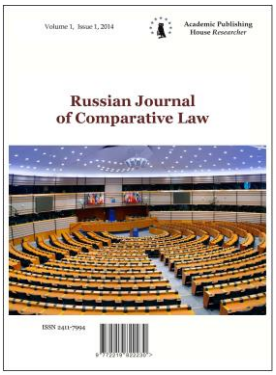

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From the Rights to the Duties of Business Entities under the European Convention on Human Rights

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Abstract

The aim of this paper is to analyse the rights and obligations of business entities under the European Convention on Human Rights ('the Convention') with the purpose of determining the correlation of business and human rights in this instrument. The key focus of this study is to identify whether business entities under this treaty should only be perceived as human rights holders or may well be recognised as being responsible for violation of these rights (obligors).

This paper addresses the following three points. First, this manuscript focuses on the concept of a 'business entity' in the meaning of the Convention. Second, the author concentrates on the rights of these entities as elaborated in the practice of the European Court of Human Rights ('the Court'). Third, an analysis of the possible obligations of businesses under this international treaty is accomplished. Based upon the Convention, the author concludes that business entities may perform the roles of both human rights holders and human rights obligors.

Keywords: business entity, human rights, duties, positive obligations, state-owned company, responsibility, European Convention on Human Rights, European Court of Human Rights.

"no silver bullet can resolve the business and human rights challenge"
Nicola Jägers
(Jägers, 2013: 295)

1. Introduction

Interrelationships between business and human rights have been intensely discussed by scholars (e.g. De La Vega, 2017: 431; Černič, 2010: 210; Deva, Bilchitz, 2013; Kamminga, 2004; Bhandary, 2011; Verdonck, 2016: 112; Karavias, 2013; Augenstein, 2011; Vázquez, 2005: 927-959) and practitioners (Business and Human Rights Research Centre) at both the United Nations and regional levels. Current developments in international law indicate that the role of business entities gradually changes. In May 2011 the Organisation for Economic Co-operation and Development (OECD) introduced its new Guidelines for Multinational Enterprises.

A significant step forward in this direction was made through the endorsement of UN Guiding Principles on Business and Human Rights (UNGP) in 2011 (HRC). These became the standard of corporate responsibility for governments, intergovernmental organisations and non-

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governmental organisations. This standard was reflected in documents of many intergovernmental organisations all over the world.

For example, in November 2016 the **ASEAN** Intergovernmental Commission on Human Rights held the AICHR Seminar on Promoting Corporate Social Responsibility (CSR) and Human Rights in ASEAN. This seminar explored the role of governments and businesses in promoting CSR, as well as possible elements of a regional strategy on the issue.

In March 2017, the **OAS** Inter-American Juridical Committee adopted a resolution titled "Conscious and effective regulation for companies in the sphere of human rights". This document called upon the OAS to examine the "Corporate social responsibility in the area of human rights and the environment in the Americas" of 2014 with the goal of strengthening progress in the region and proposes that states and companies respect concrete obligations in order to protect human rights and the environment.

The **African Commission on Human and Peoples' Rights** established the Working Group on Extractive Industries, Environment and Human Rights Violations, which highlighted the need for direct accountability of corporations for human and peoples' rights violations (Dersso: 2016). One of the newest document on the subject matter is the Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights introduced by the open-ended intergovernmental working group (OEIGWG) on 29 September 2017.

In Europe, three main human rights organisations, namely the Council of Europe (CoE), the European Union (EU) and the Organization for Security and Cooperation in Europe (OSCE) follow the UNGP as well.

In 2015, the **European Commission** issued the "Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play".

The **OSCE** published a report titled "Ending Exploitation. Ensuring that Businesses do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector".

The **Council of Europe** adopted Resolution 1757 and Recommendation 1936 on "Human Rights and Business" in 2010. In these documents, the CoE Parliamentary Assembly recommended that the CoE Committee of Ministers explore ways and means of enhancing the role of businesses in respecting and promoting human rights. As a result, the Steering Committee for Human Rights (CDDH) published two drafts in 2012: the "Draft preliminary study on corporate social responsibility in the field of human rights: existing standards and outstanding issues" and the "Draft feasibility study on corporate social responsibility in the field of human rights". Following these drafts, in March 2016, the Committee of Ministers adopted Recommendation CM/Rec (2016)3 on Human Rights and Business.

All of the aforementioned documents involving the obligations of business entities are of a soft law nature. In our research, we wish to take it a step further and also prove that a binding human rights treaty, specifically the Convention, may be seen as defining obligations on businesses. The preliminary study demonstrates that there are disagreements on the subject-matter in different CoE documents. The CDDH in its reports observed that "while businesses enjoy certain rights under the Convention, they do not have obligations under this instrument" (CDDH, 2012). On the other hand, the Court as the body responsible for the interpretation of the Convention developed a factsheet titled "Companies: victims or culprits" (Companies: victims or culprits, 2013), which shows that business subjects may be seen as both the victims of human rights violations and the violators of these rights. In view of these ambiguities, the author intends to study the case-law of the Court in order to clarify whether business entities should be recognized under the Convention as being responsible for the respect of and compliance with human rights and, if so, under which basis.

Given this, the manuscript will address the following three points: first, what is covered by the concept 'business entity' in the meaning of the Convention; second, what are the rights of business entities under the Convention as elaborated in the practices of the Court and third, an analysis of the possible duties or obligations of these subjects based on the Convention in the light of the existing case-law of the Court. In the conclusions, the answer to the main research question on possible responsibility of business entities for violations of human rights will be provided. The further division of the paper corresponds to the three above-mentioned points. In order to be

able to examine the rights and duties of corporate subjects under the Convention, first of all it is necessary to explain the concept 'business entity' for the purposes of this CoE instrument.

2. Materials and methods

The main sources for writing this article became the case-law of the European Court of Human Rights, monographs on the subject-matter, journal publications and Internet archives. The study used the basic scientific methods such as the historical method, analysis, synthesis and the method of comparative law. The use of historical method allowed to describe the practice of the Court regarding the human embryo status in a chronological order. Analysis and synthesis always complement one another. Every synthesis is built upon the results of a preceding analysis, and every analysis requires a subsequent synthesis to verify the results. The author applied these two methods throughout the paper. The method of comparative law served as a tool for defining the difference in views on the subject from the sides of the states and intergovernmental organisations.

3. Discussion

3.1. The definition of the term 'business entity' in the sense of the Convention

The way we define a concept influences the comprehensive understanding of it. Correspondingly, the content of the rights and duties of business entities will depend on the chosen approach. The theory of human rights law distinguishes between two groups of subjects: 1) human rights holders and 2) human rights obligors. If we apply this division to the Convention, the concept of ***human rights holders*** will correspond to the notion of a victim of human right violations who are often the applicants before the Court.

Regarding the position of ***human rights obligors*** in the meaning of the Convention, according to Article 1 of the Convention the primary obligation to secure human rights set forth in this treaty is imposed on the states. Taking into consideration the changing place of corporations in international law (Pahuja, 2016) particularly in regards to human rights, the next part will elaborate on the possibility of business entities to act in the capacity of human rights obligors based on the Convention and the Court's case-law.

A) "Governmental" v. "non-governmental" organisations

The distinction between human rights holders and human rights obligors can be explained best with a reference to the difference between 'non-governmental' and 'governmental' organisations. To be able to obtain the standing of the applicant (victim), in other words the human rights holder, a business entity should possess the features of a 'non-governmental organisation' in the sense of the Convention. An illumination of the subject-matter was produced by the Court in the case of *Transpetrol, a.s., v. Slovakia* (Transpetrol, a.s., v. Slovakia, 2011) In this case, the Court highlighted that "…a company is "a non-governmental organisation" if it is governed essentially by company law, does not enjoy any governmental or other powers beyond those conferred by ordinary private law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts…" (Transpetrol, a.s., v. Slovakia, 2011: 61).

Based on this, we may conclude that **a business entity is a 'non-governmental organisation', if** it is: 1) completely independent of the state; 2) governed essentially by company law; 3) subject to the jurisdiction of the ordinary rather than the administrative courts.

By contrast, **a business entity** should be seen as so called **'governmental organisation' if** it: 1) exercises governmental powers; 2) enjoys any other powers beyond those conferred by ordinary private law in the exercise of its activities; 3) is established for public-administration purposes. Additionally, the unity of interests of the business entity and the state in the form of the participation in the same proceedings, following the same purpose or being represented in those proceedings by the same lawyer attests the position of 'governmental' organisations.

In case of companies acting as 'non-governmental organisations', it is clear that they are not prohibited from lodging their complaints with the Court and may act as human rights holders. Regarding the position of the business entities having the features of 'governmental organisations' because of strong ties with the states, they may not act as human rights holders, but only as the human rights obligors. However, this does not signify that the terms 'governmental organisation' and human rights obligor should always be seen as the synonymous. The concept of human rights

obligors is much wider and may comprise also 'non-governmental' business entities. The detailed explanation will be provided further in this paper.

B) Business entities as human rights holders

The text of the Convention (Convention for the Protection..., 1950) does not contain the term 'business entity'. However, this expression can be found in the Court's case-law (Megadat.com SRL v. Moldova, 2011: 12; Gotthárd-Gáz Kft v. Hungary, 2007: 19; Léval and Nagy v. Hungary, 2003: 17; Arshinchikova v. Russia, 2007: 24; Felix Blau SP. Z O.O. v. Poland, 2010: 36; Elcomp sp. z o.o. v. Poland, 2011: 41, and others). For example, in the first paragraph of the judgment in the case of *Hélioplán Kft v. Hungary*, it was noted that "[t]he case originated in an application (no. 30077/03) against the Republic of Hungary lodged with the Court ... by a Hungarian *business entity*, Hélioplán Kft ("the applicant") ..." (Hélioplán Kft v. Hungary, 2007: 1). This excerpt clearly shows that business entities may be regarded as applicants in proceedings before the Court and consequently human rights holders.

The list of the permissible individual (not inter-state) applicants under the Convention may be found in Article 34 of this treaty: "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals..." (ECHR). Given that a direct reference to the phrase 'business entity' is absent, it may be unclear whether the Court regards a 'business entity' to be considered a 'person', a 'non-governmental organisation' or as a 'group of individuals'. The analysis of the *Travaux Préparatoires* (The Preparatory Works to Article 25 of the Convention, 1964), the case-law of the Court (Ukraine-Tyumen v. Ukraine, 2007: 28) and the legal doctrine (Emberland, 2006: 35; van den Muijsenbergh, Rezai, 2012: 47) attests that a profit-making business entity should be seen as a non-governmental organisation (NGO) for the purposes of the Convention.

One may provide hundreds of examples of the Court's judgments and decisions where applicants appear as business entities of different types, such as joint stock companies (Kirovogradoblenergo, PAT v. Ukraine, 2013; Askon AD v. Bulgaria, 2012; OAO Neftyanaya Kompaniya Yukos v. Russia, 2011; OAO Plodovaya Kompaniya v. Russia, 2007), public limited companies (S.A. Sitram v. Belgium , 2002; S.A.GE.MA S.N.C. v. Italy, 2000; N.T. Giannousis and Kliafas Brothers S.A. v. Greece, 2006; Sociedade Agrícola do Ameixial, S.A v. Portugal, 2011) or limited liability companies (British-American Tobacco Company Ltd v. the Netherlands, 1995; 3A.CZ s.r.o. v. the Czech Republic, 2011; Alithia Publishing Company Ltd and Constantinides v. Cyprus, 2008; OOO Rusatommet v. Russia, 2005; Rosenzweig and Bonded Warehouses Ltd v. Poland, 2005). Moreover, given that the Convention does not impose a nationality requirement for submission of the application, we may find cases relating to the business entities set up outside of the CoE member states (Anheuser-Busch Inc. v. Portugal, 2007: 1; Regent Company v. Ukraine, 2008: 1). Although the Court does not require an official registration of a legal person for lodging an application with it (Association of Victims of Romanian Judges and Others v. Romania, 2014; The United Macedonian Organisation Ilinden and Others v. Bulgaria, 2006), given the nature of business entities a majority of the applications involve officially registered subjects.

According to the Convention, a business entity is a non-governmental organisation. However, not necessarily every NGO in the meaning of this treaty is a business subject. An analysis of existing definitions of this term allows us to conclude that *the term 'business entity' refers to any type of legal person carrying out its activities for the purposes of producing a profit*. It could possess different names, such as company, corporation, partnership, joint venture and so on. In the current manuscript we will use these titles interchangeably. What is of importance is that all these entities were established with the aim of generating profit. Accordingly, in this paper we will not deal with case-law concerning NGOs established in the form of non-profit organisations, political parties, movements (*e.g.* LGBT), religious groups, *etc.*

C) Business entities as human rights obligors

The ideas expressed above regarding the definition of business entities under Article 34 of the Convention relate to their capacity as the applicants, the human rights holders. Given the fact that in accordance with the Convention only the states are directly responsible for violations of human rights, the definition of business entities in the capacity of human rights obligors is quite

problematic. Nonetheless, the case-law of the Court may well provide us with an explanation on the subject-matter.

Under the well-established case-law, the application submitted to the Court against a private business entity "...would be inadmissible as being incompatible *ratione personae* with the Convention provisions" (CDDH, 2012). On the other hand, in the case of *Trocellier v. France* the Court observed: "...the Contracting States are required to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, *whether in the public or the private sector*, can be determined..." (Trocellier v. France, 2006). This may lead us to the conclusion, that under some circumstances the Convention also requires compliance with its norms in the private business sphere.

Article 1 of the Convention sets forth that the right envisaged by the Convention shall be secured on the territory within the jurisdiction of the state parities. It means that the business entity responsible for the violation of human rights under the Convention has to be set up in the territory of the one of the 47 states, which have ratified the Convention. Exceptionally, the case-law of the Court envisages extra-territorial jurisdiction of state parties to the Convention (Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights). This could be relevant for a debate on the possible liability of multinational corporations.

The question arises as to what is the position of the state-owned companies under the Convention. In its commentary to Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the International Law Commission (ILC) observes: "The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority..." (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, 2001: 48). The practice shows that the Court in its case-law follows the approach taken by the ILC. Before deciding on attribution of the conduct of an entity to the state, it put the subject to the test on the compatibility of the application *ratione personae*.

In this test, the Court evaluates the *e.g.* the degree of governmental control over a business entity, the management, the position on the market, national legislation regulating the conduct of an entity, *etc.* (The details of the test see in the following cases: Mykhaylenky and Others v. Ukraine, 2004: 41-45; Khachatryan v. Armenia, 2009: 51-53; Lisyanskiy v. Ukraine, 2006: 17-20; Shlepkin v. Russia, 2007: 21-24; R. Kačapor and Others v. Serbia, 2008: 92-99; Grigoryev and Kakaurova v. Russia, 2007: 32-36). For instance, in the judgment in the case of *Mykhaylenky and Others v. Ukraine,* the Ukrainian government argued that although the debtor company was state-owned, it was a separate legal entity and the state could not be held responsible for its debts (Mykhaylenky and Others v. Ukraine, 2004: 41). The Court agreed that a valid question has been raised. On the basis of the above-mentioned test, it came to the conclusions that the state was liable for the company's debts to the applicants. In the same way, in the case of *Khachatryan v. Armenia* regarding the debts of joint-stock company 'Hrazdanmash' whose majority shareholder was the state, the Court concluded that the debtor company, in spite of the fact that it was formally a separate legal entity, did not enjoy sufficient institutional and operational independence from the state to absolve the latter from its responsibility under the Convention (Khachatryan v. Armenia, 2009: 51-53).

In general, the Court admits that the state is responsible for the conduct of business entities established in the form of state-owned companies (Cooperativa Agricola Slobozia-Hanesei v. Moldova, 2007: 8; Gusinskiy v. Russia, 2004: 70), private prisons (Dickson v. the United Kingdom, 2006: 5), state-funded schools (O'Keeffe v. Ireland, 2014: 14; Dogru v. France, 2008: 6) and public hospitals (Avilkina and Others v. Russia, 2013: 15). These examples confirm that the Court follows the rules of public international law regarding the responsibility of the state set forth by the ARWISA.

To see the difference between human rights holder and obligors, it is of interest to look at the reverse side of the coin, which is when the state-owned company acts as an applicant. An excellent example is the case of *Transpetrol, a.s., v. Slovakia* (Transpetrol, a.s., v. Slovakia, 2011). In this

case, the applicant joint-stock company complained about the fairness of proceedings before the Slovakian Constitutional Court regarding the ownership of shares. At different periods of time, the state had majority share holdings in the company. The Court observed, *inter alia,* that due to its strategic importance to the national economy, the applicant company used was excluded by law from privatisation as it was recognised as having the character of a "natural monopoly" (Transpetrol, a.s., v. Slovakia, 2011: 66). Moreover, in the proceedings before the Court the government had been represented by the same lawyer as the applicant company. These circumstances reflected the unity of interests of the applicant company and the state. Therefore, the application of this state-owned business entity was declared incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a).

However, this does not mean that in general state-owned companies are prohibited from lodging their applications with the Court. In the case of *Islamic Republic of Iran Shipping Lines v. Turkey* (Islamic Republic of Iran Shipping Lines v. Turkey, 2007), the Turkish government contested that the applicant company was a state-owned corporation, which could not be considered to be distinct *de jure* or *de facto* from the government of the Islamic Republic of Iran (Islamic Republic of Iran Shipping Lines v. Turkey, 2007: 68) and therefore the application should be declared inadmissible. The Court conducted its *ratione personae* test and decided that there is nothing to suggest that the present application was effectively brought by the Islamic Republic of Iran and the applicant company is entitled to bring an application (Islamic Republic of Iran Shipping Lines v. Turkey, 2007: 82). This case reaffirms the rule that the state-owned companies may also be seen as the human rights holders. Nonetheless, habitually, the business entities governed and controlled by the state act rather as human rights obligors.

Having defined the main features of business entities for the purposes of the Convention, it is now important to analyse the practical impact of their legal standing as framed in this international treaty. Legal standing relates to the possibility to possess certain rights or bear identified duties. Initially, the study will focus on the rights of business entities under the Convention.

I. Rights of business entities under the Convention

The fact that business entities may possess certain rights under the Convention is generally recognised. Consequently, there is no need to prove that they may be regarded as human rights holders. Therefore, this section of the paper will only provide a brief summary on the rights applicable to companies in the proceedings before the Court. What is new in this paper is the division of these rights into categories. The special value of this contribution is that it provides an exhaustive list of the provisions under which business entities may complain of. Furthermore, this list is illustrated by examples from the Court's case-law in the footnotes.

When discussing rights established in the Convention, the author suggests dividing them into two separate groups. **The first group** is composed of ***human rights***, commonly understood as inalienable and inherent in all human beings (OHCHR, What are Human Rights?). Examples of such rights are the right to a fair trial, freedom of expression, or the prohibition of discrimination. **The second group** is represented by so called '***procedural rights'***, those related to admissibility of the application and the other stages of the examination of the case by the Court. For instance, in accordance with Article 43 of the Convention an applicant company has the right to request a case be referred to the Grand Chamber of the Court. Rule 100 of the Rules of Court provides for the possibility of asking for free legal aid (ECtHR, Rules of Court, 2016: 44). According to Rule 34 of the Rules of Court, a person may ask the President of the Court's Chamber to grant authorization for the interpretation and translation into English or French of the submissions. It also includes the possibility to use the language of the CoE contracting party other than the official language in the course of the oral hearings before the Court (ECtHR, Rules of Court, 2016: 17-18).

Upon return to the first group (human rights), the study on the Convention conducted by the author (Tymofeyeva, Non-Governmental Organisations, 2015: 99-102) demonstrates that ***business entities may enjoy all or certain human rights envisaged in the following provisions*** of this CoE treaty: Article 6 (Saarekallas OÜ v. Estonia, 2007: 52), Article 7 (Radio France and Others v. France, 2004: 20; OAO Neftyanaya Kompaniya Yukos v. Russia, 2009: 499), Article 8 (Wieser and Bicos Beteiligungen GmbH v. Austria, 2007: 68), Article 9 (Glas Nadezhda

EOOD and Anatoliy Elenkov v. Bulgaria, 2007: 59), Article 10 (OOO Ivpress and Others v. Russia, 2013: 80), Article 11 (Geotech Kancev GmbH v. Germany, 2016: 44), Article 13 (Sylenok and Tekhnoservis-Plus v. Ukraine, 2010: 89; Amat-G Ltd and Mebaghishvili v. Georgia, 2005: 54), Article 14 (Sovtransavto Holding v. Ukraine, 2002: 101), Article 1 of Protocol No. 1 (Centro Europa 7 S.r.l. and Di Stefano v. Italy, 2012: 188), Article 3 of Protocol No. 1 (TV Vest AS and Rogaland Pensjonistparti v. Norway, 2008: 44, 61, 78), Article 2 Protocol No. 7 (Siglfirðingur ehf v. Iceland, 2000: 4), Article 3 Protocol No. 7 (Wouterse, Marpa Zeeland B.V. and Metal Welding Service B.V. v. the Netherlands, 2002) and Article 4 of Protocol No. 7 (Grande Stevens and Others v. Italy, 2014: 228). In view of the applicability of the non-discrimination requirements set forth in Article 14 of the Convention to businesses, there is also nothing preventing consideration of the provisions of Article 1 of Protocol No. 12 to the Convention.

One of the most important rights for the proper functioning of business is the peaceful enjoyment of possessions. An analysis of the case-law of the Court reveals that in all the cases where the Court awarded the highest amounts of just satisfaction, it had found a violation of Article 1 of Protocol No. 1 to the Convention (right to property) (Tymofeyeva, The Highest Amounts of Just Satisfaction, 2015: 255-271). The case of *OAO Neftyanaya Kompaniya Yukos v. Russia*, where the Court awarded to the applicants EUR 1 866 104 634 (OAO Neftyanaya Kompaniya Yukos v. Russia, 2014: 26, 35), remains the frontrunner among this type of cases.

Theoretically, regarding the other material provisions of the Convention and its Protocols, following the logic of the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, 2014), business entities may complain of a breach of all the provisions of the Convention. The judgment at issue confirmed that, under exceptional circumstances, NGOs may complain of a violation of even the right to life (Article 2). However, it should be noted that the applicant in the *Câmpeanu* case was a non-profit human rights organisation and was not recognised as a victim under Article 34 of the Convention but received a special status of a *de facto* representative. Therefore, it is very unlikely the Court would follow this example with regard to business entities and even if it would decide to do so, there is a significant difference in the position of a victim and a representative.

This segment of the paper involved an analysis of business entities as the victims of human rights violations. Next to be evaluated is the question if the Convention provides for the possibility in considering them to be the breach culprits. Discussion on the issue of the probability to find the business entities responsible for the respect for human rights is forthcoming.

II. Duties of business entities under the Convention

This section aspires to provide an overview of the possible duties of business entities based on the provisions of the Convention and the Court's case-law. Before beginning to elaborate on the subject-matter, it should be noted that the terms 'obligation' and 'duty' for the purposes of the current study are synonymous. The author is nonetheless aware of the fact that academic studies do not all reach the same conclusions as to the definition of these two concepts. Given the fact that Article 1 of the Convention provides only for obligations of states, the position of business entities as human rights obligors under this treaty is very unclear. Therefore, one of the main research goals of this segment is to establish whether and to what extent the Convention can serve as a basis of corporate responsibility to respect human rights. The study provides a list of the norms, which may envisage possible obligations of business entities and the corresponding case-law in the footnotes to illustrate it. The classification of duties is of great importance in determining the status of businesses under this treaty.

A. Types of obligations

Likewise in respect to the rights of businesses under the Convention, the author suggests distinguishing between two groups of duties depending on their substance. **The first group** will encompass ***the human rights obligations***, which reflect the rights envisaged in this treaty. **The second group** covers ***the procedural duties***, to the large extent foreseen by Article 35 of the Convention. This provision imposes a duty on the applicant to comply with admissibility requirements such as exhaustion of domestic remedies (Magyar Keresztény Mennonita Egyház and

Others v. Hungary, 2014: 50) or lodging an application within a six-months period from the date on which the final decision was taken (Centro Europa 7 S.r.l. and Di Stefano v. Italy, 2012: 101-105).

The next possible division of the obligations of a subject of law contains distinguishing between direct and indirect obligations (Karavias, 2013: 927). **A direct obligation** signifies a duty directly imposed on a person or entity by law and **an indirect obligation** is implied, derived from the objective and purpose of a statute. For the purposes of our research, ***the direct obligation*** is the one specifically mentioned in the text of the Convention and ***the indirect*** is the duty, which is not prescribed therein, but the one that can be derived based on its text. The indirect duties are those set forth by the states on a domestic level with the aim to regulate the conduct of businesses in order to comply with the norms of the Convention.

B. Direct obligations of business entities

The concept 'direct obligation' for the purposes of the current study signifies the duty specifically set forth in the text of the Convention. According to the typology mentioned above, these direct obligations may be divided into further two groups: 1) procedural and 2) human rights. Because of the relevance to the research question of whether business entities could or should hold human rights obligations, the procedural duties will be discussed only in brief. It would be sufficient to say that, for instance, Article 35 of the Convention envisages a duty for a business entity to comply with the six-month rule. This duty was confirmed in the admissibility decision in the case of *Benet Czech, spol. s r.o. v. the Czech Republic*, where the Court specifically expressed the idea that the applicant company did not comply with its obligations under the Convention. In particular, the Court noted that it "does not find any exceptional circumstances why the applicant company could not have complied with the six-month time-limit." (Benet Praha, spol. s r.o. v. the Czech Republic, 2010). This example clearly demonstrates that both the text of the Convention and the Court's case-law may impose certain direct obligations on business entities. Non-compliance with these requirements may lead to a sanction in the form of a rejection of the application. However, it is necessary to stress again that these are **direct procedural obligations**.

One may disagree and argue that the procedural requirements do not equate with holding obligations. However, if we have a look on the wording of some Court's judgments and decisions, we may see that these requirements are called 'the obligations'. For instance, in the judgment in the case of *Pirali Orujov v. Azerbaijan*, we can find a phrase "this does not relieve him of the obligation to comply with the six-month rule" (Pirali Orujov v. Azerbaijan, 2011: 53). The same expression was used in a number of other cases of the Court (E.g. see: Niğit v. Turkey, 2006; Doshuyeva and Yusupov v. Russia, 2016: 32; Aydin v. Turkey, 2008: 39). Similarly, in the case of *Brajović and Others v. Montenegro* (Brajović and Others v. Montenegro, 2018: 40) and the hundreds of others,* the Court speaks about the "obligation to exhaust domestic remedies" as set forth in Article 35 of the Convention. Therefore, these procedural requirements could be seen as a certain type of procedural obligations in the meaning of this treaty.

The procedural duties or obligations in issue have to be dinstinguished from the procedural human rights obligations, such the state's obligation to conduct effective criminal investigation under Article 2 and 3 of the Convention (Akandji-Kombe, 2007: 32). The latter signify procedural human rights substantive obligations, not the duty to comply with procedural rules in the sence of Article 35 of this treaty. The similar title may lead to confusions in understanding. For example, Professor Wilt and Sandra Lyngdorf in their paper titled *Procedural Obligations Under the European Convention on Human Rights* discuss "the obligation to exhaust local proceedings" (Van der Wilt, Lyngdorf, 2009: 47) and the "obligation to instigate" (Van der Wilt, Lyngdorf, 2009: 48). Overall, for the purposes of this paper, the procedural obligations under the Convention are the duties to fulfil the procedural requirements as set forth in this treaty, mainly in Article 35.

Regarding **direct human rights obligations** of business entities, the existence or non-existence of such obligations may depend on the distinction between 'governmental' and 'non-governmental' ogranisations. With respect to the position of the human rights holders under the Convention, the case-law of the Court requires that such an entity should be 'non-governmental'.

* The search in HUDOC as of 8 February 2018 provides for 470 judgments and decisions with the phrase "obligation to exhaust domestic remedies".

The text of this treaty, nevertheless, is silent with regard to the position of a company as a human rights obligor. Therefore, in theory, nothing prevents us from supposing that so called 'governmental' business entities may also be seen as direct human rights obligors.

The case-law of the Court contains a number of examples when the state was directly responsible for the conduct of so-called 'governmental' business entities. To remind, the business entity is a 'governmental organisation' when it exercises governmental powers, enjoys the powers beyond those conferred by ordinary private law or is established for the public administration purposes. Such an entity is dependent on the state and is subject to the jurisdiction of administrative courts. The above listed features should not be obligatory cumulative. The Court decides on the status of a business entity on the case-by-case basis.

The exercise of the governmental powers may be transferred to the companies responsible for the running of prisons, providing armed combat and/or security services (the private military and security companies (Bednar, 1/2016: 80-92), performing border control, involved in provision of medical services and many others. For example, in the case of *Dickson v. the United Kingdom* (Dickson v. the United Kingdom, 2007), the applicant placed into a ***private prison***, complained under Article 8 about the refusal of artificial insemination facilities. The Court ruled that this provision had been breached as such a restriction on the applicants' rights to respect for the private and family life was not justified. The case of *Codarcea v. Romania* (Codarcea v. Romania, 2009) concerned the absence of the means of ensuring reparation for bodily injuries caused by medical error in a state hospital. The applicant, Mrs Elvira Codarcea, was admitted to the ***municipal hospital*** of the Târgu Mureş for the removal of a skin tag on her jaw. Doctor B. recommended her plastic surgery and performed a few operations. These operations resulted in paralysis of the right side of her face and other side-effects requiring special medical treatment. The applicant initiated proceedings against Dr B. and the hospital, but to no avail. Relying on Article 8 of the Convention, she complained before the Court that the proceedings had been ineffective. The Court ruled that there had been a violation of this provision.

Both cases related to the conduct of 'governmental' entities. In the first case, it was a private entity exercising governmental powers; the second case covered the activity of a state hospital. The conduct of both institutions was attributable to the state and entailed the responsibility. This was a direct responsibility for an infringement of the provisions of Article 8 of the Convention (private and family life). It should be observed that the position of these business entities was not questioned by being placed by the Court under the *ratione personae* test.

The text of the judgment in the *Dickson* case contains a phrase that "the respondent State is to pay the applicants", which clearly confirms that the obligation in question is imposed on the United Kingdom, not the private prison. Business entities in these cases acted as *de facto* organs of the state and, therefore, there were no separate direct obligations imposed on them. In these types of cases the conduct of such subjects is equal to the conduct of the states. Therefore, one can hardly distinguish between the responsibility of the states-parties to the Convention and the liability of 'governmental' entities. Nonetheless, it is possible to expect that the state will have to deal with the conduct of 'governmental' business entities by means of controlling their activity or by enacting changes into legislation forcing the responsible subjects to comply with the Convention. From this perspective, we may conclude that the Convention indirectly imposes human rights obligations also on 'governmental' business organisations. The idea of indirect obligations will be illuminated in the following part of the manuscript.

C. Indirect obligations of business entities

The human rights set forth in the Convention do not have a horizontal effect and may not be enforced directly against non-state actors, *e.g.* legal persons. However, from a certain perspective we might consider possible indirect human rights obligations of businesses. In the commentaries to the UNGP we may find a famous expression that the "responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate." This duty arises independently of a state willingness to fulfil their own human rights obligations. At the same time, it does not diminish the obligations of states. Morover, business entities should act in compliance with national laws and regulations protecting human rights.

Markos Karavias in its monograph on corporate obligations under international law speaks about the duty to respect for human rights and mentions that "an obligation to respect a right may

necessitate positive action on behalf of the corporation" (Karavias, 2013: 169). With reference to the judgment in the case of *Guerra and Others v. Italy* (Guerra and Others v. Italy, 1998), he notes that "a chemical factory may be required to improve its installations" (Karavias, 2013: 169). In this case the applicants complained about failure to provide local population with information about risk factor and the direct effect of toxic emissions from the private chemical factory (owned by the Enichem agricoltura company) on their life. They alleged breaches of Article 2, 8 and 10 of the Convention. The Court observed that Article 10 of the treaty does not impose on the state positive obligations to collect and disseminate information of its own motion and, accordingly, it is not applicable in the instant case. This signifies that such an obligation does not arise also for business entities. The Court, however, concluded that there was a positive obligation to ensure effective protection of applicants' right to respect for their private and family life. And in this respect, we may suppose that the Convention can contribute to establishing human right obligations on the part of business entities to refrain from violation its provisions. The Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (OEIGWG, 2017) support this idea by obliging business entities to "adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations" (OEIGWG, 2017). With regard to the right to life, the Court held that given its conclusion as to a violation of Article 8 of the Convention, it is unnecessary to consider the case under Article 2. By this, the Court avoided in this case the discussion on whether private companies could be indirectly responsible for the respect to the right to life.

On the basis of the current Article 41 of the Convention (just satisfaction), the applicants also sought an order from the Court requiring the respondent State to decontaminate the entire industrial estate concerned, to carry out an epidemiological study of the area and to undertake an inquiry to identify the possible serious effects on residents. They did not request the termination of activities of the factory, presumably, because in 1994 it permanently stopped producing fertiliser. Referring to its well-established case-law (Zanghì v. Italy, 1991: 26; Demicoli v. Malta, 1991: 45; Yağcı and Sargın v. Turkey, 1995: 81), the Court observed that "it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention" (Guerra and Others v. Italy, 1998: 74). Although it is possible to presume that there exists an obligation of business entities to act with respect to the human rights standards envisaged in the Convention, the exact means are to be established at the national level. The precise actions should be considered within the meaning of so-called 'corporate social responsibility' (Lopez, 2013: 59; Nolan, 2013: 138; Tanja, Maarten, 2015).

As already demonstrated, indirect obligations of business entities to respect human rights are closely related to 'positive obligations' under the Convention. The concept of positive obligations means that CoE states can be obliged to act and to take active steps to ensure an effective enjoyment of the rights protected by the Convention (Klatt, 2011).

The Court has observed that the effective exercise of certain human rights may require positive measures of protection in the sphere of relations between non-state actors (Öneryıldız v. Turkey, 2004: 134; Positive obligations on member States under Article 10 to protect journalists and prevent impunity, 2011: 43). This requires the state to regulate business entities' conduct to ensure compliance with Convention norms, which forces them to act in accordance with its human rights standards. An example is the case of *Eweida and Others v. the United Kingdom* (Eweida and Others v. the United Kingdom, 2013). In this case, one of the applicants, Ms Eweida, was employed by a private company, British Airways Plc. In September 2006, she was sent home from work because of her refusal to hide her cross in breach of the company's uniform code. She remained at home without pay until February 2007, when British Airways amended its rules on uniforms and allowed her to display the cross. The Court held that in respect to the period of these four months the British authorities failed sufficiently to protect the applicant's right to manifest her religion in breach of the positive obligations under Article 9 of the Convention (Eweida and Others v. the United Kingdom, 2013: 95). Ms Eweida was awarded EUR 32 000. The media commented on this ruling by saying that: "Case was brought against UK government, not BA, so taxpayer will pick up

bill." ('Thank you Jesus!', Daily Mail) On one hand, it is clear that the direct responsibility in the case lies with the state, the United Kingdom. On the other hand, this case shows that there exists an indirect obligation for British Airways and the other private companies to comply with the freedom of religion requirements. They are under an obligation to allow their employees to display religious symbols at work. There is a great probability that following the ruling in this case, the states will seek to control the conduct of private companies in order to avoid paying a similar type just satisfaction to other applicants.

The next example is one of the newest rulings on the subject, the Grand Chamber judgment in the case of *Bărbulescu v. Romania*, which was issued in September 2017 (Bărbulescu v. Romania, 2017: 148). Here, the Court held that the finding of a violation constitutes in itself sufficient just satisfaction for the damage sustained by the applicant. The Court awarded to the applicant only a total of EUR 1 365 in respect of costs and expenses. In theory, this case does not place the states under a threat of paying huge sums of just satisfaction. Even so, the fact that the state was held responsible for the conduct of a private company will definitely lead to the call to enact corresponding measures by the state in respect to business entities.

The applicant, Mr Bogdan Mihai Bărbulescu, was employed in the Bucharest office of S., a Romanian private company. He was dismissed for using the company's Internet network during working hours in breach of the company's internal regulations. It was proved that over a certain period of time the company had monitored his communications on a Yahoo Messenger account, including those with Mr Bărbulescu' fiancée. The applicant complained before the Court under Article 8 of the Convention that monitoring of use of the Internet at his place of work and use of data collected to justify his dismissal breached his right to respect for private life and correspondence. In the light of the fact that the applicant's enjoyment of his right to respect for his private life had been impaired by the actions of a private employer, the Court examined the complaint from the standpoint of the state's positive obligations. It noted that the domestic courts had failed to determine, *inter alia*, whether the applicant had received prior notice from his employer of the possibility that his communications on Yahoo Messenger might be monitored. It was established that Mr Bărbulescu had not been informed of the nature nor the extent of the monitoring. As a result, the Court ruled that the domestic authorities had not afforded adequate protection of the applicant's right under Article 8 of the Convention.

The above-mentioned cases illustrate that the human rights set forth by the Convention may also be breached by the conduct of private business entities, which do not exercise governmental powers and falling under the concept of 'non-governmental' organisations in the sense of Article 34. In such a situation, we speak of indirect obligations, which may be established on the basis of the Court's case-law. The judgments in question may lead to setting forth by the states the duties on a domestic level with the aim to regulate the conduct of businesses in order to comply with the norms of the Convention. This proves that ***the Convention may indirectly regulate corporate conduct by requiring states to enact and enforce legislation applicable to business entities, which reflects the human right norms of this treaty.***

Analysis of the Court's case-law conducted by the author (Tymofeyeva, 8/2017: 291-305) demonstrates that indirect human rights obligations of business entities may arise under the following provisions of the Convention: Article 2 (Öneryıldız v. Turkey, 2004: 89),* Article 3 (O'Keeffe v. Ireland, 2014: 169), Article 4 (Rantsev v. Cyprus and Russia, 2010: 198), Article 5 (Storck v. Germany, 2005: 108), Article 8 (Tătar v. Romania, 2009: 125), Article 9 (Eweida and Others v. the United Kingdom, 2013: 110), Article 10 (VgT Verein gegen Tierfabriken v. Switzerland, 2001: 79), Article 11 (Sørensen and Rasmussen, 2006: 76-77), and Article 14 (Danilenkov and Others v. Russia, 2009; Eweida and Others v. the United Kingdom, 2013: 110) of the Convention. Apart from this, indirect obligations of business entities may also be derived from the norms set forth in the additional Protocols to the Convention, such as Article 1 of Protocol No. 1

* In this case the Court found a violation of Article 2 of the Convention in connection with deaths resulting from an accidental explosion at the Ümraniye municipal rubbish site due to its regulatory framework being proved defective. Given the status of municipality in the ARSIWA, this case rather relates to a situation when a business entity acts as a state agent. However, as far as the lack of an appropriate legal framework may also influence the behaviour of private subjects, this case confirms a possibility of a corporate social responsibility.

(Fuklev v. Ukraine, 2005: 93), and Article 2 of Protocol No. 1 (Catan and Others v. the Republic of Moldova and Russia, 2012: 148, 150).

Given the content of Protocols No. 6 and No. 13 and possible obligations of business entities to protect human life, we may also consider indirect duties under Article 1 of these Protocols to the Convention, as well as Article 2 of Protocol No. 6 to the Convention. Similar to the preceding are the situations in respect of Article 1 of Protocol No. 12 and Article 14 of the Convention.

Deprivation of liberty by businesses on the basis of Article 1 of Protocol No. 4 to the Convention and Article 5 of the Convention has common features, as well as the restriction of freedom of movement under Article 2 of Protocol No. 4 to the Convention. In theory, there may arise duties of businesses under Article 3 of Protocol No. 1 to the Convention, Articles 3 and 4 of Protocol No. 4 and Articles 1 and 5 of Protocol No. 7 to the Convention.

Articles 2, 3 and 4 of Protocol No. 7 to the Convention involve criminal proceedings before the domestic courts, which are traditionally managed by the states. For this reason, we do not expect any obligations of business entities under these provisions; but if criminal justice in a state is exercised by non-state enterprises this might become an issue. This relates to *e.g.* the serving of sentence.

The description of the case-law of the Court in the footnotes would require writing a monograph. In short, the Court has acknowledged obligations of the states to control the activity of business entities in the way they take the necessary steps to ensure that the lives of people are not endangered (Öneryıldız v. Turkey, 2004: 134). The Convention also imposes an indirect obligation on business organisations to refrain from activities that may amount to torture, inhuman or degrading treatment or punishment (Costello-Roberts v. the United Kingdom, 1993: 32), as well as not to be engaged in human trafficking (Rantsev v. Cyprus and Russia, 2010: 298). Private companies may be involved in the performance of activities related to the deprivation of liberty (Storck v. Germany, 2005: 108). The Factsheet 'Companies: victims or culprits' (Companies: victims or culprits, 2013) elaborated by the Registry of the Court in the part B titled "Companies at the origin of a human rights breach" refers to cases dealing with the closed-shop agreement between a company and a trade union (Young, James and Webster v. the United Kingdom, 1981: 49), relating to environmental pollution and hazards (Taşkın and Others v. Turkey, 2004: 113; Fadeyeva v. Russia, 2005: 92) and the individual criminal responsibility of company representatives in respect of Internet publications (Perrin v. the United Kingdom, 2005). Certain human rights obligations of companies may have their origins in employment-related disputes (Eweida and Others v. the United Kingdom, 2013: 110; Sidabras and Others v. Lithuania, 2015: 116) or the reporting of individuals in the media (Von Hannover v. Germany, 2004: 80).

The Court observed that the boundaries between the state's positive and negative obligations do not lend themselves to precise definition (Dickson v. the United Kingdom, 2007: 70). Similarly, it is not easy to distinguish between direct and indirect obligations arising under the Convention. Thus, the case of *Fuklev v. Ukraine* concerning the non-enforcement of a judgment against a joint stock company, the Iskra Brick Factory (IBF), a private legal entity where the state held 13.4 % of the shares. The Court observed that "…the IBF itself enjoyed sufficient institutional and operational independence from the State to absolve the State from responsibility under the Convention for its acts and omissions …" (Fuklev v. Ukraine, 2005: 67). It concluded that a state may have a "positive obligation to enforce the judgment given against a private entity in the applicant's favour" (Fuklev v. Ukraine, 2005: 68). In the end, the Court ruled that there had been a violation of Article 6 § 1 of the Convention in view of the failure of the bailiffs to act well or to effectively control the enforcement proceedings (Fuklev v. Ukraine, 2005: 86). It was unclear if a breach of the Convention occurred as a result of state authorities' conduct or because of the state's failure to ensure the enforcement of a court ruling by a private business entity. Consequently, this same situation may serve as a basis for the indirect accountability of companies and the direct responsibility of the state. This ambiguity accompanies every aspect of indirect human rights obligations of business entities under the Convention.

4. Results

To respond the research question on the standing of business entities in the proceedings before the Court, namely on the content of their rights and duties under the Convention, the author had to first define the notion in question. Analysis of the text of the Convention and the practice of

the Court shows that there is no one definition ofaa a 'business entity' applicable for the purposes of this treaty. The standing of an applicant under Article 34 of the Convention requires that the businesses should be 'non-governmental organisations'. To be able to claim to be a victim of human rights infringement (NGO), the business entity must be able to prove that it is: 1) completely independent of the state; 2) governed essentially by company law; 3) subject to the jurisdiction of the ordinary rather than the administrative courts. Equally, the business subject is 'governmental organisation' when it: 1) exercises governmental powers; 2) enjoys any other powers beyond those conferred by ordinary private law in the exercise of its activities; 3) is established for public-administration purposes. The distinction between the 'governmental' and 'non-governmental' organisations is of key importance in determining the status of the company status in the proceedings before the Court. Human rights holders must possess features of 'non-governmental' organisations. In view of Article 1 of the Convention, the position of businesses as human rights obligors is difficult to define. The analysis demonstrates that both 'governmental' and 'non-governmental' business entities may play the role of human rights obligors.

Regarding the rights of business entities under the Convention, the author proposes to distinguish between human rights, such as freedom of speech, and procedural rights, e.g. the possibility to ask for free legal aid. The existence of human rights of NGO business entities has been proven by numerous examples from the case-law. The paper provides an exhaustive list of the provisions of the Convention envisaging their human rights in Section II. Therefore, it is absolutely clear that business entities may act as human rights holders based on this international treaty. The more difficult task is to prove that business entities may also play the role of human rights obligors.

For the purposes of identification of possible obligations of businesses, it was necessary to explain the difference between different types thereof. Two types of classification of obligations under the Convention come into consideration. The first type involves division into human rights obligations and procedural duties. The second group distinguishes between direct and indirect obligations. In view of this division, the author proves that the procedural duties, such as the need to comply with the six-month rule, may be seen as direct procedural obligations imposed on business entities by the text of the Convention. Regarding the human rights obligations, the author agrees that these direct obligations under the Convention may be imposed only on the states. With regard to business subjects, the research showed that the Convention does not impose on them such obligations directly. However, an analysis of the case-law of the Court allows us to presume that its judgments may lead to imposition by the states of duties on companies at the domestic level. These duties aim to regulate the conduct of businesses in order to comply with the norms of the Convention and may be seen as indirect human rights obligations. This study provides the list of the provisions of the Convention from which these indirect obligations of businesses may be derived.

5. Conclusions

On the whole, the research demonstrates that the Convention can contribute to establishing human rights obligations for business entities. These obligations are indirect and may be introduced through the applications of victims to the Court alleging breach of their rights by corporations in view of the positive obligations of the state-parties to the Convention. The state may impose the obligations in issue additionally by adopting relevant legislation as a preventive measure for breaches of the Convention.

This proves that business entities may have not only certain rights under the Convention, but also obligations. The case-law of the Court provided in the paper confirms that business entities may be seen as performing the roles of both human rights holders and human rights obligors. It is, however, important to distinguish between 'governmental' and 'non-governmental' business entities, direct and indirect obligations, procedural and human rights duties.

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