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Corporate obligations concerning socio-economic rights: An introduction

Jernej Letnar Čerňič

ABSTRACT

Participants in the global economic and financial milieu directly affect the day-to-day level of respect and protection of the human rights of vulnerable individuals. On one hand, corporations create jobs, tax revenues and economic growth, while, on the other, some of them can be criticised for their lack of respect for human rights. The dilemma that arises is this: how should transnational and other corporations most effectively respect and protect human rights without compromising their primary business objectives? In this way, this article examines and proposes theoretical framework for corporate obligations concerning socio-economic rights.

Keywords: corporations, socio-economic rights, responsibility, victims

Obveznosti gospodarskih družb za uresničevanje ekonomskih in socialnih pravic : uvod

POVZETEK

Udeleženci v svetovnem gospodarskem in finančnem okolju vsakodnevno neposredno vplivajo na spoštovanje in varstvo človekovih pravic ranljivih posameznikov. Na eni strani korporacije ustvarjajo delovna mesta, davčne prihodke in gospodarsko rast, medtem ko lahko nekatere povzročajo kršitve človekovih pravic. Dilema, ki se zastavlja, je: kako naj transnacionalne in druge korporacije najbolj učinkovito spoštujejo in varujejo človekove pravice,

ne da bi ogrozile svoje primarne poslovne cilje? Pričujoči članek zato obravnava in predlaga teoretični okvir za pravne obveznosti na področju socialno-ekonomskih pravic.

Ključne besede: korporacije, socialno-ekonomske pravice, odgovornost, žrtve

A. Introduction

Participants in the global economic and financial milieu directly affect the day-to-day level of respect and protection of the human rights of vulnerable individuals. On one hand, corporations create jobs, tax revenues and economic growth, while, on the other, some of them can be criticised for their lack of respect for human rights. The dilemma that arises is this: how should transnational and other corporations most effectively respect and protect human rights without compromising their primary business objectives? This question is connected with the equally important question of whether and where victims can enforce corporate accountability for human rights abuses. Individuals that have suffered human rights violations allegedly committed by corporations often face extreme difficulties in bringing their claims before a court of law, let alone proving them. If they or their relatives are lucky, they can claim compensation from the state, but in the majority of cases they are left empty-handed. Corporations have, in the past decade, become increasingly aware of their corporate, social and human responsibilities. However, with the exception of a few isolated cases, access to justice has barely improved. In most cases of human rights violations by corporations the victims remain without the right to effective judicial protection.

There have been many recent developments in the field of business and human rights over the past few years. This article does not seek to provide a comprehensive description of recent developments, as this have been in detail elsewhere.¹ Rather, it analyses potential possibilities for progress in the field of business and socio-economic human rights. Several theoretical approaches have been presented in the past in the field of business and human

¹J. Letnar Čeranič and T. Van Ho, 'Introduction', in J. Letnar Čeranič and T. Van Ho (eds), *Direct Corporate Accountability for Human Rights* (Oisterwijk (The Netherlands): Wolf Legal Publishers, 2015) pp.1-23.

rights.² However, this article examines and proposes theoretical framework for corporate obligations concerning socio-economic rights. What is clear is that any framework which hopes to be successful has to give voice to victims and enable them access to the courts, while simultaneously considering the perspectives and interests of businesses. Due diligence standards and internal grievances procedures may provide some avenues, however it is doubtful that they can bring justice to the victims of human rights violations. This article is divided into three main parts. Section B provides an assessment of the current state-of-the art concerning corporations and socio-economic rights. Section C examines the nature and scope of corporate obligations concerning socio-economic rights and proposes a new theoretical framework for business and socio-economic human rights. Section D argues for a more pluralistic debate on the topic, which would involve employing a holistic approach, taking account of all the different strategies available in the field of business and human rights. The conclusion thereafter offers some bullet points suggesting possible ways forward.

B. Corporations and Socio-economic rights

Corporations play an important role in the realisation of the economic and social rights of their employees and of society as a whole.³ For example, they are responsible for guaranteeing adequate labour conditions to their employees, and they may be involved in the provision of water services to communities. They can become violators of economic and social rights, for example where their activities lead to environmental pollution, or where

² S. R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) *Yale Law Journal*, Vol. 111 pp. 443-545. Andrew Clapham, *Human Rights Obligations of Non-State Actors* 266-270 (2006); N. Jägers, *Corporate Human Rights Obligation: in Search of Accountability* 75-95 (2002); P. T. Muchlinski, *Multinational Enterprises and the Law* 519-524 (2d ed. 2007); D. Kinley and J. Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 *Va. J. Int'l L.* 931, 961-993 (2004); N. Stinnet, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 *B.C. Int'l & Comp. L. Rev.* 211, 217-18 (2005); D Weissbrodt & M Kruger, *Current Development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 *Am. J. Int'l L.* 901, 919-20 (2003). L. Van den Herik, J. Letnar Čerňič, 'Regulating Corporations under International Law: from Human Rights to International Criminal Law and Back Again' (2010) 8 *Journal of International Criminal Justice* 725.

³ See Business and Human Rights Resource Centre, *Support for initiatives promoting development and economic/social rights*, <http://business-humanrights.org/en/company-policy/steps/steps-to-promote-rights-in-wider-society/support-for-initiatives-promoting-development-and-economicsocial-rights>.

their products are detrimental the health of consumers. It will be argued that corporations bear a certain responsibility for the realisation of economic and social rights, which can be derived from international as well as from national (constitutional) law. The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides in Article 2(1) that states shall undertake “steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁴ This provision includes most common characteristics of economic and social rights including that their full realization is to be achieved *progressively* depending on the available financial resources of a state.⁵ However, the phrase ‘maximum available resources’ does not refer only to financial capabilities of a state, but also to those of the international community and corporations on the basis of obligations of ‘international assistance and co-operation’.⁶ Corporate obligations under economic and social rights are therefore not merely an abstract matter. On the contrary, the present study analyses an issue of salient meaning for thousands of victims of direct or indirect corporate human rights violations around the world. A number of allegations have been made against corporations in relation to violations of economic and social rights. In recent decades there has been a growing body of evidence that the impact of corporate activities on poor communities in developing countries can result in human rights violations.⁷

Positive obligations under economic and social rights are most often connected with financial resources. Therefore, insisting on the immediate realization of the core of economic and social rights in every situation may impose an unjustified burden on states that have been facing systematic and long-term public resources

⁴ *International Covenant on Economic, Social and Cultural Rights*, GA res 2200A (XXI), 21 UNGAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.

⁵ R. E. Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social and Cultural Rights’ (1994) 16 *Human Rights Quarterly* 694.

⁶ *General Comment No 3, para 13. See M. Sepúlveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp, Hart/Intersentia, 2003) 370–77.

⁷ J. Letnar Čerňič and T. Van Ho (eds), *Direct Corporate Accountability for Human Rights* (Oisterwijk (The Netherlands): Wolf Legal Publishers, 2015).

shortages. For instance, some states and even some corporations can provide free elementary education, whereas others, even the least developed states, must charge for attending primary school simply due to lack of available public financial resources even though charging fees is often counterproductive and the obligation to provide free education falls within core obligations under the ICESCR and is therefore not dependent on available resources.⁸ Some commentators claim that international human rights law therefore traditionally places only obligations of conduct on states, not obligations of result. However, the views of the ESCR Committee and scholarship on immediate obligations of result challenge such an assumption.⁹

Economic and social rights have for a long time been considered as secondary and even nowadays in practice both sets of rights are still not placed on an equal footing. Economic, social and cultural rights include rights to housing, food, education, water and health.¹⁰ This set of rights complements the so-called civil and political rights.¹¹ As Scheinin notes, ‘there is no water-tight division between different categories of human rights’.¹² However, despite claims that both sets of rights are of equal importance and interdependent, civil and political rights are more solidly established under international and national law.¹³ Economic, social and cultural rights generally have a programmatic nature and are not always directly justiciable to the same extent that civil and political rights are.¹⁴ And while an extensive body of case law has come to existence in relation to civil and political rights, courts are still very reluctant to try cases on the basis of economic, social and cultural rights. This refers to the question of the so-called ‘justiciability’ of economic, social and cultural rights, the question of whe-

⁸ Committee on Economic, Social and Cultural Rights, *General Comment 11, Plans of action for primary education* (Twentieth session, 1999) UN Doc E/C.12/1999/4 (1999), para 7.

⁹ P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156–229. See also Sepúlveda (n 24).

¹⁰ A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, Martinus Nijhoff Publishers, 2001) 21, 22; See also Amnesty International, *What are Economic, Social and Cultural Rights?* www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr, accessed 30 April 2013.

¹¹ M. Scheinin, ‘Human Rights Committee: Not Only a Committee on Civil and Political Rights’ in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 540, (Cambridge, Cambridge University Press, 2008).

¹² *ibid.*

¹³ M. Scheinin ‘Economic and Social Rights as Legal Rights’ in Eide, Krause and Rosas (eds) (n 27) 41, 53.

¹⁴ *ibid.*

ther these rights are enforceable before a court of law.¹⁵ Yeshanew defines justiciability as rights being 'subjected to a judicial or quasi-judicial procedure of enforcement.'¹⁶ Scheinin argues that 'the problem relating to the legal nature of economic and social rights does not relate to their validity but rather to their applicability'.¹⁷ The central question of economic and social rights therefore lies in their enforcement or justiciability. However, the Optional Protocol to the ICESCR entered into force on 5 May 2013, thereby recognising the political acceptance by states of their justiciability.¹⁸ Further, the European Committee of Social Rights examines more and more collective complaints. What is more, the body of case law in domestic jurisdictions is growing substantially.¹⁹

C. The Nature and scope of corporate obligations concerning socio-economic rights

This paragraph briefly explains a tripartite typology of human rights obligations, including corporate human rights obligations.²⁰ The tripartite obligations to respect, protect and fulfil economic and social human rights apply universally to all rights and entail a combination of negative and positive duties.²¹ This tripartite typology

¹⁵ F. Coomans (ed), *Justiciability of Economic, Social and Cultural Rights* (Antwerp, Intersentia, 2006). See also M. Langford, 'Justiciability of Social Rights: From Practice to Theory' in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press, 2008).

¹⁶ S. A. Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System* (Cambridge, Intersentia, 2013) 37.

¹⁷ C. Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 2 *Erasmus Law Review* 379.

¹⁸ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Doc.A/63/435; C.N.869.2009.TREATIES-34, 11 December 2009, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-3-a&chapter=4&lang=en, accessed 15 May 2013.

¹⁹ M. Craven and M. Langford, *The International Covenant on Economic, Social and Cultural Rights*, revised edn (Oxford, Oxford University Press, forthcoming 2014). K. Young and J. Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal*; F. Coomans, 'Justiciability of the Right to Education' (2009) 2(4) *Erasmus Law Review* 427–43.

²⁰ J. Pablo Bohoslavsky, J. Letnar Čerňič (eds.), *Making Sovereign Financing and Human Rights Work*, Oxford, Hart, 2014.

²¹ See generally African Commission on Human and Peoples' Rights, *Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria)* 44, ACHPR/COMM/AO44/1 (17 May 2002) (reporting that the Commission interpreted the African Charter for Human and Peoples' Rights and developed a four-fold typology of human rights obligations in the case of Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, (Communication 155/96, 27 May 2002)). The Commission held that 'internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect,

logy of human rights obligations refers, under traditional human rights doctrines, to state obligations.²² However, the fact that the state is the bearer of human rights obligations does not imply that only the state has such obligations.²³ This includes also obligations of corporations to observe the reasonable minimum core of economic and social rights.²⁴

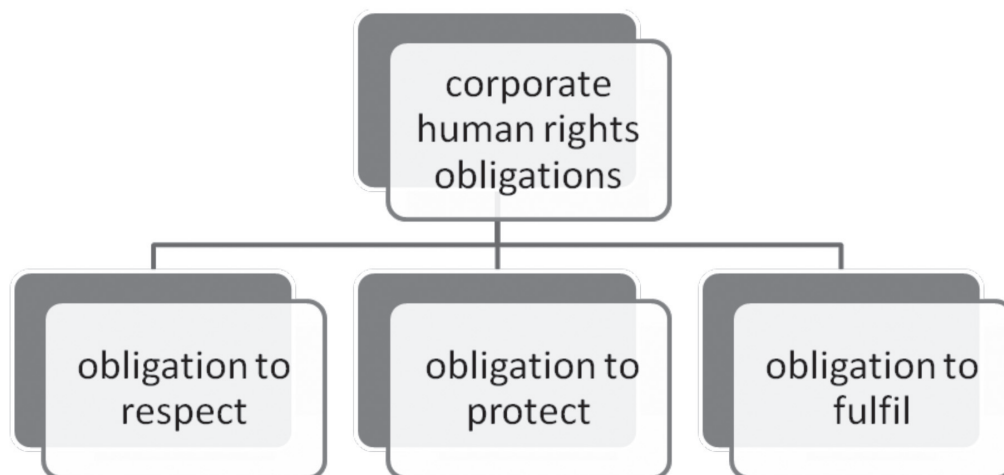


Figure 1 : Corporate tripartite human rights obligations

protect, promote, and fulfil these rights'. *ibid.*

²² See International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 6 (26 January 1997), available at <http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgeleerdheid/organisatie/onderdelen/studieeeninformatiecentrummensenrechten/publicaties/simspecials/20/Documents/20-01.pdf>, accessed 30 March 2013 (requiring states responsible for violating international legal obligations to establish mechanisms for investigating, prosecuting and correcting such violations); UN Comm on Economic, Social and Cultural Rights, General Comment No 12: The Right to Adequate Food (Art 11) para 15 (12 May 1999) (explaining that the obligation to 'respect' imposes on states a duty not to take any measures that in any way deprive protected parties of the right concerned); H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, Princeton University Press, 1980) observing the tripartite typology of duties to include (1) duties to avoid the deprivation of the right concerned, (2) duties to protect rights holders from deprivation, and (3) duties to aid rights holders who have been deprived).

²³ See A. Rosas and M. Scheinin, 'Categories and Beneficiaries of Human Rights' in R. Hanski and M. Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, 2nd edn (Turku, bo Akademi University, 1999) 57–58.

²⁴ See A. Nolan, Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland, *Int J Constitutional Law* (2014) 12 (1): 61–93. See also O. K. Osuji, U. L. Obibuaku, *Rights and Corporate Social Responsibility: Competing or Complementary Approaches to Poverty Reduction and Socioeconomic Rights?* *Journal of Business Ethics*, 2014, pp 1–19.

Corporate Obligation to Respect

Corporate obligation to respect means that financial corporations shall refrain from interfering in the enjoyment of the reasonable minimum essential level of economic and social rights.²⁵ This rule derives from the ancient Roman principle *sic utere tuo ut alterum non laedes*.²⁶ This obligation to respect also obliges the corporations to effectively recognise economic and social rights of individuals. The obligation to respect means that corporations must undertake due diligence, ensuring not only that they comply with human rights obligations concerning economic and social rights, but also that they do everything possible to avoid causing harm to economic and social rights. *Mutatis mutandis*, a corporation would need to ensure that 'every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations'.²⁷ The Guiding Principles on business and human rights note in paragraph 11 that corporations 'should respect human rights', which 'means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.²⁸ Paragraph 11 does not include the word 'shall', whereas, for instance, the 2008 Ruggie report recognised that 'the baseline responsibility of companies is to respect human rights'.²⁹ In contrast, as noted above, several international documents, national legal orders and scholars argue that corporations already have human rights obligations. For instance, the United Nations Guiding Principles on extreme poverty state that 'business enterprises, have, at the very minimum, the responsibility to respect human rights'.³⁰

²⁵ See *International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 158, at 7, UN Doc HRI/GEN/1/Rev.1 (12 May 1994).

²⁶ See E. E. Ruddick, 'The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced' (1997) 77 *Boston University Law Review* 429, 471 n 231.

²⁷ General Comment No 19, para 60.

²⁸ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) (by John Ruggie).

²⁹ 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, para 54.

³⁰ The United Nations guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/HRC/21/39, 18 July 2012, para 100.

Further, the OECD Guidelines for Multinational Enterprises noted that both states and enterprises ‘should’ respect human rights ‘within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate’, including domestic human rights obligations.³¹ Whereas the text of the Guidelines employs the verb *should*, the Commentary on the Guidelines suggests that enterprises have an obligation to respect human rights because ‘respect for human rights is the global standard of expected conduct for enterprises’.³² The nature of obligations to respect requires that corporations avoid causing harm.³³ However, enterprises should only respect human rights ‘within the context of their own activities’.³⁴ They should ‘avoid causing or contributing to adverse human rights impacts and address such impacts when they occur’.³⁵ Further, the Guidelines oblige enterprises to conduct due diligence ‘as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts’.³⁶ The measures that corporations can adopt to ensure respect for the economic and social rights of the population of borrowing states include acknowledging the human rights in internal policies and their codes of conduct, constantly and consistently examining human rights situations where economic and social rights are at stake, effectively monitoring policies that protect the reasonable minimum core economic and social rights of individuals in the borrowing state, and implementing an effective monitoring system to ensure that human rights policies relating to economic and social rights are being implemented. Corporations are also obliged to prevent and investigate violations, address complaints brought by victims, and potentially provide reparations for harm and injuries caused.³⁷

Corporate Obligation to Protect

A corporation’s obligation to protect economic and social rights includes the obligations to protect the individual’s enjoyment of

³¹ *OECD Guidelines*, 31 (Human Rights).

³² *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, 37.

³³ *OECD Guidelines*, 31 (Human Rights).

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *Guiding Principles on Business and Human Rights*, 15 and 22.

economic and social rights, particularly of their reasonable minimum core, and to support the protection of economic and social rights by employing its expertise and resources to protect. Obligation to protect means not only that corporations must not interfere with economic and social rights of individuals of the borrowing state, but it must request that its business partners throughout their supply chain also comply with them. In order to ensure that corporations ensure such commitment a due diligence or human rights impact assessment should be conducted prior to adopting a decision to proceed with project.³⁸ Insistence on such a procedure may seem at first illusionary, but it is necessary to make sure that private lenders do not eye only potential profits and totally disregard social and economic rights. The corporate obligation to protect also includes a commitment devote the necessary human resources to complying with the reasonable minimum core of the economic and social rights.

Corporate Obligation to Fulfil

The third category of corporate obligations concerning economic and social rights includes the obligation to fulfil, which is defined as a positive obligation. It is further divided into obligations to facilitate, provide and promote.³⁹ It depends on the available financial resources of the corporation, but not only this. It requires that the corporation takes active measures to ensure the availability, accessibility and affordability of economic and social rights.⁴⁰ Corporations are therefore obliged to work towards abolition of obstacles for the enjoyment of human rights.⁴¹ For instance, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights note in principle 28 that '[a]ll States must take action, separately, and jointly through international cooperation, to fulfil economic, social

³⁸ *Guiding Principles on Business and Human Rights 15 and 17.*

³⁹ *Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Twentieth session, 1999) UN Doc E/C.12/1999/5 (1999) para 15.*

⁴⁰ See generally 'Economic, Social, and Cultural Rights: Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', Economic and Social Council, UN Doc E/CN.4/Sub.2/2003/12/Rev.2, 4 (2003). The Maastricht principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 29 February 2013, www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf, accessed 30 June 2013.

⁴¹ QUB Budget Analysis Project, *Budgeting for Economic and Social Rights: A Human Rights Framework* (Belfast, QUB School of Law, 2010) 43.

and cultural rights of persons within their territories and extraterritorially . . .'.⁴² Such obligations apply under the qualifying condition under Principle 31, which argues that 'a State has the obligation to fulfil economic, social and cultural rights in its territory to the maximum of its ability'.⁴³ *Mutatis mutandis*, the obligation to fulfil of the private lenders would mean that corporations must contribute to the enjoyment of economic and social rights of the individuals in a borrowing state when lending financial resources and strive to abolish obstacles to the enjoyment of economic and human rights. Another way would involve the corporation providing its own financial resources in order to guarantee reasonable minimum economic and social rights, for instance in a particular geographical area or with regard to particular social rights. However, a reasonable approach should be employed when examining the corporate obligation to fulfil economic and social rights. Corporations are not expected to take the role of the state, but to do what they can. States are and should be primarily responsible for fulfilling this obligation. However, a corporation, such as Royal Dutch Shell in Ogoniland, may become the primary holder of an obligation to fulfil economic rights in the context of a failed state where there is no governmental control or no efficient authority to protect economic and social rights and where corporations were asked to provide public functions on behalf of state.⁴⁴ A corporation may assume some of such obligations when the borrowing state cannot anymore guarantee economic and social rights. The size and availability of corporate financial resources will play a large role in meeting these standards to protect economic and social rights. While the resources available for fulfilling human rights obligations may not be as plentiful in small corporations as in large corporations, corporations may adopt such policies to the maximum extent given their available resources. Given the above, such obligations also have implications beyond the legal sphere in the field of ethical and moral obligations. This section has shown

⁴² *The Maastricht principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 29 February 2013, 28.

⁴³ *ibid*, 31.

⁴⁴ *The Maastricht Principles 12* (providing that non-state actors are responsible for fulfilling the obligations of the state when they are acting in the capacity of the state). See also Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN GAOR, Human Rights Council, 17th Sess, Agenda item 3, principles 2, 3–10, UN Doc A/HRC/17/31 (2011) (John Ruggie). A. Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) *Human Rights Law Review* 225.

that financial corporations have tripartite obligations to respect, protect and fulfil the reasonable minimum core of economic and social rights of individuals

D. The way forward

Despite very slow progress in the global business environment, the majority of corporations now recognise that they have a role to play in guaranteeing socio-economic rights in a given society. Such a development has not occurred overnight and would not have taken place if it had not been for various industrious efforts in international civil society to regulate corporations. Those efforts later resulted in the adoption of several international, mostly quasi-legal, documents. A million dollar question evolves around the question how to effectively move forward? How to make corporations more responsible and victims' access to justice more simple and effective? Responsible corporations that observe human rights are arguably those who employ preventive measures and do not shy away from proposals for a more effective enforcement of accountability. Allen observes that '...corporations as independent social actors...do not simply owe contract or other legal duties to those affected by its operations, but owe loyalty in some measure to all such persons as well'.⁴⁵ Porter and Kramer argue that 'strong regulatory standards protect both consumers and competitive companies from exploitation'⁴⁶ and rightly observe that 'by providing jobs, investing capital, purchasing goods, and doing business every day, corporations have a profound and positive influence on society'.⁴⁷ It appears that a corporation should pursue a substantive dimension of corporate responsibility as opposed to employing corporate responsibility as a camouflage for public eyes. Finally, Porter and Kramer note that corporations must start thinking in terms of 'corporate social integration' rather than in terms of 'corporate social responsibility'.⁴⁸ In this way, corporations would integrate human rights in their business policies without moving away from their primary objectives of generating

⁴⁵ W. T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *Cardozo Law Review* (1992), 271.

⁴⁶ M. E. Porter and M. R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, *Harvard Business Review*, December 2006. 83.

⁴⁷ *Ibid.* 91.

⁴⁸ *Ibid.* 92.

revenues and profit. Responsible corporations would take all the necessary and appropriate measures to prevent human rights violations, as they would submit themselves to independent due process to examine whether they or their executive and employees have committed any abuses. Those changes can occur through the combination of voluntary and binding approaches. In this way, they may be able to attract and keep consumers and employees if they comply with human rights.

A holistic approach to corporate accountability for human rights abuses suggests that responsibility can be established against a corporation, a state and an individual at the same time. For example, the concurrence between individual and corporate criminal responsibility in national legal orders is theoretically feasible. One example is the parallel attribution of complicity in crimes against humanity in Iraq to Mr Van Anraat and his corporation.⁴⁹ Such an initiative would have to be based on a combination of binding/voluntary and legal/non-legal approaches.⁵⁰ The following four issues are particularly important in strengthening the field of business and human rights: preventative (corporate) measures (due diligence), victims' access to justice, corporate accountability/liability and the extraterritorial application of national administrative, criminal and civil laws. States are under a primary obligation to protect human rights, not only within their territory, but also outside it where they exercise control over their corporations ("their" referring to corporations registered on their territory). National legal systems have to do a better job of securing human rights against the activities of corporations. However, corporations also have to meet their obligations and enable victims to enforce their potential accountability for human rights abuses. Human rights obligations to respect, protect and fulfil human rights against corporate violations do not rest at this point of time only with states, but also with corporations, and to some extent with individuals. Those obligations are independent, inter-dependent, equal, interrelated and are not placed in any particular order. All in all, there exists plurality of human rights obligations of corpo-

⁴⁹ *Public Prosecutor v Van Anraat*, LJN: BA4676, Court of Appeal The Hague, 2200050906 – 2, 9 May 2007. For a detailed discussion, see H. van der Wilt, *Public Prosecutor v Van Anraat, Judgment of The Hague Court of Appeal*, LsoJN BA4676, 2200050906-2, *Oxford Reports on International Law in Domestic Courts*; ILDC 753 (NL 2007), 9 May 2007, <http://www.oxfordlawreports.com/>.

⁵⁰ See also K. W. Abbott and D. Snidal, *Hard and Soft Law in International Governance*, Vol. 54, No. 3, *Legalization and World Politics (Summer, 2000)*, pp. 421-456.

rations both in domestic, international and internal corporate setting. Corporate, state and individual accountability, can work together to establish accountability for corporate human rights abuses. Ratner recognized this when he noted that »challenge is to construct a theory both down from state responsibility and up from individual responsibility ... Some principles of state and individual responsibility (both primary and secondary rules) are quite similar, permitting us to rely upon them in the corporate context. Such a methodology acknowledges that ... a corporation is, as it were, more than an individual and less than a state.«⁵¹ It appears to be more effective to take a holistic approach and make a range of plural approaches and sanctions, civil and criminal, individual, state and corporate, available to regulators to allow for a dynamic and integrated approach to enforcement.

E. Conclusion

The enjoyment of economic and social rights is crucial for the survival and well-beings of an individual. Not only states but also corporations have obligations to respect, protect and fulfil them. Corporations are required to include them in their business. They should not infringe upon the reasonable minimum core of economic and social rights. At the same time, victims of alleged human rights violations need to be provided with access to justice and the enforcement of corporate responsibility and accountability by an independent and impartial tribunal or similar forum. Corporations should be aware of, not only legal, but also moral and ethical obligations to effectively address victims' concerns. Victims have to continue to raise their voice and stand up for their rights. They require the positive and effective protection of their individual rights to be able to survive in the long term and to resist continuous attempts to abuse their rights. Individuals should reasonably expect that states, corporations and non-state actors observe human rights.

In conclusion, corporations should be aware that they do not operate in a vacuum, completely exempt from all civilization's values and the principles of human rights and fundamental freedoms. In order to strengthen business and human rights worldwide, sta-

⁵¹ S. Ratner, *op.cit.*, 496.

tes and corporations must improve their performance, become more transparent, and enable effective enforcement of corporate accountability for alleged socio-economic rights impacts. In the same direction must also come reform of the legal underpinnings of national legal systems so that the individuals have the right to full judicial protection against corporate socio-economic impacts. All in all, corporations can no longer hide behind the window-dressing of their socio-economic rights policies, but are subject to fundamental constitutional principles and rules to protect human rights and fundamental freedoms.

