**What Provisions Should a Treaty on Business and Human Rights Contain Governing Corporate Obligations?**

**Submission by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, a Centre of the University of Johannesburg**

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1. **Building An Analytical Framework for Determining Corporate Obligations**

One of the key reasons for establishing a business and human rights treaty would be to address the gaps in law that exist surrounding corporate activity that has an impact on fundamental rights.[[2]](#footnote-2) One of the central lacunae that exists concerns the lack of clarity concerning the nature and extent of the legal obligations corporations have in relation to fundamental rights.

A treaty on business and human rights could adopt one of two approaches in this regard.

The indirect model retains a focus on the obligation of the state to protect individuals against the violation of their rights by third parties such as corporations (or to require certain actions of corporations to facilitate the realisation of rights).[[3]](#footnote-3) This ‘indirect’ model would basically place an international legal obligation on the state to ensure that corporations do not violate the human rights of individuals; however, corporations would lack any obligations flowing directly from international human rights law.[[4]](#footnote-4) The ‘direct’ model, on the other hand, would involve the recognition that there are in fact direct obligations imposed upon corporations by international human rights law or that such obligations should be created by states.[[5]](#footnote-5)

Both the direct and indirect models of regulating corporations are likely to require some approach to be adopted in the text of a treaty towards determining the nature and extent of the obligations of corporations in relation to human rights (whether flowing from international law or domestic legislation). In this submission, I will focus on the direct model and explore how a treaty should approach determining the obligations of corporations.

In addressing this question, it is important to recognise that what is being sought is not a full specification in the treaty of the obligations of corporations in relation to every specific human right.[[6]](#footnote-6) Such a goal would be impossible to achieve within a framework instrument such as a treaty. Instead, the goal for the relevant treaty provision should be to provide an analytical framework that provides some guidance as to how these obligations can be determined in a particular context. Concrete obligations can later be specified in more detail by treaty bodies or domestic courts on a case by case basis.

Within domestic constitutional contexts too, a similar problem arises in constitutional design as to how to create an analytical framework for determining corporate obligations which can later be utilised by courts (and other actors) rather than providing a full specification of concrete obligations. In this submission, I consider the possibility of adopting a constitutional law model to determining corporate obligations. The word-limit imposed on the submission severely limits what can be achieved and the possibility of a detailed engagement with alternative approaches which are contained in the chapter on which this submission is based. I thus outline in broad terms the approach that I favour which embraces both beneficiary-related considerations and agent-relative considerations.

1. **Constitutional Law Provisions**

An analogue of the debate being conducted at the international level has occurred in the realm of domestic constitutional law where, in the drafting of recent constitutions, the question has arisen as to whether and how to impose obligations upon non-state actors. South Africa’s Constitution, for instance, includes a provision which envisages the direct application of constitutional rights to private bodies. Section 8(2) of the Constitution reads as follows: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.

This provision identifies two criteria for determining the obligations of private actors: the nature of the right and the nature of any duty imposed by the right. In this submission, I focus on the former criterion as I have in several other publications discussed the second criterion and its shortcomings as an approach to determining corporate obligations.[[7]](#footnote-7)

* 1. *An Approach Focused on The ‘Nature of the Rights’*

In the case of *Khumalo v Holomisa.*[[8]](#footnote-8), the Constitutional Court of South Africa has outlined three factors which are of importance in determining whether the nature of the rights render them applicable to private parties. In that case, the Constitutional Court was faced with a defamation claim between two sets of private parties (one of which was a major media publishing house): it was thus required to consider whether the right to freedom of expression could be applied directly between two private parties. First, it mentioned that a court needs to consider ‘the intensity of the right’.[[9]](#footnote-9) This factor would seem to require an understanding of the right’s importance within the wider constitutional order as well as the reasons lying behind its protection. Second, the court needs to consider the potential invasion of the right by persons other than the state. This seems to place the impact of a corporation on a human right squarely in focus. Finally, the court considered the nature of the parties before it and whether the right has a particular significance in relation to their role within the broader society. Since the case itself concerned the media, and freedom of expression is central to its operation, the right was held to be directly applicable to the private parties in that case. This factor thus involves what may be termed ‘agent-relative’ considerations and the effect they have on the obligations of particular agents. [[10]](#footnote-10)

All these elements seem to be normatively relevant and provide an attractive rubric for determining corporate obligations. Yet, one of the problems that arises in this regard is that the factors pull in differing directions. The potential impact upon the beneficiary of a right may support the imposition of a strong obligation; on the other hand, the particular nature of an entity, may push towards no obligation being recognized or the attenuation thereof. Whilst the identification of these factors is important analytically: there remains though still a need for some kind of rubric within which to determine how to resolve the normative conflicts identified. In the next part of this submission, I consider such an analytical framework drawn from constitutional law.

* 1. *Moving Towards a Two-Stage Enquiry into Corporate Obligations*

In determining the scope of the obligations of agents in relation to human rights, Constitutions in Canada, South Africa and Kenya outline a two-stage enquiry. The first stage involves interpreting the rights which requires understanding their underlying justification and the interests they protect. A determination is then made as to whether certain conduct (or an omission) is a prima facie infringement of that right.

The second stage then involves considering whether that infringement is justifiable or not. Usually, this involves what may be termed a proportionality enquiry which itself has various components which include the following:[[11]](#footnote-11)

* The first step is to determine the purpose of any infringement and whether it is legitimate within the constitutional scheme;
* The second step concerns a determination of whether there is a rational connection between the means adopted to limit the right and the purpose of the limitation (this step is what may be termed the ‘suitability’ enquiry);
* The third enquiry involves considering whether there is an alternative that sufficiently realises the purpose but has a lesser impact on the right (this is what may be termed the ‘necessity’ enquiry’).
* Finally, the fourth and final enquiry involves considering whether or not the benefits of the limitation are proportional to the harms caused to the right (often termed the ‘proportionality in the narrow sense’ enquiry).

I contend that this approach offers a promising analytical framework for inclusion in a future BHR treaty. The first stage of the enquiry requires an understanding of the right and whether the conduct (or omission) of a corporate actor provides a prima facie infringement of the right in question. This first stage of the enquiry is thus explicitly beneficiary-focused.

However, the fact that there may be a prima facie infringement of an interest of a beneficiary is not determinative. There may be good reasons why that interest cannot be realised; moreover, there may be reasons why a particular agent may lack the obligation to protect that interest in question. The second-stage of the enquiry may well be helpful, particularly, in determining when a particular agent such as a corporation has an obligation or not. The first step in this regard would be to determine whether or not there is a legitimate purpose for any infringement. The legitimacy of any purpose should, of course, be linked to the nature of the particular agent. That would not, however, end the matter. A measure may not be designed well to realise a purpose and be overly intrusive in relation to rights. This is where the suitability and necessity enquiries would be of importance. Finally, an overarching assessment of proportionality would allow for a balancing between the interests at stake and allow for wider considerations of fairness to enter into the picture in terms of determining corporate obligations.

1. **Conclusion**

The approach adopted here would thus commence with an evaluation whether particular conduct or omissions of corporations have an effect on the interests protected by a fundamental right. It is likely at the first stage that the net of corporate obligations will be cast widely. The starting point is thus beneficiary or victim-orientated. The second stage would involve considering reasons to limit the obligations of corporations in these circumstances either for reasons relating to their nature or for reasons relating to the nature of the normative considerations underlying any potential limitation. The two-stage enquiry thus has the attraction of ensuring normative clarity about both beneficiary-orientated and agent-relative considerations without mixing them: and it offers an overarching framework within which to evaluate these dimensions in relation to one another.

1. This submission is based on certain elements from my chapter titled ‘Corporate Obligations and a Treaty on Business and Human Rights: a Constitutional Law Model?’ in an edited collection by Surya Deva and David Bilchitz titled *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, forthcoming 2017). [↑](#footnote-ref-1)
2. I have provided four arguments surrounding such lacunae in D Bilchitz ‘The Necessity for a Business and Human Rights Treaty’ (2016) 1 *Business and Human Rights Journal* 203. [↑](#footnote-ref-2)
3. Such an obligation was first persuasively articulated in the case *Velasquez Rodriguez v Honduras* (1989) 23 I.L.M. 291; (1988) Inter-A.C.H.R. (Ser. C) No.4, paras 166-77. [↑](#footnote-ref-3)
4. The shortcomings of the indirect model are examined in D. Bilchitz, ‘Corporations and the Limits of State-based Models for Protecting Fundamental Rights in International Law’ (2016) 23 *Indiana Journal of Global Legal Studies* 143, at 149-157. [↑](#footnote-ref-4)
5. See D. Bilchitz ‘A chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRSG’s Framework and the Guiding Principles’ in S.Deva and D. Bilchitz (eds.), *Human rights obligations of business: Beyond the corporate responsibility to respect?* (Cambridge: Cambridge University Press 2013) 111-114. [↑](#footnote-ref-5)
6. There is also an important question that arises as to which rights are the subject of obligations for corporations which cannot be addressed here. [↑](#footnote-ref-6)
7. See Bilchitz, n. 6 above and D. Bilchitz ‘Do Corporations Have Positive Fundamental Rights Obligations?’ (2010) 125 *Theoria* 11–26. [↑](#footnote-ref-7)
8. 2002 (5) SA 401 (CC). [↑](#footnote-ref-8)
9. *Ibid*., para 33. [↑](#footnote-ref-9)
10. See K. Macdonald ‘Rethinking ‘Spheres of Responsibility’: Business Responsibility for Indirect Harm’ (2011) 99 *Journal of Business Ethics* 549 at 550 explains that agent-relative accounts of responsibility concur on the central proposition that ‘attributions of responsibility rest solely or at least primarily on facts about agents and their relations to certain harmful or favourable events or states’. [↑](#footnote-ref-10)
11. See Robert Alexy *A Theory of Constitutional Rights* trans. J. Rivers (Oxford University Press 2002). [↑](#footnote-ref-11)