Business in Development: Diminishing Human Rights? Making the case for a human rights-based approach to corporate social responsibility

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Abstract

This paper takes as it's point of departure the emergent opinion that the engagement of business is needed in order to reach development goals in the third world, and that corporate social responsibility (CSR) is increasingly viewed as the key for pushing this agenda forward.

Presenting a theoretical framework based on a differentiation between the human rights and business approach (HR&B) and the CSR approach, along with the outcomes of a human rights impact analysis of the CSR-activities of three prominent companies in the CSR field, limitations as well as opportunities for the inclusion of business in development are displayed. The paper defends the idea that a more explicit development of the HR&B approach is needed in the CSR strategies promoted by transnational companies, more specifically in economic and social contexts of development. On this basis, it suggests for the development of a human rights-based approach (HRBA) to CSR.

Keywords: Corporate social responsibility, right to health, development, and human rights-based approach.

Resumen

Este trabajo toma como punto de partida la emergente opinión sobre la necesidad del compromiso de las empresas para alcanzar los objetivos de desarrollo en el Tercer Mundo, y que la responsabilidad social empresarial (RSE) es vista cada vez más como la clave para impulsar estos objetivos.

En el texto se expone un marco teórico basado en la diferenciación entre un enfoque de derechos humanos y de negocio (HR & B) y el enfoque de la RSE, acompañado de los resultados de un análisis de impacto en materia de derechos humanos de las actividades de tres empresas destacadas en el ámbito de la RSE, así como la presentación de límites y oportunidades para la inclusión de empresas en el desarrollo. En este artículo se defiende la idea de que es necesario un desarrollo más explícito del enfoque de HR & B en las estrategias de RSE promovidas por empresas transnacionales, más concretamente en contextos económicos y sociales de desarrollo. Sobre esta base, se sugiere el desarrollo de un enfoque basado en derechos humanos (HRBA) con la RSE.

Palabras clave: Responsabilidad social corporativa, derecho a la salud, desarrollo y el enfoque basado en derechos humanos.

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Introduction

There is an emergent opinion, that the engagement of business is needed in order to reach development goals in the third world, and corporate social responsibility (CSR) is increasingly viewed as the key for pushing this agenda forward. Parting in the context of development, this paper is motivated by the observation that a human rights perspective on CSR is, to a large extent, left out in contemporary literature and practice. A matter, which is problematic seeing that, in parallel to the growing focus on the role of the private sector in development, the United Nations (UN) agencies agreed in 2003 on the "Stamford Common Understanding", which establishes that human rights are to be integrated in development strategies through a human rights-based approach (HRBA) to development[2]. An approach, which conceptualises good development practice as contributing to the realisation of human rights[3] and which, in the light of the current financial crisis, is being advanced as a key-strategy for preventing and addressing the negative human rights consequences, which are an unenviable side-effect of the downward spiral[4]. This faces the development arena with two fundamentally different approaches: *CSR* and *human rights.*

This paper is the summary of a master dissertation on the role of business in development. Here, the main outcomes of the analyses as well as the conclusions made will be presented, with the aim of providing a more critical and constructive assessment of the role of business in development. In the first chapter, the main concepts and the methodology of the research are presented. The second chapter presents the theoretical view of the research. In the third chapter an analysis of the soft law framework established to regulate the behaviour of companies as well as an analysis of the relationship between states and companies in realising economic, social and cultural rights is provided for. Chapter one to three constitute the theoretical (normative) level of the research. The fourth chapter assesses the empirical level through case studies of three companies who have engaged in CSR: Novo Nordisk, Vestergaard Frandsen and Royal Dutch Shell. The case studies are made in the context of the right to health. Finally, the findings of the research, on the normative and empirical level respectively, will be summarised and concluded upon. Parting in the integration of the two levels, the final section gives proposals for envisioning a HRBA to CSR.

1. Business in Development: Definitions

Firstly, the three main concepts of the paper: development, HRBA and CSR, need to be addressed.

1.1. *Development*

This paper takes point of departure in the UN framework for development as it is established in the United Nations Charter (hereafter the UN Charter), the Universal Declaration of Human Rights (UDHR) and in the report of the UN Secretary General (1994) "An Agenda for Development". Additionally, article 28 of the UDHR stipulates:

> "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized[5]."

It is the role for companies to play in this international order and their potential of assisting in reaching international development goals that form part of the concern of the research.

1.2. *A Human Rights Based Approach*

While differing opinions on what a HRBA should entail and how it is to be defined exist, five core principles are increasingly gaining terrain as core standards of the approach: express use of human rights language, emphasis on empowerment of rights holders, participation by all in decisions that affect them, non-discrimination and attention to vulnerable groups, and ac-

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[2] See United Nations: *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies,* Stamford, US, 2003.

[3] See United Nations: *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation",* annex II. HR/pub/06/08, New York and Geneva, 2006.

[4] Based on Grene, Hannah: "A Recession of Rights" *Public Service Review: International Development – Issue 13,* 2009.

[5] United Nations (1948), *Universal Declaration of Human Rights*, art. 28.

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countability of duty-holders. Further, different contexts require different strategies for applying a HRBA. In other words, one may speak of HRBA*s* at variance according to the operative environment. In this paper the HRBA framework is applied by using the listed principles to pose human rights questions about decisions and processes made in relation CSR-activities[6]. Further, in a HRBA the concern of *accountability* falls upon the state[7]. The HRBA identifies two types of duty-bearers, *legal* and *moral.* All individuals and institutions that have the power to affect the lives of other people (rights-holders) are *moral duty-bearers*; this includes e.g. private companies, civil society organisations and local leaders. The *legal* duty-bearer is the state, which has the duty to regulate the actions of the *moral* duty-bearers[8]. Thus, within the framework of a HRBA, companies are identified as *moral* duty-bearers to be regulated by the state. This definition of companies as (merely) *moral* duty-bearers is increasingly becoming an issue in the human rights field, and causes, as it will be argued in this paper, a profound problem of accountability.

1.3. *Corporate Social Responsability*

Due to the lack of one consistent characterization of CSR, contemporary literature on the subject is loaded with different definitions, often varying according to the organisational context in which it is defined. However, common to most of them is that they define the aim of CSR as reaching social goals, although never at the expense of the profitability of the corporation[9]. CSR-scholar John Hopkins makes a useful differentiation between three different types of CSR-activities of which *type III*[10] makes a practical identification of the type dealt with in this paper. It is defined as follows:

"Activities that promote sustainable development and anti-poverty initiatives (…) These activities serve to promote development but do not immediately impact on a company's bottom line. They are carried out to enhance a company's reputation and contribute to wider development objectives[11].

Companies adopting this type of CSR-activities accept that they have responsibilities with respect to how profits are made. It is the acceptance of this responsibility, which may develop to what has been characterised as "corporate social development". In other words, a type of CSR-activity, which is more active oriented towards contributing to development objectives[12].

1.4. *Methodology and focus of the research*

Placing the concept of CSR and the HRBA in relation to each other, the basic notion of CSR holds that economic profitability[13] is always a prime concern of a company, while a HRBA to CSR, resting on the notion of *social profitability,* would demand that human rights are not affected negatively on this expense[14]. As such, the HRBA challenges the *business case*, and yields the critical question of whether it is compatible with good development practice[15]?

Forming a framework for analysing these matters in the context of human rights based development, the soft law framework in the field of CSR as well as the International Covenant on Economic, Social and Cultural rights (ICESCR) are used as

[6] Based on Grene, Hannah., *op. cit.*

[7] Banerjee, Bobby Subhabrata (2007), *Corporate Social Responsibility. The Good the Bad and the Ugly.* United Kingdom: Edward Elgar Publishing Limited, p. 159.

[8] Kirkeman, Jakob & Tomas Martin (2007), *Applying a Rights-Based Approach - An inspirational guide for civil society*. Danish Institute for Human Rights, p. 11-12.

[9] See Hopkins, Michael (2009): *Corporate Social Responsibility and International Development: Is Business the Solution?* London: Earthscan (First Published 2007) p. 16-43, which provides for an overview of different definitions from different organisations.

[10] Type I is defined by: "Charitable donation to a "good" cause in a developing country, i.e. development philanthropy" and type II: " Development inside the company that initiates new products for developing countries, or invests in a developing country to take advantage of cheap labour or special skills or natural resources such as oil and, in turn, directly impacts upon the profits of the whole organisation" Hopkins, *op. cit.*, p. 9-10.

[11] Hopkins, M., *op. cit*., p. 10.

[12] Ibid., p. 10.

[13] The analysis of CSR comprises three levels: economic, social and environmental. But the experience of the application of CSR demonstrates that the two latter, social and environmental, are conditioned upon the first, the economical.

[14] Based on Grene, H., *op. cit.*

[15] Frynas, Jedrzej George, "The false developmental promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies", pp. 581-598 in *International Affairs,* vol. 81 (3), 2005, p. 598

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main reference points. The objectives of article 55 of the UN Charter, identifying the objectives of economic and social co-operation[16], are closely connected to the ICESCR, which in this sense can function as a more detailed framework for a HRBA to development. Further, the body of explanatory reports[17] developed for the implementation of the ICESCR provide for a useful framework in order to discuss the role of companies in development[18].

A focus on two key matters develops the argumentation:

- — the role of business in development played through CSR-activities, and
- — the tension between CSR-activities and human rights fulfilment

Having clarified the key- concepts as well as the main aspects of the methodology, the next chapter introduces the theoretical differentiation in which the study takes point of departure.

2. Corporate social responsibility and human rights and business in search for a linkage

> "Corporate social responsibility does not necessarily fulfil human rights law[19]".

The theoretical view is grounded in a differentiation between what I address as the Human Rights and Business (HR&B) approach and the CSR approach. A differentiation, which is crucial in order to capture the gap I argue, exists between CSR-activities and human rights.

While HR&B can be defined as an address of the role and responsibility of companies to act in compliance with human rights in relation to their *business-operations*, it is argued here that the role, which companies play through *type III CSR-activities* remains to be dealt with in respect to human rights. In other words, in this chapter, a claim is made that HR&B and CSR are predominantly kept separate in literature and in practice, causing for a failure to see the potential and need for integrating them.

2.1. *Human rights and business means "respect"- Corporate social responsibility means "beyond"*

In contemporary literature the term HR&B is primarily used in relation to the debate on human rights abuses committed by companies. As such, the concept is defined to mainly address the *negative responsibility* of companies to refrain from complicity in human rights abuses and the possibility of holding businesses accountable to these.

The definition of CSR-activities in focus here (*type III CSR-activities*), is often used in relation to the possible *positive responsibilities* of companies, hereby suggesting the potential of businesses to go beyond merely respecting but also actively promoting the realisation of human rights.

Klaus M. Leisinger, President and Chief Executive Officer (CEO) of the Novartis Foundation for Sustainable Development distinguishes between "must", "ought to", and "can" norms[20] in order to define the borders between what he characterises *good management practice* and CSR. While Leisinger's division of human rights obligations may be contested on the basis of the *indivisibility*[21] of human rights, his description of the "can"-dimension captures the CSR-activities dealt with here, namely the ones impacting on economic and social rights. The "can" norm resembles Daniel Aguirre's *negotiable* responsibility of CSR, which he defines as a voluntary approach that goes beyond "respecting the law". He also identifies two other *non-ne-*

[16] Feyter, Koen De (2001), *World Development Law. Sharing Responsibility for Development*. Intersentia, p. 3.

[17] Such as guidelines, general comments, principles and recommendations developed by international organs.

[18] While the "Right to Development" proclaimed by the UN in 1986, through the "Declaration on the Right to Development adopted by United Nations General Assembly resolution 41/128, provides for a direct link between development and human rights, the right is still mainly brought into play in relation to issues of socially responsible investment (SRI), it will not be addressed as such in this thesis.

[19] Aguirre, Daniel (2008) *The Human Right to Development in a Globalised World,* Ashgate Publishing, p. 183.

[20] Leisinger, Klaus M., "Corporate Responsibility for Human Rights" pp. 57-59 in *Human Security and Business*, vol 01, Rüffer & Rub, Zanardi Group, Italy, 2007.

[21] The *indivisibility* of human rights contains that all human rights are co-equal in importance; the fulfilment of one is connected to the fulfilment of another. The indivisibility of all human rights was firmly established at the World Conference on Human Rights in Vienna, 14-25 June 1993.

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gotiable responsibilities of CSR, which are useful in clarifying the distinction between HR&B and CSR. One is a "*non-negotiable responsibility* of the company to obey the law" and the other a "*non-negotiable responsibility* of the company to manage risk and minimize harm". The latter entails both social and economic measures; protecting existing corporate value and reputation, while at the same time safeguarding the social licence to operate. Risk management further entails the implementation of international safety-standards as well as the identification of new risks such as HIV/AIDS, climate change and security issues[22]. As such, the *non-negotiable principles* relate to the HR&B approach of *respecting* human rights, while if "law" in the *negotiable principle* of "creating positive solutions beyond what is required by law[23]", is defined as human rights law, the difference between the HR&B framework and the CSR framework becomes clearer; within international human rights law businesses hold the responsibility to *respect* human rights by *refraining* from doing harm. Going beyond the law therefore entails going beyond *respecting*, hence actively promoting human rights.

The *respect-approach* identified here, follows the HR&B framework developed by Special Representative of the Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: *"Respect, Protect and Remedy: A Framework for Business and Human Rights",* in which states are attributed the *duty to protect* human rights, while businesses are attributed the *responsibility to respect* human rights[24]. The main duty of the *fulfilment* and *protection* of human rights thus lies with the states. This division of roles reflects the one in a HRBA where states are *legal* duty bearers while companies are *moral* duty bearers. Discussions on making companies accountable players in international law by granting them legal personality is being argued for in contemporary debates. However, in this respect, numerous questions arise as to whether companies are then granted rights as well as duties; if so how to enforce either, and what then will be the responsibility of states in which companies operate[25]. While this discussion lies outside the scope of this paper[26], a crucial point is that the human rights debate in relation to businesses seems to be centred on making companies refrain from committing human rights abuses in their business-operations, while the *negotiable* character of *type III CSR-activities* preempts them as good and progressive for development, and thus diverts the attention from their actual impact on the realisation of human rights. Through their voluntary "do good nature" CSR-activities become a legitimate means to pursue development goals, but fail to take into account the potential consequences this may have in practice if done through the "wrong" means. Thus, if companies through CSR, are to play a role in human rights-based development that goes beyond merely *respecting* human rights law in their business-operations, it is imperative to ensure that mechanisms are in place to warrant that the CSR-activities in question abide by human rights law.

3. Searching for mechanisms to regulate CSR- activities towards human rights

Addressing the need for locating mechanisms to regulate CSR-activities so that they do not count-act the realisation of human rights, at least two main frameworks are relevant to examine; Firstly, the soft law framework in the field of CSR, and as a component in this stakeholder consultation. Secondly, state regulation through the framework of the ICESCR.

3.1. *The soft law framework*

This section summarises the outcome of the examination of five main soft law instruments developed for regulating the behaviour of companies. The analysis poses two queries; do the instruments constitute sufficient responses for making businesses responsible actors in development, and do they address the human rights impact of type III CSR-activities?

The mechanisms analysed comprise the Guidelines for Multinational Enterprises developed by the Organisation for Economic Cooperation and Development (OECD), the Tripartite

[22] Aguirre, Daniel, *op. cit.*, p. 184-85.

[23] Ibid.

[24] See UN Doc. A/HRC/8/5, 2008.

[25] Dine, Janet (2005), *Companies, International Trade and Human Rights.* United Kingdom: Cambridge University Press, p. 168.

[26] For a further discussion on the accountability of companies in international law see International Council on Human Rights Policy: *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, Versoix, Switzerland, 2002 & Dine, Janet *op. cit.*

Declaration of Principles concerning Multinational Enterprises and Social Policy (hereafter the Tripartite Declaration) developed by the International Labour Organisation (ILO), the United Nations Global Compact and the United Nations Draft Norms on Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (hereafter the Draft Norms). These instruments can be classified as inducing CSR "from above" since they are produced on an inter-governmental level. As a fifth instrument, corporate codes of conduct are assessed. These constitute CSR "from below[27]" as they are developed at the level of each company.

The analysis finds that the five instruments accounted for all include two inter-dependent aims: making companies *respect human rights* in their business-operations (HR&B) and advancing companies as *responsible actors in development* (CSR). In respect to the two queries made, they suffer from two main deficits: The voluntary nature of the instruments significantly weakens their enforcement, and hereby usefulness towards ensuring that companies act responsibly in development, due to the lack of legal sanctions for non-compliance. With respect to the second query, the instruments do not provide for a regulatory mechanism for *type III CSR-initiatives* measuring their human rights impact[28].

3.1.1. Stakeholder consultation

The Global Compact is based on stakeholder dialogue, and the Draft Norms as well as the Tripartite Declaration advocate for this method in order to ensure the respect of stakeholder rights, hence stakeholder consultation presents itself as a possible way for ensuring a human rights compliant integration of *type III CSR-activities* in development, however an analysis of the approach leads to the identification of a number of challenges:

At the micro-level, here defined by the relation between corporations and communities, a main challenge is that no social targets have been set, except for the need to open a stakeholder dialogue[29]. In other words, stakeholder dialogue is a *means*, but the *ends* to be reached with this means, have not yet been standardised, pointing to the issue of lack of attention to the results of community consultations and CSR-activities in general.

This is also evident when considering some of the concrete tools that have been developed for stakeholder-engagement, hereunder community consultation. *AccountAbility1000* (AA1000)[30] is one example while another is the *OECD Principles on Corporate Governance*. There exists no single model or common standard of corporate governance, each system varies by country and sector and occasionally even within the same corporation[31]. As such, whenever a corporation decides to consult a community, it will do so on its own terms or pick whatever instrument it finds suitable. Yet, even if standardised means of community consultation are established and the consultations hypothetically take place under principles of equality between the community and the company, this will not necessarily guarantee that the requests of the community are met[32].

This suggests for the need to analyse community consultation in a broader context; namely through a macro-level perspective; *multi-stakeholder dialogue*[33], where the demands of a country as a whole and not only of the communities are taken

[27] For a more detailed explanation of the differentiation between "CSR from above" and "CSR from below", see Marella, Fabrizio (2007): "Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade" pp. 266-310 in *Economic Globalisation and Human Rights,* Wolfgang Benedek, Koen de Feyter & Fabrizio Marella (eds). Cambridge University Press.

[28] The lack of impact assessments is a general issue in the HR&B field today, ultimately, if one does not begin evaluating the performance of companies, the initiatives will risk being undermined.

[29] Hopkins, Michael, *op. cit.*, p. 126.

[30] The AA1000 operates as a means to integrate social and ethical issues into the organisations' strategic management operations by four principles: the Foundation Principle of Inclusivity, the Principle of Materiality, the Principle of Completeness and the Principle of Responsiveness. Especially the principle of materiality is interesting, as it requests of a company, when determining material issues to "consider the needs and concerns of (…) stakeholders as well as societal norms, financial considerations, peer-based norms and policy-based performance". For more information see http://www.accountability21.net/aa1000series (consulted on 23 May 2009).

[31] Hopkins, Michael, *op. cit.*, pp. 33.

[32] See for example Eweje, Gabriel, "Multinational Oil Companies' CSR initiatives in Nigeria: The Scepticism of Stakeholders in Host Communities" pp. 218-234 in *Managerial Law* Vol. 49 No. 5/6, 2007.

[33] See also information on the CSR Multi-stakeholder Forum of the European Union, *European Multi-stakeholder Forum on CSR. Final Results and Recommendations*. Final Report, (Public) 29 June 2004.

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into account, leading following findings: One of the main challenges in producing successful outcomes of multi-stakeholder dialogue is the *relations of power*, which exist between different stakeholder groups. It is argued that the "dominant instrumental approach" to stakeholder theory embraces the fundamental economic approach at the expense of attention to economic and social conflicts of interest between corporations and external stakeholders, and that what is needed is a rethinking of the purpose of the corporation including a rejection of shareholders holding primacy[34]. In other words the *social result* of stakeholder engagement is questioned on the basis that the outcomes are pre-determined by the neo-liberal agenda. Related to this lies the risk that the multi-stakeholder dialogue ends up changing the behaviour of the stakeholders and influence the policy-making to produce profitably outcomes for the corporations, instead of listening to the requests of the stakeholders and produce positive outcomes for society[35]. These concerns are connected to a second issue, namely that of the *legitimacy* of the stakeholder groups and their demands. In other words, which stakeholder groups or interests should be considered valid? Some argue that the legitimate stakeholders are those who bear a risk in relation to the actions of the company[36]. However, hardly anyone can be excluded from potentially experiencing the effect of corporate activities. If the scope broadens as much as to include a general societal interest, there is a danger, that the stakeholder-concept will loose its meaning[37]. The major questions with respect to both community and multi-stakeholder dialogue in the context of development thus becomes how to ensure deliberative processes between different stakeholders, how to establish priorities and how to determine which voices shall be listened to in the processes[38].

The examination of stakeholder consultation, both on a micro- and macro-level reveal two major challenges: Identifying the valid stakeholders and overcoming power-biases in the processes of communication. Though, even if these challenges are overcome, a third challenge must be taken into account; the verification of *type III CSR- initiatives* as contributable to a rights-based development. Since no social targets for stakeholder consultation has been set, this cannot be guaranteed and the risk exists that the fulfilment of community demands may end up as counter-productive to the macro-development of a country.

3.2. *State regulation: Global Governance- Global Crisis*

Here, state regulation presents itself as a way of ensuring that the macro-development of a country is considered. An analysis of the triangular relationship between states, companies and human rights through the lens of privatisation as well as through the normative framework of international law leads to the findings presented below.

3.2.1. Human rights risks in corporate responsibility

The privatisation of a service becomes relevant to the human rights obligations of a state every time a human right covers the respective service. Thus, whenever a state chooses to privatise, it follows that it must ensure that the privatisation does not impinge negatively on human rights[39]. Applying Ruggie's framework, the state duty to *protect* towards third parties comes to the fore. The main argument here is that this should also apply whenever CSR-activities touch upon a human right. Below, legal pitfalls of human rights in CSR-activities, identified through the lens of privatisation, are presented. They can be pinpointed in three main concerns.

Firstly, a main differentiation between privatisation and CSR-activities can be made. With respect to privatisation, it is the state that decides to privatise, thus forming part of the process and the conditions under which the privatisation is made, allowing it the possibility of including human rights clauses in contracts such as Bilateral Investment Treaties (BIT)[40]. Due to the voluntary nature of CSR-activities, companies are not legally obliged to consult the state upon the initiation of a CSR-

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[34] Banerjee, Bobby *op. cit.*, p. 28.

[35] Ibid, p. 98.

[36] Ibid, p. 25.

[37] Dine, Janet *op. cit.*, p. 223-24.

[38] Ibid.

[39] Goméz Isa, Felipe & Feyter, Koen De (2005), "Privatisation and Human Rights – An overview" pp. 1-7 in Goméz Isa, Felipe & Feyter, Koen De (eds), *Privatisation and Human Rights in the age of globalisation.* Antwerp-Oxford: Intersentia, p. 2.

[40] For more on BITs and human rights, see Kriebaum, Ursula (2006): "Privatising Human Rights. The Interface Between International Investment Protection and Human Rights", in Wälde (ed), *Transnational Dispute Management* 3-5.

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project[41]. As such, the state may not be involved in the process, the same way as in a privatisation process, whereby the level of control with respect to human rights inevitably becomes lower.

Secondly, even if best practices of CSR-projects were developed and proven to be effective in promoting development, there is a danger that this would take away the pressure upon governments to fulfil their tasks as providers of basic services[42].

Thirdly, whether privatisation leads to the deterioration of human rights in practice, depends on pre-privatisation conditions[43]. Privatisation is more risky where there is lack of social cohesion and risk of state failure. At the same time, as with respect to CSR -activities, the chances that the government will chose to privatise or let corporations take over basic services, is much higher in exactly this context[44]. This is also why CSR-activities as a development strategy are moving in a fragile zone where human rights enforcement is often already low. The classic argument, that due to competition among corporations, the state will have the possibility to choose the most human rights friendly corporation, is likely not to hold in a developing context. Developing states are often more than reluctant to impose restrictions on corporations because they need the benefits of their investments. Further, a fundamental problem lies in the fact that developing states often do not have the sufficient resources to match the economic power of transnational companies[45].

Thus, a major concern, encapsulating the essence of the three already mentioned, is the problem of *accountability,* which arises due to the lack of legal accountability in actions that compromise human rights. This especially when committed by private actors, since the international human rights framework is created with states as the main duty-bearers[46]. Letting private actors take over services covered by human rights will inevitably lower the level of accountability, both with respect to privatisation and CSR-activities, since companies are (merely) *moral* duty-bearers in the human rights framework, lowering the accountability of their human rights performance significantly. The normative framework of human rights, stipulating the state duty to *protect,* requires a general obligation of the state to protect its citizens against third parties. In other words, the state is the responsible part for omissions to protect against violations of economic and social rights[47].

3.2.2. States, companies and human rights- A triangular relationship

Article 2.1 of the ICESCR obliges each state party to "take the necessary steps to the maximum of its available resources". It is the responsibility of the state to demonstrate that it has made every possible effort to fulfil the rights. Interestingly, the resources referred to in the ICESCR encompass the society as a whole, including the private sector. In other words, states may and should mobilise resources by engaging in cooperation with the private sector, if necessary in order to fulfil their obligations[48]. Hence, one may speak of a triangular relationship between states, companies and human rights fulfilment envisioning the potential role of CSR-activities in assisting states in realising human rights. It is also in this context that Ruggie's framework "Respect, Protect and Remedy" becomes useful to reintroduce. In the previous section, the obligation of companies to *respect* human rights was envisioned through an examination of the soft law framework. Here the state duty to *protect* must be drawn to the front. This obligation entails primarily the same as is described in the tripartite terminology[49] *"respect,*

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[41] Email from Felipe Goméz Isa, E.MA Programme Director, Bilbao, 2 July 2009.

[42] Frynas, George J., *op. cit.*, p. 596 & Aguirre, Daniel, *op. cit.*, p. 192.

[43] Feyter, Koen De & Goméz Isa, Felipe, *op. cit.*, p. 3.

[44] Bloche, M. Gregg (2005): "Is privatisation of health care a human rights problem?", pp. 207-227 in Goméz Isa, Felipe & Feyter, Koen De (eds), *Privatisation and Human Rights in the age of globalisation.* Antwerp-Oxford: Intersentia, p. 217.

[45] Goméz Isa, Felipe, "Empresas Transnationales y Derechos Humanos: Desarollos Recientes", in *Lan Harremanak- Revista de Relaciones Laborales,* Universidad del País Vasco, 2006, p. 62.

[46] Bloche, M. Gregg, *op. cit.*, p. 221.

[47] Goméz Isa, Felipe, *op. cit.*, p. 61.

[48] Chapman, Audrey R. & Russel, Sage (2002): "Introduction" pp. 1-18 in Chapman, Audrey R. & Russel, Sage (eds), *Core Obligations. Building a framework for economic, social and cultural rights,* Antwerp, New York: Intersentia, Ardsley NY, p. 9-11.

[49] The terminology was originally introduced by Henry Shue in 1980 and elaborated by Asbjørn Eide, who in 1987 during his Special Rapporteurship for the UN introduced the tripartite terminology as it is known today. See Koch, Ida Elisabeth (2009): *Human Rights as Indivisible Rights. The protection of Socio-Economic Demands under the European Convention on Human Rights.* Martinus Nijhoff Publishers, Leiden, The Netherlands, p. 14. The terminology is also elaborated in detail in the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* and further in the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.

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protect, fulfil"; namely that of protecting human rights from attrition by third parties. However, Ruggie rightly calls for attention to the many different *policy domains*, which come into play when states are to fulfil this obligation. He specifically identifies four: *corporate culture*, *policy alignment*, *international level* and *conflict zones*[50] and further specifies how they can be advanced. These policy domains are useful in identifying the challenges and opportunities in respect to state regulation. Below the three first domains are addressed.

Corporate culture refers to the potential ability of governments to create a culture in which respecting rights is an integral part of doing business. Although this is easier for the state to do in respect to State Owned Enterprises (SOEs)[51], it as been advocated that states should also try to control the activities of the non-state owned enterprises, amongst these transnational companies[52]. An example of recent developments in this area is the recently passed law by the Danish government making it mandatory for 1100 of the biggest companies in Denmark to report on their CSR-performance[53]. This way the state can play a role in strengthening the CSR framework.

Policy alignment refers to the issue that governments offer companies protection through BITs in order to attract investment. This protection may include lowering legal standards, also with respect to human rights, thus disregarding the state duty to protect. While the imbalance created between states and companies through BITs can have negative effects on all states, the imbalance is particularly problematic for developing countries. A study by the International Finance Corporation (IFC) shows that contracts signed with non-OECD countries constrain the host states regulatory powers remarkably more than those signed with OECD countries. Paradoxically, it is in developing countries that regulatory development is most needed[54]. The relevance of BITs in relation to the purposes of this paper is that the limitation of a state's regulatory powers through BITs, will also impact on a states ability to regulate CSR-activities. Ruggie further identifies the adverse effect of domestic policy incoherence in two ways, *vertical incoherence* and *horisontal incoherence*. The first mentioned referring to governments taking on human rights commitments without regard to implementation and the latter referring to when "departments such as trade, development or foreign affairs work at cross purposes with the State's human rights obligations"[55]. The *horizontal incoherence* is particularly relevant here as it captures the possibility of CSR-activities working across human rights realisation the same way as state departments, if not aligned towards human rights realisation.

The domain on the *international level* regards the possibility of stronger policy coherence between companies. In other words, if all companies adhere to the same standards, the risk that they "race to the bottom[56]" in order to stay competitive becomes smaller. By strengthening the unity of policies on the international level (CSR from above) a *level playing field*[57] might begin to emerge.

Both the tripartite terminology and Ruggie's framework emphasise the state duty to protect and recalls that the human rights regimes rests upon the "bedrock role of states[58]". In respect to this paper, a HRBA to CSR thus brings the state duty to *protect* to the fore.

The normative framework of the ICESCR provides for a way of identifying the triangular relationship between states, companies and the fulfilment of economic and social rights. The examination manifests the crucial role of the state in regulating

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[50] UN Doc A/HRC/8/5, 2008, para. 27-29.

[51] Ruggie proposes two ways of doing this: First, governments can support and strengthen market pressures on companies to respect rights and sustainability reporting can enable stakeholders to compare rights-related performance. Secondly he mentions that some states are beginning to use "corporate culture" in deciding corporate criminal accountability. They examine a company's policies, rules and practices to determine criminal liability and punishment, rather than basing accountability on the individual acts of employees or officers.

[52] Goméz Isa, Felipe, *op. cit.*, p. 61.

[53] Press release from the Danish Ministry of Economic and Business Affairs, Denmark, Copenhagen 16 December 2008.

[54] UN Doc. A/HRC/8/5, 2008, para. 33-36.

[55] Ibid.

[56] "Race to the bottom" in this sense refers to when businesses lower their social standards in order to become economically more competitive.

[57] A level playing field in a business context is defined as an environment in which all companies in a given market must follow the same rules and are given an equal ability to compete, see http://www.investorwords.com/2783/level_playing_field.html (consulted on 29 June 2009).

[58] UN Doc A/HRC/8/5, 2008, para. 50.

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the CSR-activities of companies, in order for them not to impinge adversely on the realisation of human rights and development goals. Importantly, the examination also shows, that the private sector is included as a resource for the state to use in order to fulfil its obligations towards economic and social rights. However, the pronounced crisis in global governance[59] leads to the questioning of the power of states in relation to companies. While there is no doubt that the normative framework of human rights obligates the state to protect human rights against the actions of companies, the power, especially of the developing states in the economic sphere can be questioned when considering the resources some multinational companies prevail over.

4. Case studies: addressing the role of companies in development in practice

With point of departure in the findings of the theoretical framework, where the outcomes of analyses of existing normative frameworks for engaging companies in development strategies have been presented, this chapter will add an empirical perspective to these by summarising the outcome of an analysis of three different companies operating in the area of the right to health[60].

Firstly, the right to health will be briefly introduced.

4.1. *Introducing the right to health*

General Comment number 14 (hereafter GC14) sets out four main criteria for the fulfilment of the right to health: *availability, accessibility, acceptability and quality.* In figure 2, the criteria's as they are presented in GC14, are outlined.

Figure 1

Criteria for the fulfilment of the right to health[61]

- *Availability:* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous underlying determinants of health, such as safe an potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the World Health Organisation (WHO) Action Programme on Essential Drugs.
- *Accessibility* has four overlapping dimensions: Non-discrimination; health facilities, goods and services must be accessible to all, Physical accessibility; health facilities, goods and services must be within safe physical reach for all sections of the population, Economic accessibility (affordability); health facilities, goods and services must be affordable to all, Information accessibility; the right to seek, receive and import information and ideas concerning health issues.
- *Acceptability:* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate.
- *Quality:* All health facilities, goods and services must be scientifically and medically appropriate and of good quality. Including skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

These criteria are used by companies in practice[62], especially in the pharmaceutical sector, and constitute a useful tool to identify the potential role to play for companies in the realisation of the right to health, as well as the potential pitfalls, in particular in the context of developing countries where resources are scarce. Before moving on to this, two important dimensions of the right to health must be explained.

The right to health can be divided in what here shall be addressed as a *preventive dimension* and in a *curative dimension*.

[59] Rosenau, James N., (2005) "Governance in the twenty-first century", pp. 45-68 in Rorden Wilkinson (ed), *The Global Governance Reader,* New York: Routledge, p. 47.

[60] Since assessing the impact of CSR-activities on all economic and social rights goes way beyond the scope of the study, the right to health has been singled out, creating a more proportionate avenue for investigation. Any other economic or social right may have served the same purpose; nevertheless the right to health touches upon a number of basic necessities for living, and is as such closely connected to other economic and social rights. This expands the scope of companies likely to undertake CSR-activities impacting on health issues and makes it an abundant case for exploration.

[61] UN Doc E/C. 12/2000/4, 2000.

[62] See for example Novo Nordisk, *The right to health – our paper,* at http://www.business-humanrights.org/Documents/Policies (consulted on 10 June 2009) and Novo Nordisk, *Access to health,* at http://www.novonordisk.com/annual-report-2004/how-we-perform/access-to-health.asp (consulted on 8 June 2009).

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The *preventative dimension* relates to *improved public health protection* through investing resources in clean water, a cleaner environment, education, food, housing and safe working conditions. In other words matters which may help to reduce the worsening of existing or the outbreak of new diseases and epidemics. The *curative dimension* relates to access to medical services such as *medicines and treatment.*

4.2. *Selection criteria and assessment of cases*

The present section is based on the analysis of the following three companies: *Novo Nordisk* (hereafter NN), *Vestergaard Frandsen* (hereafter VF) and *Royal Dutch Shell* (hereafter Shell).

All three have integrated CSR as part of their business strategies. The companies have been selected by two criteria generating their relevance for the purposes of this paper:

- They undertake type III CSR-activities, and
- their CSR-activities impact on an area covered by the right to health

Considering these criteria in relation to the right to health, the companies can be categorised as follows:

- Pharmaceutical companies
- CSR companies
- "Other" companies

This categorisation corresponds to two different types of impact. The type of impact differs according to the category of the company. *Direct impact* happens when the CSR-activities of a company are directly linked to the *business-operations* of the company and have a straight effect on the human right in question. In other words, whenever a human right covers the *business-operations* of a company, this constitutes *direct impact*. *In-direct impact* is constituted by the absence of a direct link between the *business-operations* of the company and the CSR- activities of the company, but where the CSR-activities touch upon a human right.

Each of the three companies analysed provide for different examples of how *type III CSR-activities* can be undertaken.

4.3. *Outcome of case-analysis*

The CSR-policies adopted by NN, VF and Shell include, in all three cases, both international standards ("CSR from above") and standards developed on the level of each company ("CSR from below"). These tools mainly embrace the HR&B approach, however the CSR policies of all three companies state that they wish to support sustainable development, and seek to do so through different *type III CSR-initiatives.* Analysing the initiatives through the theoretical framework of the study, the weakness of the contemporary soft law framework in making businesses responsible actors in development as well as the consequences of the lack of regulation of the initiatives towards human rights are revealed:

Though all three companies state that they see no trade off *between economic profitability* and *social profitability,* the economic bottom line shows with respect to all three of them. Their behaviour on the practice-level reveal the *limitations* that the economic bottom-line imposes on the actions of the companies in respect to their CSR- activities. Additionally, it questions the efficiency of soft law mechanisms, which all three companies have adopted in some form.

VF is accused of undermining other methods to address the risk of malaria than the product developed by the company (PermaNet)[63], revealing the economic bottom-line of the company. In the case of Shell, the company continues to exploit the natural resources in the Niger Delta at the expense of the welfare of the population, manifesting the company's quest for economic profit at the expense of social goals[64]. Especially illustrative is a corruption-case involving NN in Iraq where NN had paid the

[63] Written Testimony on behalf of Africa Fighting Malaria by Roger Bate, Richard Tren and Philip Coticelli House Subcommittee on Africa and Global Health Wednesday 25th April 2007 Room 2172 of the Rayburn House Office Building at www.aei.org/docLib/20070425_AFM.pdf (consulted on 9 June 2009).

[64] Amnesty International, Nigeria Ten Years On: Injustice and Violence Haunt the Oil Delta, AI Index AFR 44/022/2005 (public) November 2005 & Amnesty International "Are Human Rights in the Pipeline?" AI Index: AFR 44/020/2004 (public) 9 November 2004.

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Iraqi government during the UN's "oil for food programme", in order to ensure sales of insulin[65]. NN is a member of the Global Compact, which includes a principle on anti-corruption. Thus, the weakness of the inability of the UN to verify compliance with the Global Compact, as well as the weakness of voluntarism in general is demonstrated.

Nonetheless, in the cases of Shell and NN an interesting observation to be noted is that both companies started adopting CSR-policies due to social pressure created by their social wrongs. These finding demonstrates how pressure from civil society can push the CSR-movement forward. Further, the uproar over the case of the *Pharmaceuticals v. South Africa*[66], as well as the settlement[67] of the case of *Wiva v. Shell*[68] demonstrate the power and value of external accountability.

In respect to *stakeholder consultation* the case of Shell in Nigeria exemplifies how the failure to identify and include all valid stakeholders in the consultation process has fatal consequences for the development of the country in terms of community conflicts. The failure to coordinate the stakeholder demands made on the community level with the macro-development demands of the country has led to further turbulence. This demonstrates a lack of accountability both from Shell as well as from the Nigerian government with the result that the CSR-initiatives that have been instigated, for example in terms of the construction of hospitals and water-pipe systems, have never come into functioning. This illustrates how *vertical incoherence* by the Nigerian government, initiates processes on the micro-level in terms of community pressure, which in turn leads to quasi-governance by Shell. These processes contribute to blurring the roles between companies and states. In this way, the *type III CSR-activities* (in this case, community development projects) that are supposed to develop the economic and social rights of the host communities of the company end up diminishing them even further.

Continuing on the state duty to protect, the triangular relationship between states, companies and human rights fulfilment and the issue of the balance of powers is illustrated in a case of NN in Bulgaria[69], where the regulatory power of the state is challenged by the refusal of NN to sell insulin at the price offered by the Bulgarian state. This puts 50.000 people at risk of not being able to access their medicine. The incident occurred in spite of the company's "best possible pricing scheme[70]" which is to contribute to the *affordability* criteria of the right to health. This finding exemplifies the weakness of the bargaining power of a developing state, which in most cases lacks resources and capabilities to develop its own generic medicine, giving the pharmaceutical companies the dominant role in the right to health. In respect to the *results* of CSR-activities, a human rights impact analysis of the tools developed by VF in order to address disease control problems and contribute to the Millennium Development Goals (MDGs)[71], finds how the causal relationship between the products and human rights fulfilment is not that

[65] Dow Jones News Wires, "Novo Nordisk To Pay $9M Related To Iraq Oil-For-Food Kickbacks", *Wall Street Journal,* May 11, 2009, at http://online.wsj.com/article/BT-CO-20090511-713968.html (consulted on 8 June 2009).

[66] Pharmaceutical companies were suing the government of South Africa for violating the WTO Trade Related Intellectual Property agreement (TRIPS), after the country had passed legislation authorising it to abrogate patent rights on medicines. See Tapscott, Don, "Novo Nordisk: Transparency Champion", in *"New Paradigm Learning Corporation",* 2006. The abrogation of patent rights was a decision by Nelson Mandela due to the critical HIV/AIDS situation of the country: 30% of the population was infected by the virus, and prices and patents demanded prices way beyond the capabilities of a LDC. Suing Nelson Mandela on this matter, was estimated a highly scandalous public relation incident for the pharmaceutical companies who participated in the lawsuit. See Oliva, Max & Garralda Ruiz de Velasco, Joaquín, "Novartis Bringing Corporate Social Responsibility to the core of your strategy", Corporate Responsibility Center, Instituto de Empresa Business School, Madrid, Spain, 19 April 2007.

[67] Hoffman, Paul, "Shell Settlement a Sign of Hope for Corporate Accountability", *Forum Column Schonbrun DeSimone Seplow Harris & Hoffman LLP Attorneys at Law,* 15 June 2009.

[68] Hendricks, Faatimah, "Nigeria: Shell Settles Saro-Wiwa Case" at http://allafrica.com/stories/200906090087.html (consulted on 29 June 2009).

[69] See Bulgarian News Nework, Possible Insulin Shortage in Bulgaria Diabetics Demand Answers, at http://www.bgnewsnet.com/story.php?lang=en&sid=24132 & Sofica News Agency, Health Minister: Novo Nordisk to blame for Bulgaria Insulin Crisis, at http://www.novinite.com/view_news.php?id=103832 (consulted on 9 June 2009).

[70] See Novo Nordisk, Best possible pricing, at http://www.novonordisk.com/sustainability/values_in_action/Access_to_health_subsites/Best_possible_pricing.asp (consulted on 6 June 2009).

[71] See Vestergaard Frandsen, Innovating to achieve the MDGs, at http://www.vestergaard-frandsen.com/mdgs.htm (consulted on 9 June 2009).

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clear cut. Lifestraw[72] is capable of meeting immediate needs for potable water, but must not be seen as a substitute for the development of more sustainable water resource projects or as a way of relieving the state of its obligations towards economic and social rights. Additionally, the *affordability* of the product can be questioned seeing that the price of the product is quite high for people living below the poverty line[73].

Analysing the CSR-activities of each industry through a human rights perspective shows where the CSR-activities contribute and where they counter act human rights realisation. Remarkably, the *opportunities* appear whenever the CSR-initiatives constitute projects embarked upon in *partnership* or when they relate directly to the *business-operations* of the company. This is further elaborated below.

4.4. *Categorasition and impact*

Depending on the sector of the company, the type of impact the company has on the right to health differs. This indicates that the companies play different roles in respect to the realisation of human rights depending on their industry. This also comes of the fact that the stakeholders of a company differ according to the sector in which it operates, and that companies need to prioritise these, since they will never be able to respond to them all. Hence, one can say they have different obligations in relation to CSR[74].

Recalling the categorisation made of the companies, and taking into consideration the case-analysis made, the following typology can be made.

4.4.1. Pharmaceutical companies

NN, being a *pharmaceutical company,* has a *direct impact* on the right to health in to ways. Primarily, the company has an impact on the *curative dimension* of the right to health by providing *access to medicines.* This observation stems from the fact that the main tasks of pharmaceutical companies is the development and production of medicine. Secondly, pharmaceutical companies can also have an impact in the *preventive dimension* of the right i.e. if they engage in activities seeking to enhance the *public health protection* in a country, for example by using their expert-knowledge to assist in the formation and implementation of national health policies.

The ability to produce and develop medicine is one, which as recognised by Daniel Vasella, CEO of Novartis, no government or other institution has been as successful in undertaking as the pharmaceutical industry. As such the responsibility to produce pharmaceutical drugs rests not with governments but with the pharmaceutical industry[75]. This shows the direct link between the *business-operations* of pharmaceutical companies and the right to health, and carves out the need for cooperation between states and companies in realising the right to health. In the case study of NN it was found that one of the main positive contributions of pharmaceutical companies lies in easing the access to medicines for the least developed countries (LDCs) by lowering product-prices for these countries. Nonetheless, access to medicines requires more than just delivering the medicine in a specific place by a pharmaceutical company. The medicine needs to be delivered safely and distributed effectively[76]. Here, several factors such as distribution, education of patients, medical treatment and proper access of doctors are essential measures when considering the right to health. Therefore delivering the medicine in an efficient way must include the shared responsibility and cooperation between governments, donors, NGOs, medical professionals, pharmaceutical companies and other businesses, in order to enhance the overall impact[77].

4.4.2. CSR companies

VF being a *"CSR company"* has a *direct impact* as the company is tailored to undertake CSR-activities. In other words, its business is based on obtaining profit through business solutions

[72] Lifestraw is an instant microbiological purifier, developed by VF, which eliminates almost all bacteria, viruses and parasites from contaminated drinking water.

[73] Paul, John, *"A New Water Filter, An Old Debate",* World Resources Institute, Next Billion, at http://www.nextbillion.net/blog/a-new-water-filter-an-old-debate (consulted on 9 June 2009).

[74] Interview with Joaquín Garralda Ruiz de Velasco, Secretary-General of the General Secretariat for the Global Compact in Spain, Madrid, 30 June 2009.

[75] Oliva, Max & Garralda Ruiz de Velasco, Joaquín, *op. cit.*, p. 2.

[76] Ibid, p. 4.

[77] Ibid, p. 7.

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contributing to social and developmental causes. While this type of companies may operate within different industries and thus target different needs, their actions and business solutions with respect to the right to health are most likely to impact the *preventative dimension,* for example by developing cost-effective business solutions to prevent the spread of diseases, as it is the case with respect to VF. As such, contributing to raise the *public health protection,* rather than providing for *access to medicines.*

In order to ensure that CSR-activities in this category contribute to human rights-based development, the challenge becomes to identify the contribution, which the products are capable of making, as well as their *limitations* in a human rights context. What they can do is *assist* and *ease* processes towards human rights fulfilment, but in partnership with other actors who are able to contribute where the limitations of the business solutions are reached. Most importantly, business solutions must not substitute the obligations of states in relation to human rights.

4.4.3. "Other companies"

Shell, belonging to the category of *"other" companies* with respect to the right to health, has an *in-direct impact* since the "otherness" is constituted by the fact, that Shell is undertaking *type III CSR-activities not* related to its *business-operations*[78]. With respect to the right to health, these activities are most likely to be characterised by contributing to a cleaner environment, education, food, housing, potable water and safe working conditions, thus contributing to the *preventative dimension* of the right to health.

In the case of Shell, one can question whether the community development projects become a zero-sum game since they are mainly undertaken with the aim of repairing the damages Shell has made itself instead of actually progressing the development of the country. As pointed out by Ethical Corporation, in respect to the initiation of water supply projects by Coca Cola and SABMiller in Tanzania and Zambia, communities benefiting from these projects have often had their original water supply diverted for use in mining by the very same companies, only to then become the receivers of water or sanitation projects[79].

Shell runs an Immunisation Project and a HIV/AIDS partnership, demonstrating a more *preventive* approach, more likely to impact positively on the realisation of the right to health. The partnership approach ensures more sustainability through community buy-in and helps in managing the political risk from above[80]. In other words, by engaging in partnership with NGOs or the government itself, the contribution by these companies is more likely to have a positive effect in respect to development both on a micro- and macro level.

Although in the case of Shell, the main issue is the failure by the Nigerian government to prioritise any development of the country, sometimes the issues between companies and governments lies in divergent priorities. The case of Shell demonstrates that companies tend to only focus on the communities from which they get their resources, and may this way clash with the macro development priorities or agendas of local politicians. In order to make the projects more sustainable and beneficial for both company and community, partnerships are increasingly seen as the solution, as is also the case in Coca Cola and SABMillers water projects[81].

5. **Conclusion**

By integrating the findings made on the theoretical and empirical level, and speaking with point of departure in the three cases examined, the following conclusions are made in respect to the two key matters of the paper; *the role of business in development played through CSR-activities, and the tension between CSR-activities and human rights fulfilment*

[78] Hereby is not meant that the companies in question are not undertaking CSR-activities which *are* related to their business-activities, they are very likely to be doing both, but the activities in question here are the ones relating to a specific right (in this case the right to health).

[79] Ethical Corporation, "Water in Africa – Business turns on the tap", at http://www.ethicalcorp.com/content.asp?contentid=6498 (consulted on 1 July 2009).

[80] Ibid.

[81] Ibid.

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5.1. *The role of business in development*

Viewing the CSR activities of companies through a human rights lens, and specifically the right to health, makes it possible to characterise the human rights impact of companies in a more systematic way. By doing so, it becomes discernible how the impact of businesses on development matters can be divided in at least two main types of impact; *direct impact* when one or more human rights cover the business-operations of a company and *in-direct impact* when there is no link between the business operations of the company and the CSR-activities of the company, but where the CSR-activities touch upon a human right. In other words the *role* businesses should play in development can be mapped according to their industry, and the ways in which they can/should impact, differs according to whether they perform CSR-activities related to their business operations or not. This suggests a possibility for developing company mandates within development, for example so that companies are urged to focus their development assistance by concentrating on the particular human right(s) which their industry or business operations impact on. In addition, the case analysis strongly indicates that the role of business in development requires *partnership* both when undertaking projects with a direct and indirect impact on human rights. In other words, businesses nor can nor should engage as sole actors in development projects.

This is further confirmed through the findings made in relation to the second matter:

5.2. *The tension between CSR activities and human rights fulfilment*

In respect to the tension between CSR-activities and human rights fulfilment, this paper suggests the following proposals to reduce the tension:

Integrating the HR&B approach and the CSR approach

— The *non-negotiable responsibilities* of a company should be applied not only in relation to their *business-operations* but also when a company engages in *negotiable responsibilities (type III CSR-activities)*. Just as human rights standards are used to measure whether the *business-operations* of a company are carried out in a socially responsible manner in the HR&B approach, so too should the CSR approach be subjected to human rights standards. Implementing human rights standards in the CSR approach from above and below thus provides for one way of starting to address the need for common standard setting.

Stakeholder consultation

— Stakeholder consultation should comprise an integrated approach taking into consideration micro- and macro-level processes, thus encompassing an interplay between community consultation and multi-stakeholder dialogue. The outcomes of the dialogues, in terms of *type III CSR-initiatives,* should be subjected to a human rights impact assessment by which possible adverse impacts on the rights-based development of the country in question can be identified and avoided. Applying a human rights-based approach to stakeholder consultation additionally facilitates the identification of goals and indicators to evaluate the impact in practice and clearly calls for non-discrimination between stakeholder groups.

The triangular relationship between companies, states and human rights fulfilment

— The implementation of *type III CSR-activities* as a tool for development should encompass a coordinated effort, involving partnership with all relevant actors such as governments, NGOs and professionals depending on the project in question. The guiding principles of the coordinated effort should be the criteria of fulfilment of the human right(s), upon which the *type III CSR-activities* have an impact. Additionally, indicators for monitoring the *results* of the projects should be set based on human rights standards.
As such, in cases where *type III CSR-activities* impact upon a human right, companies should be encouraged to consult the state before beginning the implementation of the activities. Seeing that the state is the legal duty-bearer in the human rights framework, securing accountability in the activities becomes the obligation of the state. As long as companies are considered moral duty-bearers in the international human rights framework their legal accountability can be questioned, and it remains the duty of the state to protect human rights from third party intervention.

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Accountability

— Considering that companies are moral duty-bearers within the international human rights framework, and therefore mainly are accountable for human rights abuses through the governments of the countries in which they operate, and that in a developing context, the regulatory mechanisms of the state may be significantly weakened; in order to increase the accountability of CSR-activities, mechanisms for external accountability should be strengthened. As companies respond to a high degree to their economic bottom-line, one of the main ways to achieve accountability from their part is through mechanisms, which can impact on this. Here the pressure of external stakeholders especially in respect to consumers and communities can prove highly significant. The case of *Wiva v Shell* shows how mechanisms such as the Alien Tort Claims Act (ATCA) can serve to empower the rights of external stakeholders.

  In other words, sensitising companies for external accountability, through the further development of rights-based grievance mechanisms; not only in the HR&B approach but also in the CSR approach would increase the accountability of CSR as a tool in development.

While including business in development involves a risk of diminishing human rights, not doing so might too do so. In order to minimize the risk on both sides, this paper has proposed for the development of a human rights-based approach to corporate social responsibility.

5.3. *Future perspectives and areas of investigation*

The paper opens for new lines of investigation in respect to the role of business in development. Where the findings suggest for a more systematic way of assessing the role of business in development, it is also a suggestion as for how to identify contributory and counter-productive practices for companies in development by using human rights standards.

The typology of companies made above, could be further developed and provide for basic guidelines as to how businesses should be advised when wishing to contribute to development.

In respect to the development of a HRBA to CSR, the study has demonstrated the need and given proposals, but an actual development of the approach or a tool for how to engage businesses meaningfully in development is still missing.

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