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The UN Guiding Principles on Business and Human Rights and their Implementation in Germany and the Czech Republic

Abstract: In this paper the authors focus on the United Nations Guiding Principles on Business and Human Rights of 2011 which present the most ambitious international attempt to tackle the problem of business and human rights. The authors deal with the genesis and the added value of the UN Guiding Principles and analyze which legal tools may be used by victims against business entities that have violated their human rights. A special view is given on law and legal practice in Germany and in the Czech Republic. Although the UN Guiding Principles, so far, have had only little influence on national rules concerning jurisdiction, procedural and material law in liability cases we find that their potential shall not be underestimated. We expect that the implementation of the UN Guiding Principles will lead to a reform of national procedural regulations. States will have to consider ways how to introduce new procedural instruments like e.g. representative action and class action and how to address issues concerning evidence in international cases.

Keywords: UN Guiding Principles, business, human rights, jurisdiction, legal remedies, Czech Republic, Germany, European Union

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1. Introduction

In the context of globalization, there is little dispute that business activities may have a negative impact on human rights. With regard to human rights violations caused by transnational corporations, world media have been informing e.g. about inhuman working conditions, disrespect for indigenous rights and the destruction of the natural environment. In situations when TNCs based in rich countries transfer their activities to poor countries, the risk of human rights violations may be enormous. One of the reasons for this is that the economic power of some private business entities exceeds the economic power of many states.

In the past two decades the UN has intensively dealt with the responsibility of private corporations for human rights violations. The UN Guiding Principles on Business and Human Rights of 2011 are the most ambitious international attempt to tackle the problem of business and human rights. In this study we will present the genesis and the added value of the UNGPs. Thereafter we will describe which legal tools may be used by victims against business entities violating their rights. In the last part, we will focus on the problem of legal redress in Germany and in the Czech Republic. In this context we will see how the UNGPs as a document of international soft law may influence national regulations on jurisdiction, procedural and material law in international liability cases.

2. The UN Guiding Principles on Business and Human Rights

2.1. International law and foreign business activities

International law, as a coordinative legal system, is established by sovereign states. Rights and obligations under international law are, in principle, addressed to states. Therefore, international investment law that governs issues of capital transactions is mainly based upon international treaties binding to states parties. Also human rights law which stipulates e.g. property rights and fair trial standards in favour of private individuals including business entities is conceived in terms of state obligations.

According to the principles of state responsibility, it is the host state of the business corporations which actually under international law bears the responsibility for the prevention of acts that violate human rights. However, governments in developing countries, too often, are not willing to enact appropriate enforcement and control measures. In cases of human rights violations, they are afraid of serious disadvantages in international location competition. In some cases they are simply unable to react properly as those responsible within the complex structures of transnational business entities can hardly be determined. From this perspective, the traditional mechanisms of state responsibility do not help.

Therefore, the assumption that private business corporations are not legal subjects under international law meets with skepticism. It is feared that international

law might become ineffective if transnational corporations as relevant actors were not included in the system. Relevant UN bodies started to deal with corporate responsibility in terms of international soft law. In August 2003, the then UN Sub-Commission on Promotion and Protection of Human Rights, as a sub-organ of the UN Commission on Human Rights, recommended the adoption of “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.² The Draft Norms were based on international treaties, on guidelines of international organizations on voluntary corporate codes of conduct and on model guidelines of NGOs and trade unions. So, in part, the “Draft Norms” were simply reformulating what already existed. However it partly also intended to transform the concept of voluntary commitments to more concrete obligations of business entities.

In the light of significant disagreement by business corporations criticizing the alleged privatization of human rights protection, the UN Human Rights Commission finally decided not to adopt the document.³ As a consequence thereof, UN Secretary-General Kofi Annan in July 2005 appointed John G. Ruggie as Special Representative on Human Rights and Business.

The UN Guiding Principles on Business and Human Rights which are the final product of John Ruggie’s work⁴ were endorsed by consensus in the UN Human Rights Council in June 2011.⁵ They represent the universally accepted authoritative framework and the global standard of practice for preventing and addressing the risk of the adverse impact of business activities on human rights. Although they do not constitute a legally binding document and rather fall under international soft law, they build on existing standards and include elements covered in international and domestic law. They also do not preclude developments leading to the adoption of a legally binding instrument in the future.

2.2. The Structure of the UN Guiding Principles

The Guiding Principles establish a framework of three pillars: firstly the state’s duty to protect human rights, secondly corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing the rights of others, and thirdly access to remedies for victims of business-related abuse. The document clarifies and details duties of states and responsibilities of business entities which are distinct but complementary. 14 of the 31 Guiding Principles are addressed to business entities. As the Guiding Principles have been conceived to be as inclusive as possible,

2 E/CN.4/Sub.2/2003/12 (2003).

3 M. Kube, Chancen globaler Gerechtigkeit? Möglichkeiten der Bindung transnationaler Unternehmen an die Menschenrechte, “Forum Recht” 2006, vol. 4, pp. 114-117.

4 The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council A/HRC/17/31.

5 Human Rights Council resolution 17/4 of 16 June 2011.

they shall apply to all states and to all companies of all sizes, in every sector, and in any country.

Especially through the principles of the second pillar, the UNGPs provide a foundation for expanding the international human rights regime to encompass not only countries and individuals, but also companies.⁶ After the mandate of Special Representative John Ruggie had expired in 2011, a UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Entities⁷ was established to promote the “effective and comprehensive dissemination and implementation” of the UN Guiding Principles.⁸ Its mandate includes also exploring options and making recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas.⁹

2.3. State Duties and Corporate Responsibility to Protect Human Rights

International human rights law obligations require that states respect, protect, and fulfill the human rights of individuals within their territory and/or jurisdiction.¹⁰ These obligations frame the first pillar of the UN Guiding Principles. The duty to protect is a standard of conduct, not result. This means that states are not per se responsible when a business enterprise commits a human rights abuse but they may breach their international human rights law obligations if they fail to take appropriate steps to prevent such abuse and to investigate, punish, and redress when it occurs.¹¹

The second pillar identifies the responsibility of business entities to respect human rights and it specifies a due diligence process which companies should give effect to.¹² According to Ruggie, the second pillar required the most significant conceptual departure from the standard human rights discourse and has become the centrepiece of the Guiding Principles.¹³ The responsibility to respect human rights

6 J.G. Ruggie, *Just Business, Multinational Corporations and Human Rights*, W.W. Norton and Company LTD, London 2013, p. 124.

7 More information available at: <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> (accessed 24.04.2019).

8 D. Augestein, M. Dawson, P. Thielborger, *The UNGPs in the European Union: The Open Coordination of Business and Human Rights*, “Business and Human Rights Journal” 2018, vol. 3, pp. 1-22.

9 Resolution of the Human Rights Council 17/4 of 16 June 2011.

10 Commentary to the Guiding Principle 1 – The state’s duty to protect human rights; UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

11 J.G. Ruggie, *Just Business...*, *op. cit.*, p. 84.

12 UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, Geneva 2015, p. 1.

13 J.G. Ruggie, *Just Business...*, *op. cit.*, p. 90.

represents a global standard of expected conduct for all business enterprises wherever they operate¹⁴ and refers to internationally recognized human rights. At a minimum, it refers to those rights that have been expressed in the International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.¹⁵ In principle, business activities can have an impact, directly or indirectly, on the entire spectrum of human rights. However, in practice, some human rights may be at greater risk than others.¹⁶

The word "responsibility" was intended to signal that it differs from legal duties as it exists over and above legal compliance.¹⁷ To identify, prevent, mitigate, and account for human rights abuses, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and communicating how impacts are addressed.¹⁸ The due diligence process shall go beyond identifying and managing material risks to the company itself and should include risks the business activities may pose to the rights of affected individuals.¹⁹

3. The UNGPs and the Concept of Due Diligence

The concept of human rights due diligence is introduced in both the first and second pillar of the UNGPs. Human rights due diligence, however, should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions or those required for compliance monitoring purposes in areas such as banking or anti-corruption. These activities

14 Commentary to the Guiding Principle 11 – The corporate responsibility to respect human rights; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

15 Guiding Principle No 12; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

16 Commentary to the Guiding Principle No 12; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

17 Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, United Nations 2012, p. 13.

18 Guiding Principle No 17 – Human Rights Due Diligence; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

19 J.G. Ruggie, *Just Business...*, *op. cit.*, p. 99.

are generally concerned with identifying, preventing and mitigating risks to business, whereas human rights due diligence is concerned with risks to people.²⁰

The Commentary to the Guiding Principles notes that “conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.”²¹ Understanding the linkages between human rights due diligence and legal liability can offer insights into different ways to strengthen domestic legal regimes from a business and human rights perspective.²² Clarification of the relationship between human rights due diligence and determination of corporate liability has been provided by the Office of the United Nations High Commissioner for Human Rights in its recent report presented to the Human Rights Council in June 2018.

The exercise of human rights due diligence by a business enterprise may become relevant to questions of corporate legal liability in several ways. It can be firstly made an explicit legal requirement under national law; secondly part of evidence presented to prove that a company was not negligent; thirdly invoked as a statutory defence to an offense, and fourthly relevant when determining the appropriate sanction or remedy if legal liability was established.²³

Domestic regulatory regime can require human rights due diligence as a standard of conduct. States can adopt laws that require companies to carry out human rights due diligence activities or else face legal liability. French duty of vigilance law²⁴ requires French companies with at least 5,000 employees in France, or 10,000 employees throughout the corporate group to publish an effective vigilance plan detailing measures for risk identification and for the prevention of severe violations of human rights resulting directly or indirectly from their operations, as well as the operations from companies they control, and certain subcontractors and suppliers. In the Netherlands, a new act establishing due diligence standards with respect to

20 OHCHR, Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability, Report of the UN High Commissioner for Human Rights, A/HRC/38/20/Add.2, p. 4.

21 Commentary to the Guiding Principle 17, UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

22 OHCHR, Improving accountability..., *op. cit.*, p. 4.

23 OHCHR, Consultation: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, Concept Note, October 2017, p. 3.

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

the problem of child labour has been adopted. It requires companies to develop and apply strategies in their supply chains and sanctions non-compliance.²⁵

In Switzerland, a Responsible Business Initiative and related parliamentary initiative requiring companies to exercise due diligence in their own operations as well as companies they control were proposed. In June 2018, a counter-proposal representing a compromise between the initiators of the Responsible Business Initiative, the parliament and business representatives was adopted by the National Council. The proposal still has to be approved by the Council of State. It covers companies exceeding set thresholds, companies with particular high-risk activities regardless of their size; however, the proposal excludes large companies with particular low risks.²⁶

At the EU level, the Non-Financial Reporting Directive 2014/95 establishes a basis for due diligence to be required in respect of human rights and corruption.²⁷ The Directive requires companies to “*prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. (...) The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.*” Besides the Non-financial Reporting Directive, it is worth noting also the EU Regulation on conflict minerals adopted in 2017 which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.²⁸

The corporate due diligence in respecting human rights has been incorporated also into the German national action plan on Business and Human Rights. The Federal Government articulated its expectation that all enterprises introduce the corporate due diligence in a manner commensurate with their size, the sector in which they operate, and their position in the supply and value chain. Compliance will be reviewed annually from 2018. In the absence of adequate compliance, the Government will consider further action, which may culminate in legislative measures and in the widening of the circle of enterprises to be reviewed. The goal is

25 D. Blackburn, Removing barriers: How a treaty on business and human rights could improve access to remedy for victims, International Centre for Trade Union Rights 2017 (available at <https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf>, accessed 24.04.2019), p. 52.

26 For further information see the webpages of the citizens' initiative: <https://corporatejustice.ch/press-release/compromise-remains-open> (accessed 24.04.2019).

27 Directive 2014/95/EU, Article 1.

28 Regulation EU/2017/821 on conflict minerals.

that at least 50% of all enterprises based in Germany with more than 500 employees will have incorporated due diligence standards by 2020.²⁹

The Czech national action plan on business and human rights formulates due diligence requirement in a soft way. It recommends that businesses consider introducing an internal due diligence mechanism to spot and eliminate human rights risk, or incorporate human rights risks into their existing due diligence mechanisms.³⁰ As for the EU requirements, the Czech Republic has transposed the Non-financial Reporting Directive into Act No 563/1991 on accounting. Non-financial information will be disclosed by large public-interest entities with more than 500 employees. Information on respect for human rights will be a mandatory part of the report.

The concept of negligence is a basis for corporate liability in many jurisdictions. Human rights due diligence can be relevant when determining whether a company negligently caused or contributed to harm. Tests of negligence frequently include the following elements: a) the existence of a legal duty of care towards an affected person; b) a breach of the applicable standard of care by the defendant and c) a resulting injury to the affected person; d) caused by the breach. Although many companies appear to view human rights due diligence as relevant, there is little evidence as yet that the Guiding Principles have an impact on judicial decision-making about the nature and scope of corporate duties and standard of care in cases where businesses are alleged to have caused or contributed to adverse human rights impacts. There are few instances³¹ of the Guiding Principles being referred to directly in court judgements.³²

While not appropriate in all cases, the exercise of human rights due diligence could be a basis for a possible defence to liability. In the field of bribery, the UK Bribery Act 2010 created a strict liability offense for companies for failing to prevent bribery. However, the Act gives companies a defence if they can show that they had in place “adequate procedures” designed to prevent from undertaking such conduct.³³ Conducting human rights due diligence could also help companies to reduce the risk of secondary liability or “complicity” when a business enterprise contributes to adverse human rights impacts caused by other parties.

Human rights due diligence can also be relevant for determining the type and severity of sanctions and remedies once liability is established. Under Italian Legislative Decree 231/2001, companies can receive a reduction of pecuniary

29 German Federal Foreign Office, National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, Berlin 2017, p. 10.

30 National Action Plan for Business and Human Rights of the Czech Republic for the years 2017–2022, approved by the government on 23rd October 2017, p. 35.

31 Decisions in Canadian courts have made references to the Guiding Principles – e.g. Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 or Choc v. Hudbay Minerals Inc., 2013 ONSC 1414.

32 OHCHR, Improving accountability..., *op. cit.*, p. 7.

33 Bribery Act 2010, § 7 (2).

sanctions if, before any trial starts, they fully compensate any damage, and adopt and implement an organizational model suitable to prevent similar crimes from occurring again.³⁴

4. The UNGPs and Access to Legal Remedies

The third pillar of the Guiding Principles specifies the need to ensure better access to legal remedies which address the joint responsibility of states and business enterprises for human rights violations. States are required to take steps to investigate, punish, and redress business related abuses of human rights. Through judicial, administrative, legislative or other appropriate means, states shall ensure that those affected have access to an effective remedy.³⁵ Besides judicial remedies, also state-based non-judicial and non-state-based mechanisms may be used.

Effective remedies on the national level shall tackle both procedural and substantive aspects. According to the Commentary to the Guiding Principles, state-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. In this respect, domestic judicial mechanisms shall be effective, and legal, practical and other relevant barriers that could lead to a denial of access to remedy shall be reduced. Relevant barriers may be for example the costs of bringing claims against business corporations, difficulties in securing legal representation and inadequate options for aggregating claims or enabling representative proceedings such as class actions and other collective action procedures.

4.1. Measures at the EU level

As issues related to access to justice fall partly under EU law, the EU has considered ways of how to implement the third pillar of the UNGPs. In its Conclusions of 2016, the EU Council requested the EU Agency for Fundamental Rights (FRA) to issue an expert opinion on possible avenues to lower barriers for access to remedy. The FRA opinion has been delivered in April 2017 and deals with a number of important aspects related to legal remedies.³⁶

It is natural that the EU Charter of Fundamental Rights, besides other international human rights documents, serves as the main point of reference in the FRA opinion. Business-related human rights abuses may affect concrete rights laid

34 Italian Legislative Decree No 231/2001, Criminal Liability of Legal Entities, art. 12(2). The provision is regulating cases where the fine can be reduced.

35 Guiding Principle No 25 – Access to Remedy; UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

36 FRA Opinion – 1/2017 [B&HR], Vienna, 10.04.2017.

down in the Charter, e.g. the right to security of the person, economic and social rights, civil and political rights, the right to non-discrimination, the right to privacy, labour rights, and rights of communities or groups including indigenous peoples, as well as consumer rights and rights related to environmental protection.

The FRA has pointed out that, from the perspective of EU law, extraterritorial access to remedy is an important issue. In the past, the EU has adopted harmonized rules on the choice of court and the choice of law. In principle, the Brussel regulation (Brussel I recast) provides for companies that have their statutory seat or their central administration in an EU Member State to be sued before the courts of that state for damages that have been caused by the company outside of the EU. Europeanized rules of private international law (Rome II Regulation) further provide that, as a rule, applicable law is that where the damage occurs.

However, the FRA opinion found that despite harmonized EU rules on jurisdiction EU Member States continue to apply different approaches to issues which have not been harmonized so far: e.g. the liability of a parent company for acts of a subsidiary and due diligence criteria of a parent company with respect to a subsidiary. Therefore, it remains unclear under which conditions the connection between an EU based company and a subsidiary outside the EU is sufficiently strong to establish the jurisdiction of an EU court rather than a court in a host state. By the way, the problem of “forum shopping” does not apply only in relation between an EU Member State and a third country but also between two Member States. In some Member States remedies are more accessible than in others.

With a view to divergent standards on the Member State level, it is appropriate to study concrete national solutions. For the purpose of this paper we will focus on the legal situation in Germany and the Czech Republic.

4.2. Germany

4.2.1. General considerations

Although Germany is one of the world’s largest economies and is hosting many internationally operating business entities, German courts, so far, have dealt with transnational tort litigation very rarely. According to Philipp Wesche³⁷ this situation is due to two main factors, first, a lack of advocacy organizations specialized in the enforcement of human rights and, second, the poor legal framework relating to such litigation. Wesche believes that the problem is not so much the issue of jurisdiction as German courts can exercise jurisdiction over companies domiciled in Germany, irrespective of where the damage occurred.

37 P. Wesche, Corporate human rights abuses and access to justice in Germany – why so little tort-litigation? (available at <https://www.business-humanrights.org/en/corporate-human-rights-abuses-and-access-to-justice-in-germany-%E2%80%93-why-so-little-tort-litigation>, accessed 24.04.2019).

In general, there are no jurisdictional rules specific to transnational disputes. If the standard rules of the German Code of Civil Procedure (ZPO) provide for local jurisdiction, this means that the German court will also have international jurisdiction. German law, further, does not distinguish between national and foreign plaintiffs.³⁸ Jurisdiction of the German courts is, in principle, established through the place of residence of the defendant in Germany. In the field of tort law, German courts according to § 32 ZPO assume jurisdiction over foreign parties if the tort took place in Germany. The way to German courts, however, remains closed in a situation with a pure foreign connection, in which there is no sufficient territorial or personal connection to Germany. Therefore it is not possible to assert the jurisdiction of German courts in cases of human rights violations which have been perpetrated by foreign-based subsidiaries in relation to citizens of the host State or other persons who are not German nationals.³⁹

Moreover, even in those international cases over which German courts assert jurisdiction, German material law does not apply and, besides this, procedural barriers make litigation very difficult in practice. Wesche has pointed out that, unlike common law systems, German procedural law does not provide for discovery procedures. In common law this tool enables claimants to obtain large amounts of documents from within companies. Under German procedural law however, claimants have to specify the name and describe the documents they want to obtain. Therefore, evidence on the internal structure of a business entity or internal health and safety practices will be hardly available.⁴⁰

Besides this, several authors have criticized the lack of collective actions under German law.⁴¹ As representative proceedings and class actions are not available, it is not very attractive for law firms to litigate on behalf of many victims of human rights violations. According to Wesche, the statutory lawyers' fees which are dependent on the value of the matter in dispute are often too low to cover the costs of developing cross-border litigation.

Another problem is related to the applicable law. Although German courts, under specific circumstances, may assert jurisdiction in cases of human rights violations caused by German-based business entities, they will have to apply the law of the host country. Such approach is questionable in cases in which the local standards of human rights protection are significantly lower than in Germany. Besides this, most German law firms are not very familiar with the national law of countries in which

38 M. Molitoris, A. Abt, Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU. National report for Germany (available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_germany_en.pdf, accessed 24.04.2019).

39 A. Hennings, Über das Verhältnis von Multinationalen Unternehmen zu Menschenrechten. Eine Bestandaufnahme aus juristischer Perspektive, Göttingen 2009, p. 132.

40 P. Wesche, Corporate human rights abuses..., *op. cit.*

41 See e.g. C. Geiger, Kollektiver Rechtsschutz im Zivilprozess, Tübingen 2015.

systematic human rights violations happen. Also for judges the application of foreign law may be difficult in such cases.⁴²

In order to increase access to compensation for victims Wesche suggests that the German government shall take up the UN Guiding Principles on Business and Human Rights and provide operational recommendations to improve access to remedy. Second, an impartial study on the material and procedural barriers to litigation in German law should be conducted.

4.2.2. The case of Jabir et alii v. KiK

In September 2012, more than 260 workers died in a fire at a textile factory in the Pakistani town of Baldia, hundreds of people were very seriously injured. As the German clothing retail company “KiK Textilien und Non-Food GmbH“ (KiK) was the main customer of the factory, a survivor and 3 families of victims filed a lawsuit against the company at a German court. According to the claimants KiK should be held responsible for safety deficiencies in the factory which caused the high number of casualties. It was reported that the factory was built in violation of applicable building and fire safety standards, electrical installations were in bad condition and, despite previous fire incidents, it did not possess sufficient fire alarms and extinguishers. Moreover, there were insufficient emergency exits, and those that did exist were locked at the time of the fire.⁴³

After KiK had paid US\$1 million in emergency compensation shortly after the accident, the International Labour Organization, in September 2016, informed that, during its mission to Pakistan, it had facilitated an agreement in which KiK agreed to pay a total of \$5.15 million to the affected families and survivors as a compensation for loss of income, medical and allied care as well as rehabilitation, to the victims of the fire. The compensation agreement made reference to the ILO Employment Injury Benefits Convention 121.⁴⁴

Already before an agreement was reached in Pakistan, in March 2015, a lawsuit was filed with the District Court of Dortmund seeking compensation for pain and suffering caused by the fire for all the affected families. The claimants further requested an apology and the promise that KiK, in the future, would act in compliance with the relevant safety regulations at its outsourced clothing production facilities. The Dortmund court in August 2016 accepted jurisdiction and granted legal aid to the claimants.

42 M. Kaufmann, *Menschenrechtliche Unternehmensverantwortung in der Liefer- und Wertschöpfungskette: juristische Möglichkeiten*, “WISO” 2016, vol. 2, pp. 53-68.

43 P. Wesche, M. Saage-Maaß, *Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK*, “Human Rights Law Review” 2016, vol. 16, pp. 370-385, 372.

44 See the ILO Press Release of 10 September 2016 at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang--en/index.htm (accessed 24.04.2019).

As for the link between KiK and the Pakistani factory the claimants alleged that KiK had controlled factory conditions and assumed responsibility for safety management. According to the claimants KiK regularly intervened in the factory's operations, including by directing and monitoring safety management. KiK's own code of conduct, which forms part of its supply chain contracts, required suppliers to ensure safe working conditions and allowing KiK to monitor them. KiK admitted it developed correction plans and supervised their implementation.⁴⁵ However, later KiK insisted that the fire was caused by an arson attack carried out by a local political party and there were no fire safety issues reported by auditors.⁴⁶

From the procedural perspective the case of *Jabir et alii v. KiK* illustrates a number of problems which occur in international tort litigations that are carried out before a German court. With regard to the issue of jurisdiction the regulation Brussels I leaves it upon national rules whether jurisdiction shall be assumed in cases concerning jurisdiction over companies located outside the EU. As German law, aside from some very narrow exceptions, does not provide for the jurisdiction of German courts over foreign subsidiaries, the complainants could not bring a lawsuit against the Pakistani factory.⁴⁷

As for the case against German-based KiK, it is clear that the German court, in line with regulation Rome II, has to apply the law of the country where the damage occurred (*lex loci damni*). At first glance it is hard to say whether the application of *lex loci damni* constitutes an advantage for the claimants or the defendants. According to Wesche and Saage-Maaß, it would be a mistake to consider the legal systems of developing countries automatically as less developed in terms of human rights protection than the German legal system. If the legal system in developing countries seems to be weak or malfunctioning, this is often due to the poor quality of enforcement rather than the content of the relevant law. Quite surprisingly, Wesche and Saage-Maaß contain that, in the KiK case, the application of Pakistani tort law will benefit the claimants as it provides legal precedent with regard to parent company liability and enables them to claim damages for pain and suffering for loss of life, which do not exist in the German system.⁴⁸

With regard to procedural rules, German law remains applicable irrespective of the material law. One of the basic issues will be how to cope with the asymmetry of relevant information. Most of the evidence that might disclose a violation of security standards and shortcomings in the monitoring procedures lies in the hand

45 P. Wesche, M. Saage-Maaß, *Holding Companies Liable...*, *op. cit.*, p. 373.

46 See a report by the German broadcaster Deutsche Welle (DW) of 9 February 2017 (<https://www.dw.com/en/german-retailer-kik-compensates-pakistans-industrial-9-11-families/a-37470138>, accessed 24.04.2019).

47 P. Wesche, M. Saage-Maaß, *Holding Companies Liable...*, *op. cit.*, pp. 373-374.

48 P. Wesche, M. Saage-Maaß, *Holding Companies Liable...*, *op. cit.*, p. 375.

of the defendant company. In this respect we may note that an attractive feature of common law jurisdictions is the disclosure or discovery procedure. This means that documents related to the facts of the case must be submitted to the court and the other party prior to the trial.⁴⁹ However, the German Code of Civil Procedure does not provide for such tool. Therefore, for the claimant it is hard to decide on whether it is worth investing further resources. Whenever the claimant, with reference to § 421 ZPO, asks the German court to order the defendant to disclose documents, he has to describe the document, explain the details of the facts which shall be proven, provide an accurate description of the contents of the documents and explain why the defendant is in possession of the document. It seems clear that such tool is of limited help.⁵⁰

In August 2018 the district court in Dortmund granted legal aid to the claimants,⁵¹ a fact which some authors have interpreted as promising.⁵²

4.3. Czech Republic

4.3.1. General considerations

The situation in the Czech Republic differs from the one in Germany where many business entities operating abroad are hosted. There are not many private entities based in the Czech Republic which develop their business globally. However, within the Czech Republic, there is evidence of cases where employees, frequently foreign nationals employed through temporary employment agencies, found themselves in a highly vulnerable position and their rights have been abused by business corporations. From a Czech perspective, it is therefore more appropriate to examine the cases of human rights abuses of foreign nationals that have occurred.

Even though Czech private companies have been able to catch up with the wider trend of paying attention to corporate social responsibility,⁵³ the level of acceptance of the UN Guiding Principles remains rather low, so far.⁵⁴ It is the ambition of the Czech National Action Plan to raise awareness of the concept of business and human rights so that businesses are able to avoid mistakes born of ignorance and negligence.

49 C. Van Dam, *Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights*, "JETL" 2011, vol. 3, pp. 221-254, 230.

50 P. Wesche, M. Saage-Maaß, *Holding Companies Liable...*, *op. cit.*, pp. 380-381.

51 LG Dortmund, 29.08.2016 – 7 O 95/15.

52 J. Salminen, *From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains*, Turku 2017, p. 200.

53 V. Hermanová, H. Smekal, *Implementation of the UN Guiding Principles: The Case of the Czech Republic*, Masarykova univerzita 2013, p. 18.

54 Centre for Human Rights and Democratization, *Business and Human Rights, Current State in the Czech Republic and Implementation of the UN Guiding Principles on Business and Human Rights, Analysis for the MFA of the Czech Republic*, Brno 2015.

When introducing the concept, the Government built on both existing legislation and voluntary corporate commitments.

In general, human rights in the Czech Republic are legally protected and enforceable; anyone who feels that his rights have been violated may seek judicial protection. However, lawsuits tend to be lengthy and arduous for someone who does not speak the language. For example, the number of labour law disputes gradually decreases (both in absolute and relative numbers). Also the expected costs of the proceedings have a deterrent effect on victims of human rights abuses.⁵⁵ In criminal proceedings, victims may be represented by an agent, such as a non-profit organisation. There are certain cases under Czech law where Czech citizens and nationals, as well as legal persons established in the Czech Republic, can be prosecuted for violations of human rights abroad.⁵⁶ These include the criminal law tenets of personality and universality.⁵⁷ A legal person can be liable for all crimes other than a narrow group of acts expressly precluded by law.⁵⁸

4.3.2. Most serious infringements of working conditions

Whereas minor cases of labour law violations are subject to checks by labour inspection bodies, more serious cases can be prosecuted as crimes.⁵⁹ This is also the case of hidden exploitation of migrant workers where civil law proceedings do not represent a suitable solution.

In 2008, an organized group was detected that had been recruiting farmworkers abroad. These farmworkers, coming from Romania and working in asparagus fields or in meat factories, were sometimes working up to 12 or 18 hours a day and were paid only a fraction of the wages they had been promised. A judgement of the Supreme Court was given in March 2014.⁶⁰ The Supreme Court was examining the crime of trafficking in human beings and especially its elements of forced labour and other forms of exploitation, committed in an organized group (Section 232a 2) c) of Act No 40/2009, the Criminal Code). In its judgement, the Supreme Court requested the respective regional court to reconsider the legal qualification of the act and to take into account its reasoning which contains extensive deliberation on the element of forced labour.

Another case was heard by the Supreme Court in 2013.⁶¹ Between 2007 and 2009, at least 22 construction workers – homeless persons or foreign nationals – were held enslaved. They were working under severe conditions. Sometimes they

55 M. Štefko, *Alternativní řešení pracovních sporů, výhled do budoucna* (forthcoming).

56 Czech National Action Plan on Business and Human Rights, 2017, pp. 6-7.

57 Sections 6, 7 and 8 of Act No 40/2009, the Criminal Code.

58 Act No 418/2011 on the criminal liability of and proceedings against legal persons.

59 Czech National Action Plan on Business and Human Rights, 2017, p. 16.

60 Judgment of the Supreme Court 7 Tdo 1261/2013 of 12 March 2014.

61 Judgment of the Supreme Court 4 Tdo 366/2013 of 14 May 2013.

were physically attacked and were not paid the promised wage. Also in this case, the Supreme Court examined the crime of trafficking in human beings but with a special focus on the element of the benefits gained by the offender who was abusing the difficult financial and social situation of the victims. The Supreme Court refused the objections of the offender.

Between 2009 and 2011, there were several cases of large-scale labour exploitation involving up to several hundred workers in the forestry sector. These cases were heard by the Constitutional Court of the Czech Republic. A finding of the Constitutional Court was given in 2016⁶² in the case of Vietnamese forest workers who had not been paid their wage even though they had been working up to 12–14 hours a day, 7 days per week, under severe conditions. The Constitutional Court cancelled the decisions of the Police and the Office of the Prosecutor which had qualified the act as a fraud. The Constitutional Court requested the respective authorities to reconsider the case while taking into account the crime of trafficking in human beings. Another finding of the Constitutional Court⁶³ was given in 2015 in the case of 66 Vietnamese, Romanian and Slovak forest workers who had been working under undignified working conditions and had not been paid their wage. The Constitutional Court cancelled the decisions of the Police and the Office of the Prosecutor which had qualified the respective act as a fraud due to the violation of the right to effective investigation.

To prevent these modern-day unfair practices, there needs to be a coordinated cooperation between several state bodies and social partners. A law is being drawn up that should tighten conditions for the establishment and operation of temporary employment agencies and the Government was tasked to raise foreign nationals' awareness of their labour rights and obligations.⁶⁴

5. Conclusions

The United Nations Guiding Principles are supported by significant consensus. States, businesses and other actors have launched implementation initiatives with the aim to prevent and redress business related human rights abuses. On the other hand, supporters of a binding international treaty on business and human rights question the value of the Guiding Principles and their regulatory sequelae.⁶⁵ The national

62 Finding of the Constitutional Court II ÚS 3436/14 of 19 January 2016.

63 Finding of the Constitutional Court II ÚS 3626/14 of 16 December 2015.

64 Czech National Action Plan on Business and Human Rights, 2017, pp. 17-18.

65 C. Methven O'Brien, *Experimentalist Global Governance and the case for a Framework Convention based on the UN Guiding Principles on Business and Human Rights*, (in:) M. Mullen et al., *Navigating a New Era of Business and Human Rights: Challenges and Opportunities under the UNGPs*, 2019 (forthcoming), p. 1.

action plans implementing the Guiding Principles reveal the different domestic ambitions and efforts. It is true that the business and human rights agenda penetrates almost every area of public and corporate law and, given the different regional and national circumstances, government measures vary from state to state.

Human rights due diligence represents one of the main substantive elements of the Guiding Principles. It is obvious that there is a need for greater clarity about the relationship between the exercise of human rights due diligence and corporate legal liability. Businesses should not wait for governments to come up with legal regimes requiring human rights due diligence as the corporate responsibility to respect human rights exists over and above compliance with national laws and regulations.⁶⁶ A key goal must be the encouragement of meaningful human rights due diligence by companies in the spirit of the Guiding Principles.⁶⁷

Another major principle of the Guiding Principles deals with better access of victims to legal remedies. In the third part of this study we have analyzed relevant German and Czech cases which have shown that judicial mechanisms addressing the responsibility of business entities for human rights abuses are sometimes lengthy and not always effective. In Germany, a private lawsuit before the competent court of first instance has the potential to become the leading case under German private law. As in the Czech Republic access to private litigation is complicated in procedural terms, human rights abuses are mainly treated by the instruments of national criminal law.

As a first step in order to improve the situation we can see attempts to introduce class actions into Czech law. In 2017 the Czech Ministry of Justice presented a draft reflecting the EU Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. As the draft is supposed to introduce a completely new element into Czech procedural law, which is based on individual actions, several issues like the burden of proof and the level of proving a claim will need to be clarified before such act may be adopted.

We have seen that the Guiding Principles, so far, have had only little influence on national regulations concerning jurisdiction, procedural and material law in liability cases. We may expect that the implementation of the Guiding Principles, sooner or later, will lead to a reform of national procedural regulations. But it seems that there is still a long way to go in order to reach a solution which will be satisfactory in the light of international standards.

66 Commentary to the Guiding Principle 11, UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, annex to A/HRC/17/31, endorsed by the Human Rights Council resolution 17/4 of 16 June 2011.

67 OHCHR, Improving accountability..., *op. cit.*, p. 5.

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