roseberry, M. Morsing (eds.), *Corporate Social and Human Rights Responsibilities: Global, Legal and Management Perspectives*, Palgrave Macmillan, 2011; D. Stoitchkova, *Towards Corporate Liability in International Criminal Law*, Intersentia, 2010; T. van de Loo, *Corporate Social Responsibility in the Supply Chain: A Study on the Potential of Social Codes of Conduct for Development*, Lambert Academic Publishing, 2010; J. Dine, *Companies, International Trade and Human Rights* (Cambridge Studies in Corporate Law), Cambridge University Press, 2010; J.G. Frynas, S. Pegg, *Transnational Corporations and Human Rights*, Palgrave Macmillan, 2003; C. Harding, U. Kohl, N. Salmon, *Human Rights in the Market Place (Markets and the Law)*, Ashgate 2008; M. Emberland, *The Human Rights of Companies*, Oxford University Press, 2006; A. Bernard (ed.), *Corporate Accountability for Human Rights Abuses, A Guide for Victims and NGOs on Recourse Mechanisms*, International Federation for Human Rights, 2010; M. Bernatt, *Spoleczna odpowiedzialność biznesu. Wymiar konstytucyjny i międzynarodowy*, Wydawnictwo Naukowe Wydziału Zarządzania UW, 2009; M. Bernatt, J. Bogdanienko, T. Skoczny T. (eds.), *Spoleczna odpowiedzialność biznesu. Krytyczna analiza*, Wydawnictwo Naukowe Wydziału Zarządzania UW, 2011; N.C. Smith, G. Lenssen (eds.) *Odpowiedzialność biznesu. Teoria i praktyka*, Studio Emka, 2011; A. Lewicka-Strzałecka, *Odpowiedzialność moralna w życiu gospodarczym*, Wydawnictwo Instytutu Filozofii i Socjologii Polskiej Akademii Nauk, 2006.

by analysing international sources of companies human rights obligations. Afterwards the paper answers the question whether an effective system of liability of companies for human rights violations have been built. The negative answer to this question serves as an argument for claiming that companies should have an objective due diligence policy so as to avoid adverse human rights impacts being caused by its activity.

## 2. The concept of human rights

Human rights play an important role in modern societies and are reflected in the legal framework of both national and international character. Universality of human rights is confirmed by numerous internationally recognised legal acts. The most important role is played by UN Universal Declaration of Human Rights and the main instruments through which it has been made binding on states - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. When it comes to labour standards their core is described in the International Labour Organisation Conventions. On the regional level human rights are regulated i.a. by the *European Convention on Human Rights* (the Convention for the Protection of Human Rights and Fundamental Freedoms), American Convention on Human Rights and African Charter on Human and Peoples' Rights. What is however crucial for the analysis in this paper is that human rights obligations established in the above mentioned binding, hard law acts impose obligations on states and not on private entities. The traditional and still prevailing understanding of human rights is vertical and not horizontal. What is more it is the positive obligation of state to build such domestic legal system that will resolve effectively the disputes between private actors (e.g. company and physical person) on the national level. This requires i.a. that individuals are provided with effective judicial remedies against the abuses and damages caused by corporate actions.

Despite the regulation of human rights in the legal acts the very idea of human rights has to do more with morals, ethics rather than with law. Their tradition, historical source is moral, not legal. It is underlined that human rights primarily reflect people's aspiration and only afterwards became legal norms<sup>2</sup>. Legal theoreticians argue also that human rights proclaim widely accepted standards for freedom, for limitations on state power, and for services that can be expected from a society as represented by the state in accordance with an underlying set of moral values<sup>3</sup>. Human rights are universal moral rights of fundamental character<sup>4</sup>. They belong to every person in his or her relations with the state and with any other authority in a position to use coercive power against the individual<sup>5</sup>.

## 3. Application of human rights values in business

From the traditional point of view human rights as a concept refer to the relation between the state and individuals (vertically) and are not applicable in the sphere of private relations (horizontally). It remains also rather indisputable that binding, positive obligations to protect human rights should be associated with states and not with companies. It is claimed that in case of developed countries it is the state positive obligation to build such legal system that protects individuals against corporate human rights' abuses<sup>6</sup>.

Against this background the moral or ethical origin of human rights may be seen as basis for arguing that human rights should be perceived as the source of universally recognised values and not merely as positive legal norms. Such approach confirms that human-rights-based values may be seen applicable not only in the vertical relation between state and individual but also horizontally in the realm of business

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<sup>2</sup> W. Osiatyński, *Prawa człowieka i ich granice*, Znak, 2011, p. 23. For English original of this book see W. Osiatyński, *Human Rights and Their Limits*, Cambridge University Press, 2009

<sup>3</sup> Ibid.

<sup>4</sup> J. Feinberg, *Social Philosophy*, Englewood Cliffs: Prentice-Hall Inc., 1973, p. 85.

<sup>5</sup> W. Osiatyński, *Prawa człowieka...*, p. 23.

<sup>6</sup> From practical reasons it is difficult to expect that such institutions will be built in the developing countries. To the contrary some of these countries may want to attract foreign investments by not building legal institutions that could be perceived by companies as the limitation for their investments, see S. Shamir, *Between self-regulation and the Alien Tort Claims Act: on the contested concept of Corporate Social Responsibility*, "Law and Society Review" 2004, 38(635), p. 637.

activity<sup>7</sup>. Companies even when they conduct business activity in the countries where effective legal instruments protecting against abuses of companies towards individuals are non-existent should respect human rights as their internal, ethical values. The support for such approach may be found in the preamble to the UN Universal Declaration of Human Rights. It is underlined there that every individual and every organ of society shall promote respect for the rights and freedoms listed in the Declaration. Company - as the business organism built by individuals - is the organ of society in the broad meaning of this term. At the same time companies (especially transnational corporations investing in the developing countries) are able to use coercive power against the individual. Thus they should be deemed obliged by the human rights standards deriving from UN Universal Declaration of Human Rights.

#### 4. The sources of human rights standards for business

It has been pointed above that human rights standards have not been yet formulated on the international level as the ones that are binding for companies<sup>8</sup>. However, many steps have been undertaken during last fifteen years on the international fora to describe human rights obligation in form of soft law documents (e.g. guidelines). These acts even if lacking binding force may be seen as main source of ethical standards the companies should respect in their activity.

The biggest role in establishing human rights standards has been played by the United Nations (UN)<sup>9</sup>, the Organisation for Economic Co-operation and Development (OECD)<sup>10</sup> and in the field of employees' rights by International Labour Organization (ILO)<sup>11</sup>. On the regional level European Union has included human rights into its Corporate Social Responsibility policy<sup>12</sup>.

Recently a uniform approach to the issue of human rights and business has been taken - both OECD and European Union accepted in their renewed strategies the final proposals of J. Ruggie UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises contained in the UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" issued in March 2011

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<sup>7</sup> J.L. Cernic notes that in a number of jurisdictions a direct horizontal application of human rights obligations have been already provided for. He bases this observation on section 8(2) of Bill of Rights of the South African Constitution. This provision stipulates that 'a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right', see J.L. Cernic, *Human Rights Law and Business: Corporate Responsibility...*, p. 49-50; see also M.K. Addo, *The changing face of parent and subsidiary Corporation: Entity vs. Enterprise Liability*, Connecticut Law Review" 2005, 37(667), p. 670. As to the horizontal applicability of human rights in German constitutional law see the judgement of German Constitutional Court in case Lüth (BverfGE7, 198). It has been claimed that German constitutional provisions "shine" onto private relations, see J. Limbach, „Promieniowanie" konstytucji na prawo prywatne, *Kwartalnik Prawa Prywatnego*, 1999, 3, p. 406. As to the horizontal application of rights and freedoms provided in Polish constitution see K. Woźtyczek, *Horizontalny wymiar praw człowieka zagwarantowany w Konstytucji RP*, *Kwartalnik Prawa Prywatnego*, 1999, 2, p. 229-236. More on horizontal application of constitutional provisions in: A. Sajo, R. Uitz, *The Constitution in Private Relations: Expanding Constitutionalism*, Eleven International Publishing, Utrecht 2005.

<sup>8</sup> In some jurisdictions corporate human rights obligation may derive from national law, see J.L. Cernic, *Human Rights Law and Business: Corporate Responsibility...*, p. 33-39.

<sup>9</sup> See more below in this section.

<sup>10</sup> See the OECD Guidelines for Multinational Enterprises, [www.oecd.org/daf/investment/guidelines](http://www.oecd.org/daf/investment/guidelines)

<sup>11</sup> See ILO Tripartite Declaration of Principles Concerning Multinational Enterprises (ILO Declaration). The aim of ILO Declaration is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise. The principles provided in the Declaration are addressed to governments, labour organizations, and multinational enterprises themselves and recommend actions and social policies that further social progress and guarantee workers rights. The ILO Declaration sets out principles in the fields of employment, training, conditions of work and life and industrial relations that governments, labour organizations, and multinational enterprises are advised to observe on a voluntary basis. The provisions of the Declaration should be viewed in conjunction with hard law ILO Conventions, such as Convention (No. 29) concerning Forced or Compulsory Labour, 1930, Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, 1948, Convention (No. 98) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949, Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, 1958, Convention (No. 122) concerning Employment Policy, 1964.

<sup>12</sup> When defining the concept of Corporate Social Responsibility (as "the responsibility of enterprises for their impacts on society") the European Commission notes that companies, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, see para. 3.1. of a renewed EU strategy 2011-14 for Corporate Social Responsibility of 25.10.2011, COM(2011) 681 final, a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

(hereafter: UN Guiding Principles)<sup>13</sup>. European Commission states directly that better implementation of the UN Guiding Principles will contribute to EU objectives regarding specific human rights issues and core labour standards, including child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining<sup>14</sup>. The OECD Guidelines for Multinational Enterprises (hereafter OECD Guidelines)<sup>15</sup> state that enterprises should respect the internationally recognised human rights of those affected by their activities and refer directly to UN Guiding Principles<sup>16</sup>.

Also in frame of the UN the catalogue of basic human rights that should be respected by companies have been proposed. Already in 1999 a Global Compact was established<sup>17</sup>. It is an initiative to encourage businesses worldwide to adopt voluntarily sustainable and socially responsible policies, and to report on them<sup>18</sup>. It is focused on norm diffusion and the dissemination of practical know-how among companies worldwide<sup>19</sup>. From the normative perspective UN Global Compact means the adoption of 10 principles in the business activity. In a matter of human rights businesses should support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses. When it comes to labour standards businesses are expected to uphold the freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced and compulsory labour, the effective abolition of child labour and the elimination of discrimination in employment and occupation.

The UN failed however to establish a detailed business-applicable and business-binding human rights catalogue. It has been proposed by the working group on business and human rights of UN Sub-Commission on the Promotion and Protection of Human Rights (a subsidiary body of the Commission on Human Rights). In 2003 the working group prepared the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (hereafter the UN Norms)<sup>20</sup>. The draft was presented to the Commission on Human Rights which finally did not approve it in the proposed form. It happened because the UN Norms were widely criticised both by states and business representatives because of imposing direct, non-voluntary obligations on corporation under international law its legally binding character and not commonly recognised Human Rights obligation in business field they consisted of<sup>21</sup>.

The current approach under which human rights obligations imposed on corporations are not legally binding has been developed since 2005 by the UN Special Representative of the Secretary General on human rights

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<sup>13</sup> The 2011 UN Guiding Principles cover three pillars: the state duty to respect human rights; the corporate responsibility to respect human rights; and the need for access to effective remedy. See more below.

<sup>14</sup> See point 4.8.2. of a renewed EU strategy 2011-14 for Corporate Social Responsibility of 25.10.2011.

<sup>15</sup> The OECD Guidelines are addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, corruption, consumer interests, science and technology, competition, and taxation. The Guidelines are voluntary and not enforceable before the courts. This, however, does not imply that the OECD Guidelines do not oblige governments to encourage their observance by multinational enterprises, see Deva S., Sustainable good governance and corporations: an analysis of asymmetries, Georgetown International Environmental Law Review, Summer, 2006, p. 735.

<sup>16</sup> See point IV of OECD Guidelines.

<sup>17</sup> <http://www.unglobalcompact.org>

<sup>18</sup> Nowadays the Global Compact has become the world's largest Corporate Social Responsibility initiative, consisting of around three thousand participating companies and forty national networks. At the same time this initiative faces critics for not being strict enough to companies breaching Global Compact Principles.

<sup>19</sup> <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

<sup>20</sup> <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

<sup>21</sup> See more J.G. Ruggie, Current developments. Business and human rights: the evolving international agenda, the American Journal of International Law, 2007 101(819), pp. 820-827, D. Kinley, R. Chambers, The UN Human Rights Norms for Corporations: The Private Implications of Public International Law, Human Rights Law Review 6:3 (2006), pp. 447-497, Rebecca M. Wallace, Olga Martin-Ortega, The UN Norms: A First Step to Universal Regulation of Transnational Corporations' Responsibilities for Human Rights? 26 DUBLIN U. L.J. 304 (2004). The UN Norms had a lot of supporters among NGOs and human rights theorists, see T.M. Schmidt, Transnational corporate responsibility for international environmental and human rights violations: will the United Nations' "Norms" provide the required means?, California Western International Law Journal, Fall 2005, pp. 236 -246, A. Wallis, Data Mining: Lessons from the Kimberley Process for the United Nations' development of human rights norms for transnational corporations, Northwestern University Journal of International Human Rights, December, 2005, pp. 68-80.

and transnational corporations and other business enterprises, John Ruggie<sup>22</sup>. His task under the mandate was especially to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights”<sup>23</sup> - to define main human rights principles that can be applied to business activity.

In June 2008 J. Ruggie submitted to the Human Rights Council a Report “Protect, Respect and Remedy: a Framework for Business and Human Rights” (hereafter the UN Report)<sup>24</sup>. The UN Report recognizes the need for a framework of rules, practices, and institutions that address the intersection of business and human rights. It states that markets pose the greatest risks - to society and business itself - when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly. The UN Report distinguish between business activity and the capabilities to govern those activities also from human rights perspective. The UN Report states that: “the root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”<sup>25</sup>. These governance gaps are responsible for the existence of the environment in which companies abuse human rights without neither civil nor penal law consequences. The UN Report concludes that “there are few if any internationally recognized rights business cannot impact”<sup>26</sup>. Thus the UN Report is not trying to list completely the rights. Instead it is mapping the main governance gaps where human rights abuses are most probable to occur and responsibilities of the companies towards human rights as a whole<sup>27</sup>.

### **5. A place of companies responsibility in the human rights protection system**

The approach to companies human rights responsibility that has been proposed by J. Ruggie in his UN Report and the UN Guiding Principles has been accepted by OECD and EU. In this common approach companies human rights responsibility is subsidiary to the one of states. It is also characteristic that when talking about states obligations UN Guiding Principles and OECD Guidelines use the word “must” or “have a duty”<sup>28</sup>. Differently companies obligations are described with the word “should”<sup>29</sup>. The UN Report and the UN Guiding Principles are constructed around three core principles: 1) the State duty to protect against human rights abuses by third parties, including business; 2) the corporate responsibility to respect human rights; 3) and the need for more effective access to remedies.

The first and third principle concentrates on traditional approach in the international human rights protection - the principal role of state in guaranteeing the high standards of human rights protection. States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction. This duty requires that States “take all necessary steps to protect against such abuse, including to prevent, investigate, and punish the abuse, and to provide access to redress”<sup>30</sup>. Under the third principle as part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy<sup>31</sup>.

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<sup>22</sup> J. Ruggie was appointed by the Commission on Human Rights, see Commission on Human Rights Resolution 2005/69, UN Doc. E/CN.4/2005/L.87, (Apr. 15, 2005), [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-69.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc)

<sup>23</sup> The other tasks were as follows: to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation; to research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”; to develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; to compile a compendium of best practices of States and transnational corporations and other business enterprises.

<sup>24</sup> <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

<sup>25</sup> Introduction, para. 3.

<sup>26</sup> See para. 52 of the UN Report.

<sup>27</sup> See also the analysis of 320 cases posted on the Business and Human Rights Resource Center web page from February 2005 to December 2007 included in Addendum 2 to the UN Report: *A Survey of the Scope and Pattern of Alleged Corporate-Related Human Rights Abuse*, A/HRC/8/5/Add.2 (May 23, 2008), <http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf>.

<sup>28</sup> See para. 1 and 25 of the UN Guiding Principles and point IV of OECD Guidelines.

<sup>29</sup> See para. 11 of the UN Guiding Principles and point IV of OECD Guidelines.

<sup>30</sup> The UN Report, para. 18.

<sup>31</sup> According to the UN Report such mechanisms must be at a minimum: (a) Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process; (b) Accessible: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal; (c) Predictable: a mechanism must provide a clear and known procedure with a time frame for

The second principle refers specifically to companies responsibilities when it comes to human rights. It is stated directly in the UN Guiding principles that business enterprises should respect human rights<sup>32</sup>. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved<sup>33</sup>.

## 6. Enforceability of business obligations in regards to human rights

The above analysis showed that companies responsibility in the field of human rights is secondary to states one. It is the obligation of states to build a system under which companies could be held accountable for breach of their human rights obligations. However, for the time being the national systems of human rights rules addressed to companies seem to be ineffective. Two main reasons for that may be given.

The first is that human rights obligations are described on the level of international law in general terms and as explained above only in the form of soft law regulations. Without translating these general principles into detailed, binding, statutory national norms it can be very difficult for victims of corporate human rights abuses to prove that given company breached its human rights obligations<sup>34</sup>.

Additionally ineffectiveness of current system has its grounds in the institutional and procedural shape of enforcement of corporate human rights obligations. On the international level there is no compulsory judicial system in frame of which companies could be held liable for human rights violations.

The unique internationally coordinated system is the one of OECD<sup>35</sup>. On the national level - where the implementation of OECD Guidelines should take place - the main role is played by the National Contact Points. The NCP is a government office that is responsible for the promotion and observance to OECD Guidelines. The NCP gathers information on national experiences with the Guidelines, handles enquiries, discusses matters related to the Guidelines and assists in solving problems that may arise in this connection, they are responsible for handling grievances and providing remedies. The participation of companies concerned in the proceedings before NCPs is not obligatory. OECD agrees that the effectiveness of the NCP is a crucial factor in determining how influential the Guidelines are in each national context<sup>36</sup>. It recognizes also that governments should be accorded flexibility in the way they organise NCPs but in a way to make all NCPs function in a visible, accessible, transparent, and accountable manner<sup>37</sup>. The discussion of how OECD Guidelines should be constructed and implemented is still open. In the UN Report "Protect, Respect and Remedy: a Framework for Business and Human Rights" it is stated that the NCPs are potentially an important vehicle for providing remedy. The UN Report concludes that in practice, however, NCPs have often failed to meet their potential<sup>38</sup>. According to the UN Report, this happens because the housing of some NCPs primarily or wholly within government

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each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome; (d) Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms; (e) Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards; (f) Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

<sup>32</sup> See para. 11 of UN Guiding Principles

<sup>33</sup> Ibidem.

<sup>34</sup> It is characteristic that in case suits filed before US courts the provisions of US law - *Alien Tort Claims Act* (28 U.S.C. § 1350), are invoked as the basis of the suit (and not international law). *Alien Tort Claims Act* grants rights to aliens to seek civil remedies in US courts for certain violations of their human rights, inside and outside of US, see J.L. Cernic, *Human Rights Law and Business: Corporate Responsibility...*, p. 37. See also S. Shamir, *Between self-regulation and the Alien Tort Claims Act...*

<sup>35</sup> It consists of three elements: the National Contact Points (NCP), which must be provided by every state adhering to the OECD Guidelines, the OECD's Committee on International Investment and Multinational Enterprises (CIME), and the advisory Committees of business and labour federations, BIAC and TUAC. The CIME's responsibilities include: providing clarifications on the interpretation of the Guidelines, reviewing and exchanging views on them and responding to requests from Members, BIAC or TUAC on aspects of the Guidelines.

<sup>36</sup> See: [http://www.oecd.org/document/3/0,3343,en\\_2649\\_34889\\_1933116\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/3/0,3343,en_2649_34889_1933116_1_1_1_1,00.html)

<sup>37</sup> Ibid.

<sup>38</sup> The UN Report, para. 98.

departments tasked with promoting business, trade and investment raises questions about conflicts of interest<sup>39</sup>. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are also typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported<sup>40</sup>. Such a situation seems to violate to some extent UN standards of legitimacy, accessibility, predictability, its equitable character, rights-compatibility and transparency<sup>41</sup>.

Alternatively to National Contact Points the disputes can take place before national courts. However, the courts in the developing countries may not be prepared to hear the cases involving big corporations. When it comes to courts from the developed countries from which most of big corporations originate the courts will not be ready to hear the cases involving the events that took place in different countries – out of these courts jurisdictions. Even if this formal obstacle will be overcome by the claimants (what seems more probable in the common law countries) they will still have to prove the direct liability of the given corporation. This may prove difficult as usually acts violating human rights are committed by western corporations subsidiaries or contractors and not directly by these corporations.

## 7. Self-policing human rights observance

The conducted analysis shows that from the legal point of view obligations of companies when it comes to human rights remain very difficult to be effectively enforced. Especially there are many examples that prove that it is very difficult to make companies accountable even for the most flagrant human rights abuses that took place in the developing countries<sup>42</sup>.

The practical problems with the enforcement of human rights regulations against companies does not contradict the assumption that human rights are the source of moral standards in business. In this respect the opinion that it is the inherent nature of multinational companies to realise their investments in the developing countries where the legal framework protecting against corporate human rights abuses is weak seems to be exaggerated<sup>43</sup>. Also general observation denying any positive influence of companies voluntary programs is too far-reaching<sup>44</sup>. At the same time the observation that norms adopted voluntarily by companies remain very often only on paper is a truth one.

This the reason why there is need that companies truly internalize human rights as their ethical values. Human rights must be taken into consideration when conducting business activity and planning profit maximization policy (human rights concerns should be seen by companies as a limit in pursuing this policy). In this respect international documents discussed above are sufficient for identifying business-related human rights and determining the limits of corporate human rights responsibility.

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<sup>39</sup> Ibidem. It can be said that such a situation exists in Poland where NCP is situated in frame of the state agency responsible for the promotion of Polish enterprises.

<sup>40</sup> Ibid.

<sup>41</sup> Thus the UN Report refers also to the possible way of reforming the NCPs. As an example, Dutch NCP is given where a four-person multi-stakeholder group handles grievances independent of, though supported administratively by, the Government, was established. The UN Report concludes that OECD and adhering States should consider these and other options for addressing current deficits - preserve the important role of governments in raising awareness of the Guidelines but also provide incentives for corporate compliance and learning. See para. 99 of the UN Report.

<sup>42</sup> However the number of cases against corporations is growing, for a complete list of such cases see <http://www.business-humanrights.org/LegalPortal/Home/Completestlistofcases>. Many cases even if pursued effectively before the courts (mainly American ones) are settled. For example this took place in case of Unocal Corporation concerning a use of forced labor to construct a natural gas pipeline in Burma, see <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitBurma>

<sup>43</sup> T. Collingsworth, a lawyer involved in many cases against corporations (on the plaintiffs side) is of the opinion that companies voluntary systems are launched with an inherent conflict of interest – the need for human rights compliance stems from the process whereby global companies seek out countries where they know that weak national legal systems will allow them to ignore laws protecting people and the environment so that they are free to act without regulation; see T. Collingsworth, Bringing the rule of law to the global economy – Using the Alien Tort Statute to hold multinational companies accountable for human rights violations, available at: <http://www.reports-and-materials.org/Terry-Collingsworth-commentary.pdf>

<sup>44</sup> T. Collingsworth underlines that there is little evidence that any effort to allow self-policing of codes of conduct, with no prospect of real enforcement or any remedy for violations, results in measurable human rights progress, see T. Collingsworth, Bringing the rule of law to the global economy – Using the Alien Tort Statute...

Modern corporations have usually a very complicated structure and consist of many different departments and national branches. Thus the sole declaratory decision (e.g. in a form of acceptance of code of conduct) that a given company perceives human rights as their their internal ethical values never suffices<sup>45</sup>. This is why crucially important is due diligence - "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it"<sup>46</sup>. Such a due-diligence system should track in an objective manner possible human rights violations by given company. It may make part of broader enterprise risk-management systems provided that it includes risks to rights-holders<sup>47</sup>. It is underlined that such due-diligence system should not be limited to the company itself. Especially the subcontractors of companies from the developing countries should be scrutinized by company in order to avoid risk of adverse human rights impacts<sup>48</sup>. Otherwise even the questions about complicity may arise<sup>49</sup> when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties<sup>50</sup>.

## Conclusions

Despite the recognition of human rights as a source of internationally accepted values there remains an unresolved problem with the construction of effective legal system under which human rights obligations could be enforced. In the disputes taking place before domestic courts only the national law may be used as the international legal system regulates human rights obligations of the companies only in the form of soft law recommendations and not in the form of hard law binding rules. Despite that human rights remain a very important source of companies moral standards. This corresponds with the tradition upon which human rights were built: human rights has derived from values commonly accepted by humans and were only later on transformed into legal norms. This supports the thesis that human rights - being accepted all over the world (and especially in case of developed countries from where many corporations originate) are the source for global ethical standards in business.

The progress in the the level of observance of human rights by companies may be achieved if two parallel processes take place. Firstly there is a need for a better self-control of the companies as to the possible adverse human rights impact the activity of given company or its subcontractors may have. This self-control should be especially intense if the company conducts its activity in the country where the risk of adverse human rights impacts is significant. Secondly the bigger role in monitoring human rights abuses must be played by international organisations such as OECD, ILO or European Union. Under current legal framework the enforcement of companies human rights obligations deriving from national law is in many countries inefficient. In the light of this problem non-judicial bodies acting under the supervision of international organisation may prove effective in solving some of the human rights concerns that may have been caused by companies. This means however that in the case of proceedings before such institutions proper guarantees of independence and impartiality have to be introduced.

To conclude, the recognition of human rights by companies as the source of values of their self-imposed obligations is a prerequisite for better protection of human rights all over the world. We should hope that progress in this respect may be achieved even without existence of the international legal system regulating in a binding way corporate human rights obligations.

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<sup>45</sup> Code of conducts of many multinational enterprises contain a reference to human rights. This also the case of corporations that have been accused for their negative human rights impact - Shell, Wal-Mart or Chevron. According to J. L. Cernic 176 corporations refer to UN Universal Declaration of Human Rights, see J.L. Cernic, *Human Rights Law and Business: Corporate Responsibility...*, p. 45.

<sup>46</sup> The UN Report, para. 25.

<sup>47</sup> See the UN Guiding Principles, commentary to para. 17.

<sup>48</sup> However, it is underlined in the 2011 UN Guiding Principles that where business enterprises have large numbers of entities in their value chains it may be enough to identify general areas where the risk of adverse human rights impacts is most significant and prioritize these for human rights due diligence, see UN Guiding Principles, commentary to para. 17.

<sup>49</sup> See more International Commission of Jurists, *Corporate Complicity & Legal Accountability*. Report of Expert Legal Panel on Corporate Complicity in International Crimes, vol. 2 (Criminal Law and International Crimes), p. 3; see also M. Kremnitzer, A possible case for imposing criminal liability on corporations in international criminal law, *Journal of International Criminal Justice* 8(2010), pp. 909-918.

<sup>50</sup> The 2011 UN Guiding Principles, commentary to para. 17.

