

Corporations and Human Rights: Do They Have Obligations?

International law has traditionally been understood as a system set up by states to regulate the affairs between them.¹ Especially, since the Second World War, states have committed themselves in a variety of international instruments to ensuring that the fundamental rights of individuals are realized.² This has led to an understanding that individuals are the bearers of rights and States are the sole agents who must perform the obligations that flow from these entitlements. Those State obligations have been seen to involve both duties not to harm rights (negative duties) as well as duties actively to take measures to help ensure these rights are given effect to (positive obligations).³

This traditional understanding of the State's role in relation to human rights has been challenged in this globalized world by the growth and power of a range of non-state actors with the capacity to impact significantly upon human rights. These include multi-national corporations, non-governmental organisations and groups fighting in armed conflicts. These groups create a number of difficulties for the traditional view that States are the sole agents bound by human rights obligations.

Clearly, part of the reason for a business and human rights treaty would be to ensure that business plays its part in relation to human rights. There is, however, disagreement about how to accomplish that end. This short paper outlines two different positions or models on the manner in

¹ This building block has been written by Prof David Bilchitz, University of Johannesburg and Carlos Lopez, International Commission of Jurists with the input of Prof Surya Deva, City University of Hong Kong. Some material is drawn from forthcoming articles by D Bilchitz 'Corporations and the Limits of State-based Models For Protecting Fundamental Rights in International Law' (Indiana Journal of Global Studies) and 'the Necessity for a Business and Human Rights Treaty' (Business and Human Rights Journal).

² The importance of fundamental rights to the new world order after the Second World War is already recognised as one of the purposes of the United Nations in the United Nations Charter Article 1 available at <http://www.un.org/en/documents/charter/chapter1.shtml>.

³ HENRY SHUE BASIC RIGHTS 52 (1980) is credited with developing the idea that '[t]he complete fulfilment of each kind of right involves the performance of multiple kinds of duties'. This notion has been taken up in international human rights law with various United Nations Committees recognizing, for instance, that states have a range of duties to respect, protect, promote and fulfill fundamental rights.

which any potential treaty should address the obligations of business. It will also seek to evaluate briefly some of the benefits and disadvantages of these views. We look forward to consulting with CSOs about what their preferences would be in that regard.

Model 1: The State ‘Duty to Protect’ or Indirect approach

The first approach involves retaining the view that only states are bound by human rights obligations. Nevertheless, the way in which we define these obligations entails the state taking the necessary measures to impose obligations on businesses. Thus, businesses have no obligations under international human rights treaties directly to realise fundamental rights. Instead, the state is obliged to protect individuals from harms caused by private parties: : to impose obligations where necessary on private parties through its ability to pass laws and regulations; and to investigate and create remedies for any potential violations. This is an ‘indirect’ model as businesses only acquire obligations *through* state action.

The Human rights Committee thus defines, in General Comment 31, the state duty to protect as follows: “violations of rights may arise as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.⁴ Thus, the responsibility of States is not for the violations committed by a private agent, but for its own failure to take the necessary measures to prevent the violation. This doctrine is founded on longstanding jurisprudence by regional human rights courts and international bodies.⁵ The obligation to protect is also one of the pillars of the UN *Protect, Respect and Remedy* Framework in 2008, and of the *Guiding Principles* in 2011. Foundational Principle 1 recognises that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises....”.⁶

⁴ General Comment 31 The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, para. 8;

⁵ *Velasquez Rodriguez case*, Judgment of 29 July 1988, Inter-American Court of Human Rights, paras. 166-174; *X and Y c The Netherlands*, 91 ECHR Series A (1985), para. 23; *Osman v United Kingdom*, judgement 28 October 1998, at p. 522.

⁶ See also The UN Committee on Economic, Social and Cultural Rights’ *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights* UN. Doc. E/C.12/2011/1, 12 July 2011; The Committee on the Rights of the Child’s General Comment 16 (GC 16) *On State obligations regarding the impact of the business sector on children’s rights* para 24; Maastricht Principles on Extraterritorial Obligations Principles 24 and 25.

An example of this approach being adopted in a recent treaty is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography –OPSC. Article 3(4) of this protocol,⁷ provides as follows:

“Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article [sexual exploitation, transfer of organs, forced labour, illegal adoption of a child, child prostitution. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.”

This model was taken from the UN Convention on Transnational Organized Crime. Here, we see that the state has the obligation to create liability and cognate remedies.

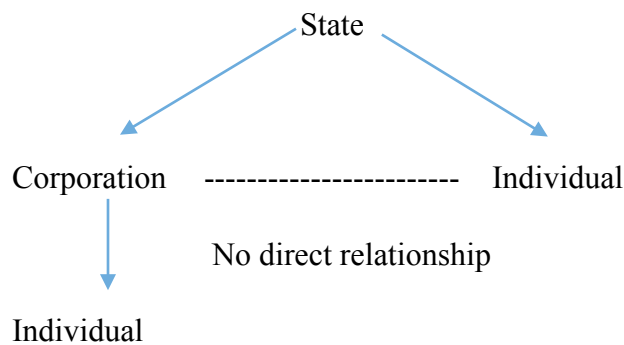


Fig. 1 – the indirect duty relationship illustrated in international law

Evaluation of Model

Key Advantages

⁷ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 3(4) of the Optional Protocol builds on the model previously adopted in the UN Convention on organized crime and the Convention against corruption, among others. See also Council of Europe, Convention on the protection of the environment through criminal law, adopted on 4 November 1998, Strasburg, <http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm> (Accessed 28 March 2014). See also Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (article 26 and 27); The Convention on Action Against Trafficking in Human Beings (articles 22 and 23); The Convention on Cybercrime (articles 12 and 13); the Criminal Law Convention on Corruption (articles 18 and 19); Convention on preventing and combating violence against women and domestic violence (article 12.2)

- The model is currently one that is utilised in international law in various spheres and does not require going beyond readily accepted legal principles in the international human rights law sphere. It would require substantial innovation and development of the grounds of corporate legal liability under national law, and the grounds upon which to attribute responsibility to corporations.
- The state will be necessary to ensure the effectiveness of any international direct obligation. Whenever the international community through international treaties intends to effect change in a given situation (i.e. corruption, organized crime, trafficking, etc) it addresses national States. International legal obligations are mostly on States. Absent a global enforcement mechanism, State action is necessary to effect changes in national laws and enforcement, and to generalise any positive outcomes that may have been achieved in relation to remedies for specific victims.
- Even if there are direct obligations model (elucidated below), there will be a strong and necessary reliance on state enforcement. This is so even when treaties are ratified and can be utilised directly by national courts and tribunals.

Key Disadvantages

- States are often unable or unwilling to act against powerful corporate actors. Major corporations operate across frontiers, with size and structures that far oversize the economies and the capacity of states, and can escape often from national regulation and accountability. The states' apparatus, staff and leaders may be deeply corrupted or penetrated by corporate interests. In these circumstances, the State cannot longer be expected to perform its duty to protect as originally designed under international human rights law.
- The model allows corporations to claim they lack any obligations in relation to human rights where the state fails to enact obligations upon them.
- It undermines the universality of the obligations upon corporations since states may enact different frameworks and obligations. The treaty can only articulate very general standards that can be enforced differently by states. Since corporate obligations depend upon what the state enacts, the obligations of a corporation will depend upon the jurisdiction in which they are registered despite the fact that fundamental rights protect the same interest of individual everywhere.

- Accountability is placed on the wrong party: states are held responsible for failing to protect individuals where corporations have violated their rights; but, corporations walk away without any liability where the state fails to enact proper laws or enforce them.⁸
- If a corporation lacks any obligations in relation to fundamental rights in the absence of state laws, it is difficult to hold that corporation to account in another state where the human rights violation is not addressed in the state where it took place.
- The model often pays little attention to determining what the obligations of corporations should be in terms of national law as it simply leaves this to the discretion of the state. Its focus is on the obligations of the state, not the obligations of the corporation. The state may thus lack guidance as to how to define the nature and extent of the obligations of corporations.

Model 2: Direct Obligations upon Corporations

Increasingly, there have been calls to move beyond the ‘indirect’ model to recognise that human rights treaties may impose direct obligations upon corporations. Indeed, it may be argued, that this is one of the key advances that can be attained by a business and human rights treaty to recognise expressly such obligations. Two arguments have been made as to why such obligations already exist in international law.

⁹ First, fundamental rights are understood in international human rights treaties to be nature rooted in a recognition that all individuals have a fundamental ‘dignity’ or ‘worth’.¹⁰ That dignity requires respectful treatment for the most important interests relating to the quality of life of an individual: these include interests in basic freedoms – such as freedom of expression and association - and those relating to individual well-being such as health, and housing. No-one, no matter who they are, is allowed to harm these interests and, it is possible that many different agents may be required to play a part in realising them. Once we recognise that corporations are powerful agents that can both imperil fundamental rights and assist in their realisation, there is no good reason why they should lack, at least some obligations in relation to such rights.

A second argument attempts to consider the foundations of the state duty to protect individuals from harm by other individuals (outlined above). The question raised is why does the state have such a duty? The reason seems to lie in the capacity of other individuals to harm the fundamental rights of others (or to

⁸ See, for instance, the focus in *Socio-Economic Rights Action Centre v Nigeria* Communication 155/96, African Commission on Human and Peoples’ Rights (2001) AHRLR 60

⁹ D Bilchitz has made these arguments in D Bilchitz ‘A chasm between “is” and “ought”? A critique of the normative foundations of the SRSG’s Framework and Guiding Principles’ in S Deva and D Bilchitz (eds). *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) 112ff.

¹⁰ See the main human rights treaties including the International Covenant on Civil and Political Rights available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> and the International Covenant on Economic, Social and Cultural Rights available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

assist in their realisation). Yet, it is hard to see why the state should have any duty to intervene and impose obligations unless the individuals themselves are under a prior duty not to harm the fundamental rights of others (or to assist in their realisation). The state may be the most powerful enforcer of obligations but it is unclear why it should create a new set of obligations upon private parties unless there is already a good case that they exist. The state is, on this argument, an unnecessary intermediary for the creation of these obligations though it may be of importance in enforcing those very obligations.

These arguments create a case for direct obligations upon private parties such as corporations under international law that flow from the human rights treaties which are already central to this system. At the same time, they are far from universally recognised and the benefit of a treaty would be to concretise this recognition in international law. There are also a number of other arguments about the important consequences of such a model which will be dealt with under advantages.

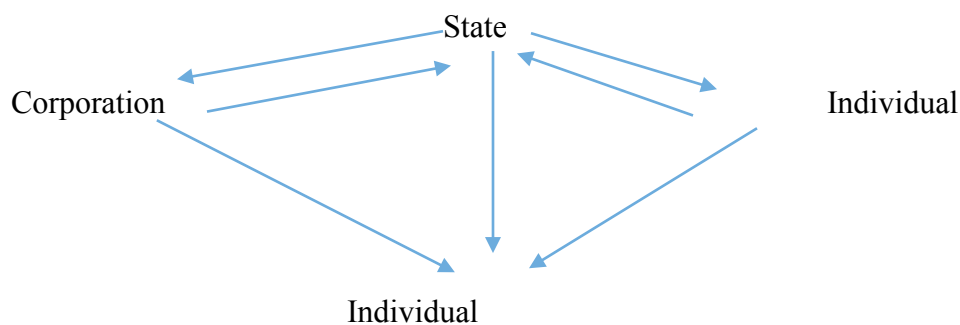


Fig 3: Multi-agent model of fundamental rights obligations which includes direct obligations of corporations in international law

Evaluation of Model

Key Advantages

- There would be a major ‘expressive’ advantage in recognising that it is not only the state that is responsible for realising fundamental rights. This will provide good reasons why powerful agents such as corporations must play a part in avoiding harm (and assist in the realisation of these rights). Corporations will also not be able to claim in public that they have no obligations for realising fundamental rights as a treaty will say otherwise

- The fact that states are weak and often unable to regulate corporations effectively often means that they do not create the necessary obligations and frameworks to recognise corporate accountability for human rights. A recognition of direct obligations will mean that corporations cannot claim they lack such obligations where the state fails to regulate, for whatever reason
- If corporations have direct obligations, then there can be consequences for their failure to fulfil those obligations. These consequences may take the form of state action: in many cases, however, a particular state may be too weak to act. If corporations have direct obligations, that means their failure to fulfil such obligations is actionable even in the absence of state action. A variety of actions may be taken in the absence of state action: reputational harm can be caused by the violation of an international legal obligation; a major public campaign launched against these violations of law; extraterritorial litigation could take place if the legal framework allows; accountability may be possible at the international level if a suitable forum is created. Without such direct obligations, in the absence of state action, corporations are off the hook.
- If corporations have direct obligations in relation to fundamental rights, these must be factored into any decisions taken through other driving forces such as commercial gain and international commercial legal structures. Company directors would need to take fundamental rights into account in their decision-making and could not claim the absence of state regulation would allow them to ignore these factors, particularly, where they operate across national borders. Recognition of direct obligations would also have important implications for trade and investment treaties and decisions made by arbitration dispute settlement bodies who would need to take into the international human rights obligations of businesses which became matters of hard law.
- Recognising direct obligations will require the treaty to put in place structures to develop the nature and extent of these obligations. Just like state obligations, that need not occur in one judgment or decision but can take place incrementally over time. The recognition of such obligations will be a catalyst for developing our understanding of both the extent and limits of corporate obligations. A mechanism such as a General Comment procedure could be developed to do so. Some constitutional jurisdictions like South Africa have already begun the process of thinking about defining corporate obligations in relation to fundamental rights and these lessons could be drawn upon.

Key Disadvantages

- The recognition of direct obligations of corporations for fundamental rights is controversial and will be opposed strongly by powerful states concerned to protect the interests of their corporations.
- Some states could seek to avoid their obligations and responsibilities regarding human rights through claiming that it is not their obligations but those of corporations. .
- Many propose direct obligations for companies under international law as a way to overcome the many existing obstacles: weakness of States or unwillingness or corruption of national authorities. The implementation of direct obligations may well face similar problems. Direct obligations under international can only be effective if national structures are in place to give effect to them: through laws, policies and programmes, or enforcement of judicial decisions.
- For direct obligations to grant access to hard remedies, in the absence of State action, it will be necessary to establish an international mechanism of a kind. The efficacy of international tribunals, however, rests often on the commitment, cooperation and efficiency of national mechanisms. Even the International Criminal Court- ICC - takes over a case only when the national State is unwilling or unable to act, and without national cooperation it is not possible for the Court to carry out its work or enforce its decisions. The role of the state will thus remain important and necessary even if a 'direct' model is adopted.

Conclusion

A business and human rights treaty will only be effective if it is able to ensure that business play their part in ensuring human rights are not harmed and to assist in the realisation thereof. In this building-block, we have engaged with a crucial question concerning how the treaty will do so: will it impose an obligation upon the state to regulate corporations or will it recognise that corporations directly have obligations in relation to fundamental rights as a matter of international law? The decision between these two courses depends upon which route you think will enhance the protection of fundamental rights internationally and be more effective in ensuring access to remedies for victims of violations of fundamental rights by corporations. We have sought to canvass some of the advantages and disadvantages of each model. It may be that it is possible to create some form of hybrid as both models do not depart from the notion that the state will remain important in the interim. The question is whether the obligations of corporations require the intermediary of the state to create them or whether they are foundational matters of international law. We hope this building-block will assist you to make a decision as to what you think will be preferable in your local context.

Some questions for CSOs:

Some people may think the direct obligations under international law approach is needed; others favour the indirect obligations approach. In order to make a decision between the two models (which we would like you to indicate), please consider the following questions:

- 1) What are the problems you face in holding corporations to account?
- 2) What is necessary within your country/legal framework to ensure effective remedies are provided to victims of human rights violations?
- 3) Which of the models do you think could better enable corporations to be held to account for human rights abuses?
- 4) What are the roles and limitations of state institutions in your context?
- 5) What role can civil society play in your context in counteracting abuses of rights by business?
- 6) What role, if any, could foreign courts play?
- 7) Would an international court be a good idea?