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# A GLASS HALF FULL: CORPORATE AND STATE RESPONSIBILITIES UNDER ECONOMIC AND SOCIAL RIGHTS DURING THE ON-GOING EUROPEAN FINANCIAL CRISIS

*Jernej Letnar Čerňič\**

## INTRODUCTION

On the eve of the financial crisis in 2007, Juan Carlos decided to buy a flat in the Madrid quarter of Princesa for 260,000 EUR.<sup>1</sup> At that time, he was earning 1,100 EUR per month.<sup>2</sup> However, the bank that approved his credit application to buy the flat set the monthly fee at 1,300 EUR.<sup>3</sup> In order to meet his financial obligations, he had to rent the flat out.<sup>4</sup> Shortly afterwards, he lost his job, was asked to repay the credit, fell ill, spent two months in the hospital, and became immobilized.<sup>5</sup> After he returned home from the hospital, the bank attempted to evict him from the flat.<sup>6</sup> Despite various attempts to try to renegotiate the loan contract and fight the eviction, the bank seized the flat and evicted him.<sup>7</sup> This case illustrates the difficulties ordinary people face when they find themselves in a fragile situation during times of economic crisis. The Court of Justice of the European Union recognized such state of affairs in the case *C-415/11 Mohamed Aziz v. CatalunyaCaixa*, noting,

[T]he Unfair Terms in Consumer Contracts Directive precludes national legislation, such as the Spanish legislation at issue, which does not allow the court hearing the declaratory proceedings—that is, the proceedings seeking a declaration that a term is unfair—to adopt interim measures, in particular, the staying of the enforcement proceedings, where they are necessary to guarantee the full effectiveness of its final decision.<sup>8</sup>

The European economic crisis has been so severe that it has affected nearly everyone. “From Lisbon through Sevilla and Ljubljana to Athens and Nicosia, the Eastern and Southern European countries have been in recent years facing the negative consequences of the economic crisis and structural reforms.”<sup>9</sup> “[T]he level of protection of social and economic rights has been rapidly declining”<sup>10</sup> and there exists growing evidence that the economic and public debt crises of Croatia, Cyprus, Greece, Ireland, Italy, Portugal, Slovenia, and Spain have

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<sup>1</sup> Alvaro de Cózar & Monica Ceberio, *El Trauma*, EN LA CALLE, <http://elpais.com/especiales/2013/desahucios/el-trauma.html> (last visited Jan. 14, 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Press Release, Court of Justice of the European Union, Spanish Legislation Infringes EU Law to the Extent that it Precludes the Court which has Jurisdiction to Declare Unfair a Term of Loan Agreement Relating to Immovable Prop. from Staying the Mortg. Enforcement Proceedings Initiated Separately (Mar. 14, 2013), *available at* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-03/cp130030en.pdf>. See Sara Iglesias Sánchez, *Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: Aziz v. CatalunyaCaixa*, 51 COMMON MKT. L. REV. 955, 955 (2014).

<sup>9</sup> *Salomon on Austerity and Human Rights in Europe*, ESOHAP (Mar. 22, 2014), <http://esohap.org/2014/03/22/salomon-on-austerity-and-human-rights-in-europe/>.

<sup>10</sup> *Id.*

directly undermined the level of socioeconomic rights individuals enjoy in those countries.<sup>11</sup> Reduction in government spending has caused a decrease in the level of protection of economic and social rights such as the right to social security, health care, education, housing, food, and water.<sup>12</sup> The economic crises have affected the everyday lives of ordinary people at both the micro and macro levels. For instance, the European Commission noted that “groups already at a heightened risk of poverty, such as young adults, children[,] and to some extent migrants, are now experiencing an even worse situation.”<sup>13</sup> A young family in Spain, for example, can no longer repay its housing loan and can therefore quickly find itself homeless. A former Greek public employee can no longer access state health insurance, as he has no income. A Portuguese student cannot enroll at a public university due to increased tuition fees. Furthermore, one cannot forget the almost biblical numbers of people seeking asylum who are suffering in reception centers in Athens, Lampedusa, and Malta. Such cases leave no one indifferent. The Eurobarometer reported that “[f]inancially vulnerable Europeans report feeling left out of society far more often than respondents as a whole. While 16 % of Europeans overall feel excluded, around a third of ‘poor’ Europeans feel this way.”<sup>14</sup> Margot Salmon argues that

Europe’s elite failed to see the Eurozone crisis, and the responses to it, not only as a financial and economic issue, but also a human one. They failed to acknowledge that stabilizing economies through austerity measures at best secures socio-economic rights only indirectly and tenuously and, at worst, violates them egregiously. Decades of experience from elsewhere in the world on the human costs of structural adjustment should inform current decision-making, as should the experience of the impunity with which international organizations function when it comes to the harm to human rights caused by their policies. The people of Greece were treated as if ‘politicians can only think about one thing at a time’, and with grave results.<sup>15</sup>

At first glance, it seems as if nothing has changed in the past few years. Shopping centers in most European countries continue to be filled, most companies continue to operate smoothly, the trains continue to run, teaching is taking place undisturbed at the universities, and the theatres continue to operate. The key question that has developed in recent years is whether the current situation is just the calm before the storm. It would be wrong to hold only Southern European countries responsible for the apparent impasse in the current situation. A fraction of the responsibility should also be placed on successful Northern European countries, which until now

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<sup>11</sup> See European Union Agency for Fundamental Rights, *Fundamental Rights: Challenges and Achievements in 2012*, at 11–38 (2013), available at [http://fra.europa.eu/sites/default/files/annual-report-2012\\_en.pdf](http://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf). See also International Labour Organization, *World Social Protection Report 2014/15: Building Economic Recovery, Inclusive Development and Social Justice*, at 2 (2014), available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_245201.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_245201.pdf).

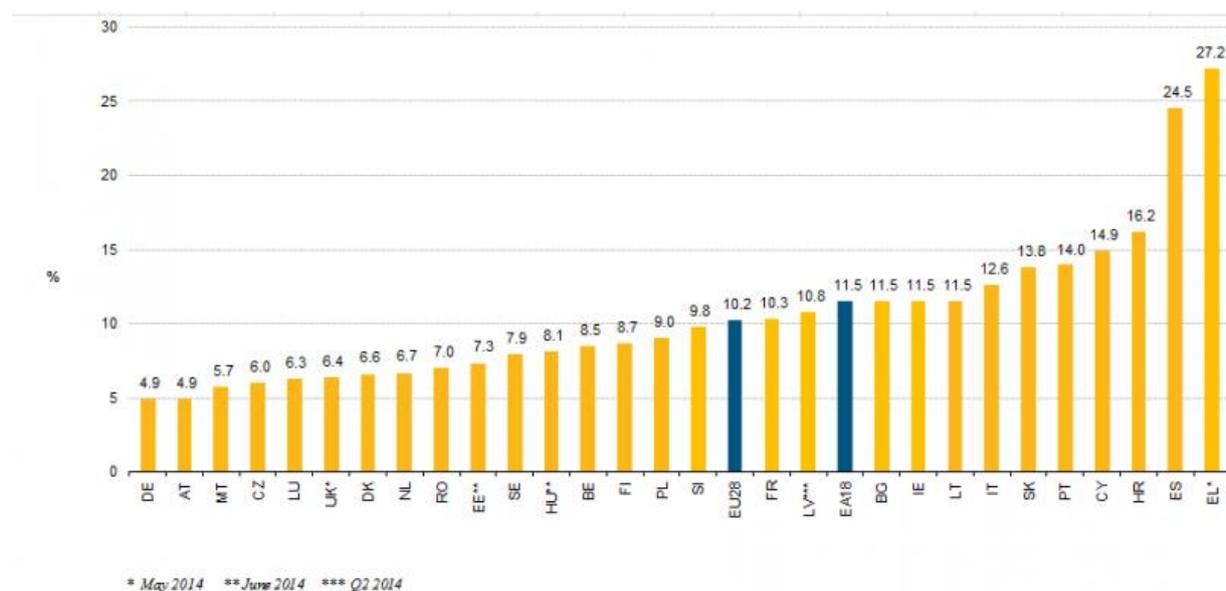
<sup>12</sup> See European Union Agency for Fundamental Rights, *supra* note 11, at 11–38.

<sup>13</sup> Press Release, European Union, Comm’n Presents the 2012 ‘Emp’t and Soc. Devs. in Eur.’ Review (Dec. 21, 2012), available at <http://europa.eu/newsroom/calendar/event/419057/2012-employment-and-social-developments-in-europe-review>.

<sup>14</sup> *Poverty and Social Exclusion Report*, at 52 (Dec. 2010), available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_355\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_355_en.pdf).

<sup>15</sup> Margot Salomon, *Austerity, Human Rights and Europe’s Accountability Gap*, OPEN DEMOCRACY (Mar. 18, 2014), <https://www.opendemocracy.net/openglobalrights-blog/margot-salomon/austerity-human-rights-and-europe%E2%80%99s-accountability-gap>.

have been unable to find long-term solutions to stabilize their single currency.<sup>16</sup> Delaying problem solving has never been a solution and never will be. The crisis is also intensifying due to both the creditor and debtor countries avoiding taking responsibility. At the same time, such policies are accompanied by populist politics that reject public saving, although it is more than clear that excessive borrowing leads to the collapse of the domestic economies, and in particular to a gradual loss of national sovereignty. The following table illustrates the unemployment rate in the EU member states:



**Figure 1:** Unemployment rates in EU member states<sup>17</sup>

An economic crisis can undermine a state's financial ability to fully implement even the reasonable minimum core of economic and social rights of its population. If "a state is obliged to repay its sovereign debt" to private corporations, international organizations, or other states, "it will be less financially capable [to] provid[e] the reasonable minimum core of economic and social rights."<sup>18</sup> "Several states spend large proportions of their annual revenue repaying sovereign debt."<sup>19</sup> This is exemplified by "current and former totalitarian regimes, whose governments often take out vast financial [] loans to finance their military activities,

<sup>16</sup> See Federico Fabbrini, *The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism*, 36 B.C. INT'L & COMP. L. REV. 1, 1-4 (2013).

<sup>17</sup> Javier Diaz-Gimenez, *The Future of Spain Economic Growth: The Elasticity of Employment*, ECONOMICS (Mar. 6, 2014), <http://blog.iese.edu/economics/2014/03/06/the-future-of-spain-economic-growth-the-elasticity-of-employment/>.

<sup>18</sup> Jernej Letnar Čer nič, *Making Sovereign Financing and Human Rights Work*, RIGHTINGFINANCE (Oct. 16, 2014), <http://www.rightingfinance.org/?p=1020>. See M. Dowell-Jones & D. Kinley, *Minding the Gap: Global Finance and Human Rights*, 25 ETHICS AND INT'L AFFAIRS 184, 191 (2011).

<sup>19</sup> Čer nič, *supra* note 18.

exuberant lifestyles[, or] imposed economic policies against the majority's interests.”<sup>20</sup> Overall, “states . . . are obliged to uphold [an] individual's . . . [economic and social] rights in the sovereign financing context.”<sup>21</sup>

However, despite the growing attention paid to economic crises, poor public and private governance, and mismanagement of public funds, there has been little examination of the impact economic crises have on the enjoyment of socioeconomic rights. Even though it is pertinent, “not much has so far been written on the relationship between [an economic crisis] and human rights,” particularly from the perspective of human rights law.<sup>22</sup> “The majority of literature tends to focus on either human rights” or economic crises as separate notions, and “specific kinds of lenders, financial instruments[, or] human rights abuses rather than studying common features of the link between [crises and socioeconomic crises] generally.”<sup>23</sup> This article therefore examines the relationship between socioeconomic rights and an economic crisis from the perspective of the human rights obligations of states, and attempts to enhance the discussion on how an economic crisis and socioeconomic rights can be adequately addressed. Further, this article examines the implementation of socioeconomic rights in times of European economic and social crisis and asks one main question: Do corporations and territorial states have obligations to maintain standards of socioeconomic rights during an economic crisis?

The rest of this article is dedicated to examining corporate and state obligations concerning economic and social rights. It will endeavor to examine the breadth of these obligations and to resolve whether these obligations remain unchanged in the times of a European economic crisis. The article will be split into seven sections. Section II discusses the implementation of economic and social rights during the economic and social crisis in Europe. Section III analyzes the nature and scope of corporate responsibilities under socioeconomic rights. Section IV discusses state obligations concerning economic and social rights and their core in three steps: first, by discussing and analyzing the fundamentals and legal nature of the state obligations; second, by examining the case law of the European Court of Human Rights; and third by studying the practice of the

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<sup>20</sup> *Id.* See S. Michalowski & J.P. Bohoslavsky, *Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank's Discussion Paper on Odious Debts*, 48 COLUM. J. TRANSNAT'L L. 61, 81 (2009); J.P. Bohoslavsky & V. Oppenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 HARV. HUM. RTS. J. 157, 204 (2010).

<sup>21</sup> Čerňič, *supra* note 18. The Castan Centre of Human Rights notes that “it does not follow that from additional sites of responsibility comes a corresponding reduction of the State's liability in respect of human rights protection and promotion.” RACHEL CHAMBERS, THE CASTAN CTR. FOR HUMAN RIGHTS LAW, RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARDS TO HUMAN RIGHTS 2, available at <http://www.law.monash.edu.au/castancentre/policywork/ohchr-sub-final.pdf>.

<sup>22</sup> Jernej Letnar Čerňič, *Placing Human Rights at the Centre of Sovereign Financing*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 1, 4 (Juan Pablo Bohoslavsky & Jernej Letnar Čerňič eds., 2014). See, e.g., C. Raj Kumar, *Human Rights Crisis of Public Health Policy: Comparative Perspectives on the Protection and Promotion of Economic and Social Rights*, 52 INDIAN J. INT. L. 351, 351 (2012); Ignazio Saiz, *Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis*, 1 J. HUM. RTS. PRAC. 277, 277 (2009); Rachael Lorna Johnstone & Aðalheiður Ámundadóttir, *Defending Economic, Social and Cultural Rights in Iceland's Financial Crisis*, 3 Y.B. POLAR L. 455, 455 (2011).

<sup>23</sup> Čerňič, *supra* note 22, at 4.

European Committee on Social Rights. Section V addresses the extraterritorial obligations of the home states of corporations, and Section VI offers predictions. Based on the preceding analyses, the conclusion in Section VII determines the benefit of corporate and territorial state obligations concerning economic and social rights and how they could be better realized in the future.

## I. ECONOMIC AND SOCIAL RIGHTS AND ECONOMIC AND SOCIAL CRISIS IN EUROPE

In past decades, a majority of states have encountered difficulties in securing socioeconomic rights. The economic crisis and “[t]he repayment of public debt directly affect[] individuals’ enjoyment of human rights, particularly economic and social rights.”<sup>24</sup> When the European Union and other international organizations, such as the International Monetary Fund, set conditions for granting further loans to Eastern and Southern European countries, they often forgot the obligations of those states to respect, protect, and fulfill the economic and social rights of ordinary people.<sup>25</sup> In recent decades, states have borrowed funds directly from other countries, international organizations, and private financial funds.<sup>26</sup> Such loans have often allowed for excessive government spending, poor public resources management, and corruption.<sup>27</sup> Within the banking sector of Eastern and Southern Europe, excessive spending and poor management has brought those countries to the brink of fiscal collapse.<sup>28</sup> This has led a number of individuals in those countries to struggle daily to provide for their families.

Previous research illustrates that heavily indebted states are less likely to ensure the adequate level of protections of economic and social rights. Further, there exists growing evidence from the [economic] crises of Southern Europe that suggests that the repayment of sovereign debt directly undermines the level of economic and social rights. In Particular, [] examples of Greece, Portugal, and Spain illustrate how damaging an effect restructuring of [public] debt can have on state resources to provide economic and social rights.<sup>29</sup>

Year	Greece	Italy	Slovenia	Spain	Portugal
2012	157.2	127.0	54.4	86.0	124.1
2013	175.1	132.6	71.7	93.9	129.0

<sup>24</sup> Jernej Letnar Čerňič, *Sovereign Financing and Corporate Responsibility for Economic and Social Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 139, 144 (Juan Pablo Bohoslavsky & Jernej Letnar Čerňič eds., 2014).

<sup>25</sup> See JOANNA DREGER, BRUGES EUROPEAN ECON. POL’Y BRIEFING, WHY IS SOVEREIGN DEBT RESTRUCTURING A CHALLENGE? THE CASE OF GREECE 11, (2012); TERESA CAVERO & KRISHNA POINASAMY, OXFAM INT’L, A CAUTIONARY TALE – THE TRUE COST OF AUSTERITY AND INEQUALITY IN EUROPE 9, (2013).

<sup>26</sup> DREGER, *supra* note 25, at 11.

<sup>27</sup> See Felipe Gómez Isa, *The Reversibility of Economic, Social and Cultural Rights in Crisis Contexts* 4 (Comité Evaluador de los Working Papers, Working Paper No. 1, 2011).

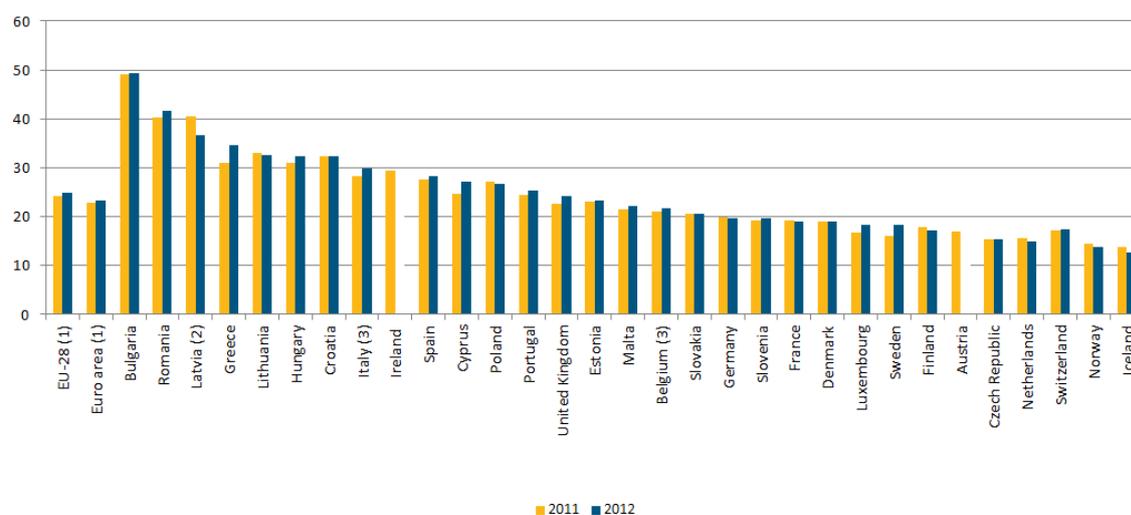
<sup>28</sup> See DREGER, *supra* note 25, at 25; Johnstone & Ámundadóttir, *supra* note 22, at 467.

<sup>29</sup> Čerňič, *supra* note 24, at 144.

2014	177.2	135.2	80.4	100.2	126.7
2015	172.4	133.9	81.3	103.8	124.8

**Table 1:** General consolidated gross government debt as a percentage of GDP at market prices<sup>30</sup>

Table 1 illustrates that borrowing has exponentially increased in recent years within problematic European countries.<sup>31</sup> Therefore, most stakeholders agree that it is necessary to limit public expenditures and include fiscal rules into national constitutions.<sup>32</sup> The stability of public finances is necessary for a balanced budget, a legal basis for limiting public borrowing, and for establishing an effective and robust monitoring mechanism for the implementation of both rules. Thus, it is necessary for a state to ensure that its public finances are balanced. It seems undisputed that a written constitution is the principle of fiscal stability and discipline. For instance, Figure 2 illustrates the changes from 2011 to 2012 concerning people at risk of poverty or social exclusion in the European Union.<sup>33</sup> It also shows that the risk has increased particularly in Eastern and Southern European countries.<sup>34</sup>



(1) Eurostat estimates for 2012  
(2) Break in time series for 2011  
(3) Provisional data for 2012

<sup>30</sup> Directorate Gen. of Econ. and Fin. Affairs (EFCIN), *Statistical Annex of European Economy*, at 184 (2014), available at [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2014/pdf/2014\\_05\\_05\\_stat\\_annex\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2014/pdf/2014_05_05_stat_annex_en.pdf).

<sup>31</sup> See *id.*

<sup>32</sup> Andrea Schaechter, Tidiane Kinda, Nina Budina & Anke Weber, *Fiscal Rules in Response to the Crisis—Toward the “Next-Generation” Rules. A New Dataset* 17–22, 26–27 (Int’l Monetary Fund, Working Paper WP/12/187, 2012).

<sup>33</sup> *People at Risk of Poverty or Social Exclusion*, EUROSTAT (2014), [http://ec.europa.eu/eurostat/statistics-explained/index.php/People\\_at\\_risk\\_of\\_poverty\\_or\\_social\\_exclusion](http://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion) (last updated Oct. 31, 2014).

<sup>34</sup> See *id.*

**Figure 2: People at Risk of Poverty or Social Exclusion in the European Union<sup>35</sup>**

A reasonable limitation on borrowing during times of deep economic crisis is needed for a state to continue to ensure socioeconomic rights. Imposing reasonable, binding limits on public borrowing can contribute to the stabilization of public finances, which could renew confidence in financial institutions and rating agencies. In this context, the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) observed in their 2012 Concluding Observations on Spain that the implementation of economic and social rights “[has] been reduced as a result of the austerity measures”<sup>36</sup> and expressed concern that “one in four minors is living below the poverty line.”<sup>37</sup> In addition, “pensions are in many cases below subsistence level, so that pensioners are at risk of falling into poverty.”<sup>38</sup> Moreover, “the situation of individuals and families who find themselves overwhelmed by housing costs”<sup>39</sup> are affected by “the regressive measures adopted by the State party that increase[s] university tuition fees.”<sup>40</sup> Therefore, the CESCR asked Spanish authorities to ensure that “all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups.”<sup>41</sup> Similarly, the CESCR noted in the 2012 Concluding Observations on Bulgaria that it

[I]s concerned, particularly in the context of the economic and financial crisis, about the recent rise in unemployment and long-term unemployment rates, which negatively affect the population of the State party, especially young persons, immigrants, Roma persons and persons with disabilities, and increases their vulnerability in violation of their rights set out in the Covenant.<sup>42</sup>

Further, the Committee on the Elimination of Discrimination Against Women (CEDAW) observed in its 2013 Concluding Observations on Greece that “the current financial and economic crisis and measures taken by the [s]tate party to address it within the framework of the policies designed in cooperation with the European

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<sup>35</sup> *Id.*

<sup>36</sup> ESCOR, CESCR, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, ¶ 8, U.N. Doc. E/C.12/ESP/CO/5 (June 6, 2012).

<sup>37</sup> *Id.* ¶ 17.

<sup>38</sup> *Id.* ¶ 20.

<sup>39</sup> *Id.* ¶ 21.

<sup>40</sup> *Id.* ¶ 28.

<sup>41</sup> *Id.* ¶ 8. See Office of the High Comm’r for Human Rights, *Impact of Austerity Measures on the Enjoyment of Human Rights*, <http://www.ohchr.org/EN/Issues/Poverty/Pages/ImpactofausteritymeasuresontheenjoymentHR.aspx> (last visited Jan. 24, 2015).

<sup>42</sup> ESCOR, CESCR, *Concluding Observations on the Combined Fourth and Fifth Reports of Bulgaria, Adopted by the Committee at its Forty-ninth Session*, ¶ 11, U.N. Doc. E/C.12/BGR/CO/4-5 (Nov. 30, 2012).

Union institutions and the International Monetary Fund (IMF) are having detrimental effects on women in all spheres of life.”<sup>43</sup> The Committee further observed that

Due to the seriousness of the situation and lack of any gender-sensitive approach to the current crisis policy within the [s]tate party, the Committee recommends that all important policymakers in Greece, including the European Union institutions and the IMF, cooperate in setting up an observatory to fully evaluate the impact on women of the many measures taken during the economic and financial crisis. Furthermore, a comprehensive gender equality policy should be developed in order to respond to the crisis and make sure that the obligations under the Convention and the aim and spirit of the Treaty of the functioning of the European Union, which requires that in “all its activities the Union shall aim to eliminate inequalities, and to promote equality, between men and women,” can be fully implemented by the [s]tate party.<sup>44</sup>

The foregoing pronouncements are illustrative of any state attempting to restructure its growing sovereign debt[,] caused by poor public and private sector management, at the expense of economic and social rights. In this way, the public resources available for social expenditure decline substantially[, which] can lead to a decrease in the level of protection of economic and social rights. As a consequence, states cannot provide equal level access to health care, social housing, water, and food. Access to university education is thereafter often subjected to increasing tuition fees, whereas there are in primary and secondary education more pupils per class.<sup>45</sup>

In conclusion, it has been established that the enjoyment, or lack thereof, of economic and social rights is directly intertwined with an economic crisis.<sup>46</sup>

## II. CORPORATE OBLIGATIONS TO OBSERVE ECONOMIC AND SOCIAL HUMAN RIGHTS

The financial corporate sector has played a significant role in the European economic and financial crisis.<sup>47</sup> Because of its involvement, it has contributed to the never-ending social crisis in the countries of Southern Europe. In countries such as Greece, Cyprus, Ireland, Portugal, Slovenia, and Spain, governments were left with no choice but to bail out doomed state-owned and privately owned banks.<sup>48</sup> In Slovenia and several other countries, major state-owned banks were giving out so-called bad loans, or loans without guarantees.<sup>49</sup> In the case of Slovenia, this forced the Slovenian government to produce several billions of Euros in losses, all to be

<sup>43</sup> Comm. on the Elimination of Discrimination Against Women [CEDAW], *Concluding Observations on the Seventh Periodic Report of Greece Adopted by the Committee at its Fifty Fourth Session (11 February – 1 March 2013)*, ¶ 6, U.N. Doc. CEDAW/C/GRC/CO/7 (Mar. 26, 2013).

<sup>44</sup> *Id.* ¶ 40.

<sup>45</sup> Černič, *supra* note 24, at 145. See European Agency for Dev. in Special Needs Educ. [EADSNE], *Teacher Education for Inclusion: International Literature Review 28* (2010), available at <http://www.european-agency.org/sites/default/files/TE4I-Literature-Review.pdf>.

<sup>46</sup> See Sabine Michalowski, *Sovereign Debt and Social Rights—Legal Reflections on a Difficult Relationship*, 8(1) HUM. RTS. L. REV. 35, 68 (2008); Christian Barry, *Sovereign Debt, Human Rights, and Policy Conditionality*, 19 J. POL. PHIL. 282, 284 (2011).

<sup>47</sup> See *The Economic Crisis – The EU's Response*, EUROPEAN UNION NEWSROOM, [http://europa.eu/newsroom/highlights/special-coverage/financial-crisis/index\\_en.htm](http://europa.eu/newsroom/highlights/special-coverage/financial-crisis/index_en.htm) (last updated Jan. 21, 2015).

<sup>48</sup> See Jan Sonnenschein, *Portuguese Trust in Banks Most Bouyant of Bailout Countries*, GALLUP (Oct. 4, 2013), <http://www.gallup.com/poll/165245/portuguese-trust-banks-buoyant-bailout-countries.aspx?ref=more>.

<sup>49</sup> See Marja Novak, *Insight: Slovenia Rues Bank Mismanagement as Bailout Talk Grows*, REUTERS (July 26, 2012, 8:41 AM), <http://www.reuters.com/article/2012/07/26/us-slovenia-banks-idUSBRE86P0A520120726>.

covered by taxpayers.<sup>50</sup> As a result of repaying bank losses, governments are not able to guarantee the same level of protection of socioeconomic rights due to the repayments limiting their financial capabilities. Levels of socioeconomic rights have therefore declined substantially in most European countries, particularly in Southern, Central, and Eastern Europe.<sup>51</sup> In most cases, no one in the banking sector faced prosecution for approving bad loans;<sup>52</sup> however, taxpayers were forced to accept cuts in social security protection.<sup>53</sup> National governments have therefore been forced to make unpopular choices. This Section analyzes the corporate obligation to ensure respect, protection, and fulfillment of human rights in times of social crisis.

#### A. RECENT DEVELOPMENTS

In the last decade, the UN has intensified its work on business and human rights. In July of 2005, John Ruggie, a professor at Harvard University, was appointed Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.<sup>54</sup> “Ruggie criticized the 2003 Norms and has submitted that the ‘norms exercise became engulfed by its own doctrinal excesses.’”<sup>55</sup> The 2008 Ruggie Report proposed “a three-pillar framework for corporate accountability of human rights, which he described as ‘protect, respect[,] and remedy.’”<sup>56</sup> Not long after, the UN Human Rights Council adopted the *Guiding Principles on Business and Human Rights* to create the foundation for implementing Ruggie’s three pillars.<sup>57</sup> After Ruggie’s mandate expired in 2011, the UN Human Rights Council appointed a five-member working group to “promote the effective and comprehensive dissemination and implementation of the *Guiding Principles on Business and Human Rights: Implementing the United Nations*

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<sup>50</sup> *Id.*

<sup>51</sup> See Ian Traynor, *Austerity Pushing Europe Into Social and Economic Decline, Says Red Cross*, THE GUARDIAN (Oct. 10, 2013, 3:00 PM), <http://www.theguardian.com/world/2013/oct/10/austerity-europe-debt-red-cross>.

<sup>52</sup> See *Why Have So Few Bankers Gone to Jail for Their Part in the Crisis*, THE ECONOMIST, (May 4, 2013), available at <http://www.economist.com/news/finance-and-economics/21577064-why-have-so-few-bankers-gone-jail-their-part-crisis-blind-justice>.

<sup>53</sup> See Michael Weissenstein, *Retirement at 60? Europe Faced with Cuts in Generous Welfare System*, THE HUFFINGTON POST (May 24, 2010, 11:57 AM), [http://www.huffingtonpost.com/2010/05/24/europe-cuts-worker-benefi\\_n\\_587209.html](http://www.huffingtonpost.com/2010/05/24/europe-cuts-worker-benefi_n_587209.html).

<sup>54</sup> Press Release, Security-General, Security-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

<sup>55</sup> Jernej Letnar Černič, *United Nations and Corporate Responsibility for Human Rights*, 8 MISKOLC J. INT’L L. 23, 28 (2011) (quoting Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 59, U.N. Doc. E/CN.4/2006/97 (Feb. 2006)).

<sup>56</sup> *Id.* (quoting Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 17, U.N. Doc. A/HR/8/5 (Apr. 7, 2008)).

<sup>57</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*].

*'Protect, Respect[,] and Remedy' Framework.*<sup>58</sup> So far, the working group has “produced two reports, which have mainly followed Ruggie's mandate. Both reports were heavily criticized by non-governmental organisations and academics.”<sup>59</sup> “Against this backdrop, in September of 2013, the Republic of Ecuador . . . proposed the adoption of ‘[a]n international legally binding instrument, concluded within the UN system, which would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States.’”<sup>60</sup> The proposal was reportedly supported by eighty-five states and various civil society organizations.<sup>61</sup>

On June 26, 2014, the UN Human Rights Council voted on two resolutions dealing with business and human rights.<sup>62</sup> One resolution was drafted by Ecuador and South Africa and was supported by Bolivia, Cuba, and Venezuela, while the other was spearheaded by Norway.<sup>63</sup> The resolution proposed by Ecuador and South Africa created “an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>64</sup> The resolution further notes “that the Chairperson-Rapporteur of the open-ended intergovernmental Working Group should prepare elements for the draft[ing of a] legally binding instrument.”<sup>65</sup> Even though the resolution moves away from the on-going work of the UN regarding business and human rights, twenty states supported it, fourteen voted against it, and thirteen states abstained.<sup>66</sup> An international treaty would “provide appropriate protection, justice[,] and remed[ies] to the

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<sup>58</sup> Human Rights Council Res. 17/4, Human Rights and the Transnational Corporations and Other Business Enterprises, 17th Sess., U.N. Doc. A/HRC/17/L.17/Rev.1, at 2 (June 15, 2011).

<sup>59</sup> HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS, (Jernej Letnar Černič and Tara Van Ho Draft eds.) (forthcoming 2015).

<sup>60</sup> *Id.*

<sup>61</sup> See Surya Deva, *The Human Rights Obligations of Business: Reimagining the Treaty Business*, Workshop on Human Rights and Transnational Corporations: Paving the Way for a Legally Binding Instrument, Geneva, Switz. (Mar. 11–12, 2014), available at [http://business-humanrights.org/sites/default/files/media/documents/reimagine\\_int\\_law\\_for\\_bhr.pdf](http://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf).

<sup>62</sup> Larry Catá Backer, *And a Treaty to Bind them All—On Prospects and Obstacles to Moving from the GPs to a Multilateral Treaty Framework, a Preliminary Assessment*, LAW AT THE END OF THE DAY (July 3, 2014), <http://lcbackerblog.blogspot.com/2014/07/and-treaty-to-bind-them-all-on-prospects.html>.

<sup>63</sup> *Id.*

<sup>64</sup> Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, ¶ 1, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014).

<sup>65</sup> *Id.* at ¶ 3.

<sup>66</sup> *Resolution and Voting Results of 26<sup>th</sup> HRC session*, UN WATCH (June 26, 2014), <http://blog.unwatch.org/index.php/2014/06/26/resolutions-and-voting-results-of-26th-hrc-session/>.

victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business[] enterprises.”<sup>67</sup> Nonetheless,

As correctly noted by Arvin Ganesan of Human Rights Watch, [] “[a] fundamental flaw lies in Ecuador’s insistence that the treaty focus on multinational companies, even though any company can cause problems and most standards, including the UN [guiding] principles, don’t draw this artificial distinction.”

A day later, Norway’s proposed resolution was adopted consensually. This resolution . . . expressed support for ‘the work of the Working Group on the issue of human rights and transnational corporations and other business enterprises in the fulfilment of its mandate. . . . Ruggie noted recently that “the resolution introduced by Argentina, Ghana, Norway, and Russia—currently overshadowed by Ecuador’s resolution—will play an important role going forward.”<sup>68</sup>

It is understood that both conflicting approaches are often one–dimensional and the most appropriate way forward would be to allow for pluralist approaches to the questions of binding and nonbinding initiatives in the field of human rights and business.

#### 1. THE NATURE AND SCOPE OF CORPORATE OBLIGATIONS

“Corporations are obliged to respect, protect, and fulfil human rights through a combination of negative and positive duties.”<sup>69</sup> However, “[t]his tripartite typology of human rights obligations normally refers, under traditional human rights doctrines, to state obligations.”<sup>70</sup> However, the fact that the state is the bearer of human rights obligations does not imply that only the state has such obligations.<sup>71</sup> This article argues that corporations also have obligations to respect, protect, and fulfil human rights.<sup>72</sup>

##### a. Corporate Obligation to Respect

The corporate obligation to respect requires “corporations [to] refrain from interfering with the enjoyment of human rights . . . .”<sup>73</sup> This obligation to respect also obliges corporations to effectively recognize the human

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<sup>67</sup> *Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council*, BUS. & HUMAN RIGHTS RES. CTR. (2013), <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

<sup>68</sup> HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS, *supra* note 59.

<sup>69</sup> JERNEJ LETNAR ČERNIČ, HUMAN RIGHTS LAW AND BUSINESS – CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS 53 (2010).

<sup>70</sup> Jernej Letnar Černič, *State Obligations Concerning Indigenous Peoples’ Rights to their Ancestral Lands: Lex Imperfecta?*, 28 AM. U. J. INT’L L. 1129, 1148 (2013).

<sup>71</sup> See Allan Rosas & Martin Scheini, *Categories and Beneficiaries of Human Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 57–58 (Raija Hanski & Markku Suski eds., 1999).

<sup>72</sup> See HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 55 (2d ed. 1996); Asbjorn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L. J. 35, 37 (1989).

<sup>73</sup> David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 963 (2004).

rights of individuals. The obligation to respect means that corporations must not only “undertake due diligence to ensure not only that they comply with human rights obligations . . . , but also that they do everything possible to avoid causing harm . . . .”<sup>74</sup> More specifically, the *Guiding Principles on Business and Human Rights* note in Paragraph 11 that corporations “should respect human rights[,] . . . mean[ing] that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>75</sup> The commentary to Paragraph 12 argues that “[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.”<sup>76</sup> In this way, the *Guiding Principles* do not distinguish between different categories of rights, such as civil, political, economic, or social rights.

Paragraph 11 does not include the word *shall*, whereas, [John Ruggie’s 2008] report recognized that “the baseline responsibility of companies is to respect human rights.” . . . In contrast, as noted above, several international documents, national legal orders[,] and scholars argue that corporations already have human rights obligations. For instance, the United Nations Guiding Principles on [E]xtreme [P]overty state that “business enterprises, have, at the very minimum, the responsibility to respect human rights.”

Further, the OECD Guidelines for Multinational Enterprises noted that both states and enterprises that lend to sovereign states “should” respect human rights “within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate,” including domestic human rights obligations.<sup>77</sup>

Whereas the text of the Guidelines employs the verb *should*, the commentary on the Guidelines suggests that enterprises have an obligation to respect human rights because “respect for human rights is the global standard of expected conduct for enterprises.” The nature of obligations to respect requires “avoiding infringing on the human rights of others and should address adverse human rights impacts with which they are involved.” However, [financial] enterprises should only respect human rights “[w]ithin the context of their own activities.” They should “[a]void causing or contributing to adverse human rights impacts and address such impacts when they occur.” Further, the Guidelines oblige enterprises to conduct due diligence “as appropriate to their size, the nature and context of operations[,] and the severity of the risks of adverse human rights impacts.”<sup>78</sup>

“Corporations are also obliged to prevent and investigate violations, address complaints brought by victims, and potentially provide reparations for harm and injuries caused.”<sup>79</sup> Overall, corporations are obliged to refrain from violating human rights in their activities.

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<sup>74</sup> Černič, *supra* note 70, at 1152.

<sup>75</sup> *Guiding Principles*, *supra* note 57, at ¶ 11.

<sup>76</sup> *Id.* at 13.

<sup>77</sup> Černič, *supra* note 24, at 153 (internal citations omitted).

<sup>78</sup> Jernej Letnar Černič, *The 2011 Update of the OECD Guidelines for Multinational Enterprises*, INSIGHTS (Feb. 10, 2012), <http://www.asil.org/insights/volume/16/issue/4/2011-update-oecd-guidelines-multinational-enterprises> (internal citations omitted).

<sup>79</sup> Černič, *supra* note 24, at 154.

b. Corporate Obligation to Protect

The corporate “obligation to protect human rights [also] includes the obligations to protect the individual’s enjoyment of [human] rights . . . and to support the protection of those rights by employing its expertise and resources . . . .”<sup>80</sup> It is these obligations that require the adoption of positive measures to comply with socioeconomic rights. The “[o]bligation to protect means not only that [] corporations must not interfere with [human] rights of individuals[,]” but also that “business partners throughout the supply chain” comply with them as well.<sup>81</sup> The *Guiding Principles on Business and Human Rights* do not directly refer to the obligation to protect; however, they do refer to it indirectly. Specifically, they note that

[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.<sup>82</sup>

Further, Principle 13(b) notes that corporations shall “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>83</sup> The obligation to protect generally means that corporations have a duty to supervise their supply chains in order to ensure that their suppliers, distributors, and other business partners also comply with socioeconomic rights.<sup>84</sup> In the case of the financial sector, this would mean that transnational banks must ensure that both their subsidiaries and local banks comply with socioeconomic rights as well. However, this may be difficult to implement in practice. The measures that corporations can adopt to ensure the respect of human rights include acknowledging the human rights in internal policies and codes of conduct, constantly and consistently examining human rights situations where human rights are at stake, effectively monitoring policies that protect the human rights of individuals, and implementing an effective monitoring system to ensure that policies relating to human rights are being implemented.<sup>85</sup> Another legal source relevant to the activities of corporations is the *Principles on Responsible Investment*, developed by a group of international investors.<sup>86</sup> Further, the Equator Principles Financial Institution provides that it “will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Guiding Principles*, *supra* note 57, ¶ 14.

<sup>83</sup> *Id.* ¶ 13.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* ¶¶ 16–21.

<sup>86</sup> *History*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, <http://www.unpri.org/about-pri/about-pri/history/> (last visited Jan. 22, 2015). *See* U.N. DEP’T OF ECON. AND SOC. AFFAIRS, REPORT OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT, MONTERREY, MEXICO, 18-22 MARCH 2002, U.N. Doc. A/CONF.198/11, U.N. Sales No. E.02.II.A.7 (2002).

with the Equator Principles” to ensure that the “projects [they] finance and advise on are developed in a manner that is socially responsible and reflects sound environmental management practices.”<sup>87</sup>

### c. Obligation to Fulfil<sup>88</sup>

The third category of corporate obligations concerning human rights includes the obligation to fulfil, which is defined as a positive obligation. It is further divided into an obligation to facilitate, provide[,] and promote. [However, the obligation truly] depends on the available financial resources of the corporation . . . . It requires that the corporation take[] active measures to ensure the availability, accessibility[,] and affordability of [human] rights. Corporations are therefore obliged to work towards abolition of obstacles for the enjoyment human rights. For instance, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights note in Principle 28, that “[a]ll States must take action, separately, and jointly through international cooperation, to fulfil economic, social[,] and cultural rights of persons within their territories and extraterritorially . . . .” Such obligations apply under the qualifying condition of Principle 31, which argues that “[a] State has the obligation to fulfil economic, social[,] and cultural rights in its territory to the maximum of its ability.” *Mutatis mutandis*, the obligation to fulfil . . . would mean that financial corporations must contribute to the enjoyment of [human] rights of the individuals . . . and strive to abolish obstacles to the enjoyment of economic and human rights. . . . Another way would involve the corporation providing its own financial resources in order to guarantee reasonable minimum [human] rights, for instance in a particular geographical area or with regard to particular social rights. However, a reasonable approach should be employed when examining the corporate obligation to fulfil [human] rights. . . . [C]orporations are not expected to take the role of the state, but are expected to do what they can. States are, and should be, primarily responsible to meet this obligation. However, a corporation, such as Royal Dutch Shell in Ogoniland, may become the primary holder of an obligation to fulfil economic rights in the context of a failed state where there is no governmental control or no efficient authority to protect [human] rights and where corporations were asked to provide public functions on behalf of the state.<sup>89</sup>

In such cases, a corporation might have assumed the role of the state, thereby assuming the state’s obligations as well. A corporation may assume some of these obligations where the state is not present and can no longer guarantee human rights, provided that the corporation has stepped in to the role of the state.<sup>90</sup>

The size and availability of corporate financial resources will play a large role in meeting these standards to protect [human] rights. While the resources available for fulfilling human rights obligations may not be as plentiful in small corporations as in large corporations, corporations may adopt such policies to the maximum extent given their available resources. Given the above, such obligations also have implications beyond the legal sphere into the field of ethical and moral obligations.

This section has shown that corporations have tripartite obligations to respect, protect[,] and fulfil the reasonable minimum core of economic and social rights of individuals in the borrowing state.

### III. STATE OBLIGATIONS UNDER SOCIOECONOMIC RIGHTS

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<sup>87</sup> *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/ep3/38-about/about/195> (last visited Jan. 22, 2015).

<sup>88</sup> This portion of the Article draws heavily from Černič, *supra* note 24, at 155–56.

<sup>89</sup> Černič, *supra* note 24, at 155–56 (internal citations omitted).

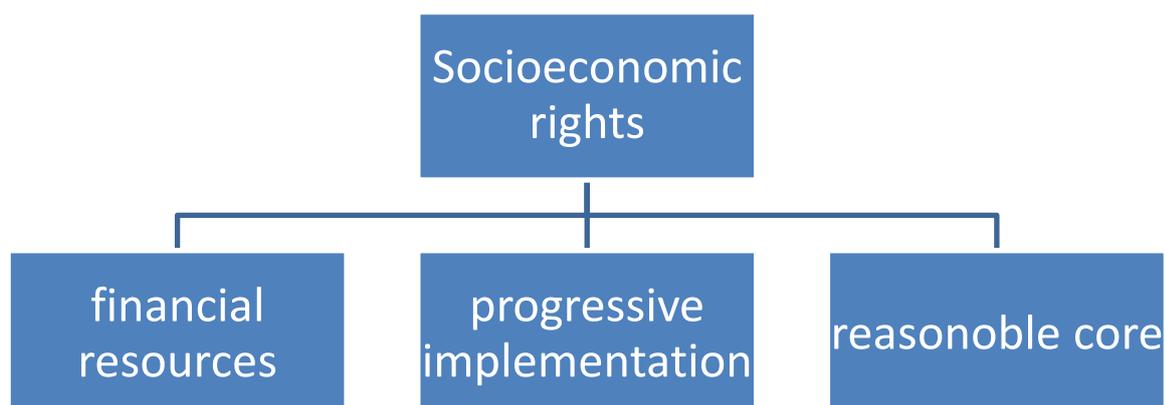
<sup>90</sup> See THE ESSEX BUSINESS AND HUMAN RIGHTS PROJECT, CORPORATE LIABILITY IN A NEW SETTING: SHELL & THE CHANGING LEGAL LANDSCAPE FOR THE MULTINATIONAL OIL INDUSTRY IN THE NIGER DELTA 60 (2012).

### A. FUNDAMENTAL PRINCIPLES

States have primary obligations to ensure that socioeconomic rights are well protected. Traditionally, states are obliged to protect human rights within their territory. This Section therefore first examines obligations of territorial states in relation to economic and social rights.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides in Article 2(1) that states shall undertake “steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” This provision includes the most common characteristics of economic and social rights, including that their full realization is to be achieved *progressively* depending on the state’s available financial resources.<sup>91</sup>

However, it is more common for states to attempt to conceal the real state of the public budget in order to avoid their obligations regarding socioeconomic rights.



**Figure 3:** Characteristics of socioeconomic rights

However, the phrase “maximum available resources”<sup>92</sup> refers not only to a state’s financial capabilities, but also to the international community’s obligations of “international assistance and cooperation.”<sup>93</sup> “Positive

<sup>91</sup> Černič, *supra* note 24, at 142 (internal citations omitted). See Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social and Cultural Rights*, 16 HUM. RTS. Q. 694, 701 (1994).

<sup>92</sup>International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at art. 1, ¶ 1 (Jan. 3, 1976).

<sup>93</sup> Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment No. 3: The Nature of States’ Parties Obligations (Art. 2, Para. 1 of the Covenant)*, ¶ 13 (Dec. 14, 1990) [hereinafter *General Comment No. 3*]; Magdalena Sepúlveda, *Obligations of ‘International Assistance and Cooperation’ In An Optional Protocol To The International*

obligations under economic and social rights are most often connected with financial resources. Therefore, insisting on the immediate realization of the core of economic and social rights in every situation may impose unjustified burdens on states that have been facing systematic and long-term public resource shortages[,]”<sup>94</sup> especially during economic and financial crises.<sup>95</sup> “For instance, some states and even some corporations can provide free elementary education, whereas others . . . must charge for attending primary school simply due to a lack of available public financial resources.”<sup>96</sup> This is of course despite the fact that

charging fees is often counterproductive and that the obligation to provide free education falls within the core obligations under the ICESCR and is therefore not dependent on available resources. Some commentators claim that international human rights law therefore traditionally places only obligations of conduct on states, not obligations of result. However, the views of the ESCR Committee and scholarship on immediate obligations of result challenge such an assumption.<sup>97</sup>

Economic and social rights have long time been considered as secondary and even nowadays in practice both sets of rights are still not placed on an equal footing. Economic, social[,] and cultural rights include rights to housing, food, education, water[,] and health. This set of rights complements the so-called civil and political rights. As Scheinin notes, “[T]here is no watertight division between different categories of human rights.” However, despite claims that both sets of rights are of equal importance and are interdependent, civil and political rights are more solidly established under international and national law. Economic [and social] rights generally have a programmatic nature and are not always directly justiciable to the same extent that civil and political rights are.<sup>98</sup>

Even though an extensive body of case law has come to existence in relation to civil and political rights, courts are still very reluctant to try cases based on economic, social, or cultural rights.<sup>99</sup> This refers to the question of the “justiciability” of economic, social, and cultural rights, and whether these rights are enforceable before a court of law.<sup>100</sup> Sisay Yeshanew, an international law scholar,

[D]efines justiciable rights as those that can “be subjected to a judicial or quasi-judicial procedure of enforcement.” [However,] Scheinin argues that “[t]he problem relating to the legal nature of economic and social rights does not relate to their validity but rather to their applicability.” The central question of economic and social rights therefore lies in their

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*Covenant On Economic, Social, And Cultural Rights*, 24 NETH. Q. HUM. RTS. 271, 274 (2006). See Černič, *supra* note 24, at 142.

<sup>94</sup> See Černič, *supra* note 24, at 142.

<sup>95</sup> See *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges* (European Univ. Inst., Working Paper No. 5, 2014) available at <http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>.

<sup>96</sup> Černič, *supra* note 24, at 142.

<sup>97</sup> *Id.* See Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 185 (1987); Sepúlveda, *supra* note 101.

<sup>98</sup> Černič, *supra* note 24, at 142 (internal citations omitted).

<sup>99</sup> Jernej Letnar Černič, *Economic, Social and Cultural Rights of the Purak Peoples (Committee on Economic, Social and Cultural Rights)*, in LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS: ALTERNATIVE JUDGMENTS 100 (Mark Gibney & Wouter Vandenhoe, eds., 2014).

<sup>100</sup> *Id.* (citing *Justiciability of Economic, Social and Cultural Rights: Experiences From Domestic Systems* (Fons Coomans ed., 2006). See Malcom Langford, *Justiciability of Social Rights: From Practice to Theory*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 1, 1–3 (Malcom Langford ed., 2008).

enforcement or justiciability. [] [T]he Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, entered into force on May 5, 2013, [recognizes] the political acceptance by [signatory] states of their justiciability.<sup>101</sup>

Furthermore, the European Committee of Social Rights has been examining increasing numbers of collective complaints.<sup>102</sup> In addition, the body of case law in domestic jurisdictions is growing substantially as well.<sup>103</sup>

The CESCR developed the conceptual baseline for economic and social rights in which every individual should enjoy. It argued that

A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.<sup>104</sup>

The minimum core model requires states to ensure basic levels of compliance in relation to a right. Historically, this has not been the usual case with economic and social rights, but it almost immediately (or with immediate effect) became a common feature of economic and social rights.<sup>105</sup> Nonetheless, the CESCR cautions state parties “to move as expeditiously and effectively as possible towards that goal.”<sup>106</sup> However, defining the minimum level of a right in a particular country is even more problematic. The CESCR “lacks concrete standards for evaluating the performance of governments and their compliance with the Covenant,” and therefore, “it should come as no surprise that the Committee itself does not use progressive realization as the standard by which it reviews the performance of states parties.”<sup>107</sup> Additionally, courts and human rights bodies may easily employ the minimum core model to identify minimum levels of negative obligations, as their applicability is questionable in relation to positive obligations.<sup>108</sup> In applying this principle, the minimum core approach applies particularly to obligations to respect and protect economic and social rights, and to a lesser extent, to fulfill obligations that involve financial resources of a state.

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<sup>101</sup> Černič, *supra* note 24, at 143 (internal citations omitted). See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc.A/RES/63/117 (Dec. 10, 2008).

<sup>102</sup> See Černič, *supra* note 24, at 144.

<sup>103</sup> See *id.*; Fons Coomans, *Justiciability of the Right to Education*, 2 ERASMUS L. REV. 427, 427–28 (2009); Katharine G. Young & Julietta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 180–81 (2013).

<sup>104</sup> *General Comment No. 3*, *supra* note 93, at ¶ 10.

<sup>105</sup> CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, ¶ 37, Jan. 20, 2003.

<sup>106</sup> *General Comment No. 3*, *supra* note 93, at ¶ 9.

<sup>107</sup> Audrey R. Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23, 32 (1996).

<sup>108</sup> Sandra Liebenberg, *Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate*, in CONSTITUTIONAL CONVERSATIONS 303, 309 (Stu Woolman & Michael Bishop eds., 2008).

However, as noted above, the phrase “maximum of its available resources”<sup>109</sup> refers to both the financial capability of a state as well as the international community.<sup>110</sup> Therefore, seeking expeditious implementation of economic and social rights can encumber states already experiencing resource shortages.<sup>111</sup> This shortage of resources and pressure to recognize new rights could cause a state to not have the ability to fulfill minimum rights that could have been fulfilled under other circumstances. For instance, a state which cannot ensure basic health care, housing, or education to a majority of its population cannot expect to provide an individual with life-saving drugs, a social flat, or free education.<sup>112</sup> For this reason, it is more convincing and appropriate to employ and interpret the minimum core model together with a “reasonableness test” drafted by the South African Constitutional Court in *Grootboom*<sup>113</sup> and subsequent cases.<sup>114</sup> The Court eloquently stated in *Grootboom* that

[t]hey must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>115</sup>

The state policies to implement economic and social rights under the jurisprudence of the South African Court of Human Rights must be reasonable. The following figure illustrates the concept of a reasonable minimum core:

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<sup>109</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 92, at art. 1, ¶ 1.

<sup>110</sup> *General Comment No: 3*, *supra* note 93, at ¶ 13. See Sepúlveda, *supra* note 93, at 352.

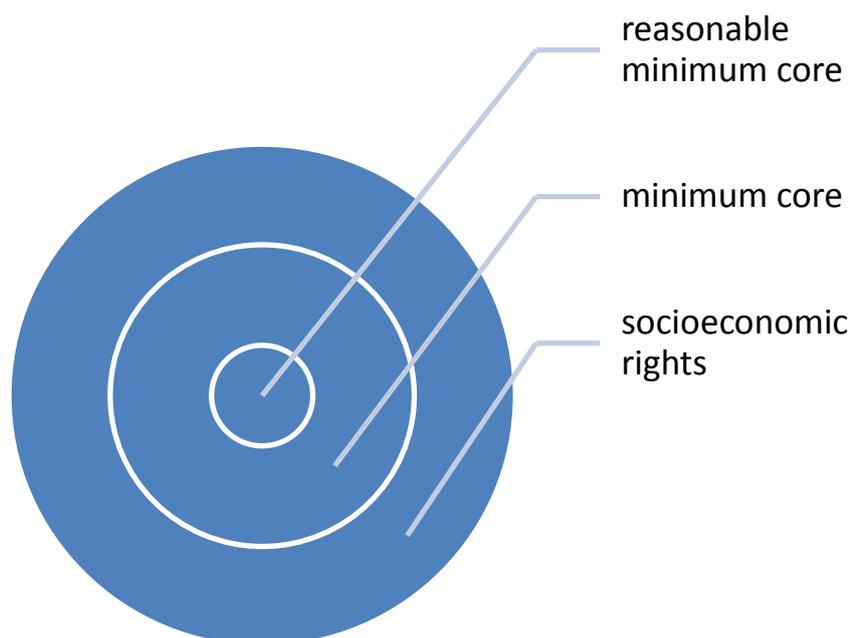
<sup>111</sup> See Černič, *supra* note 24, at 152.

<sup>112</sup> See *Republic of South Africa v. Grootboom and Others* 2000 (1) SA 1 (CC) at ¶ 46 (S. Afr.); Carol Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence*, 123 S. AFR. L. J. 264, 268–71 (2006).

<sup>113</sup> *Grootboom* (1) SA 1 (CC) at ¶ 46.

<sup>114</sup> See *Mazibuko and Others v. City of Johannesburg and Others* 2009 (1) SA 1 (CC) at ¶¶ 93–97 (S. Afr.). The Court stated, “What is clear from the conduct of the City is that it has progressively sought to increase access to water for larger households who are prejudiced by the 6 kilolitre limit. It has continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city. It cannot therefore be said that the policy adopted by the City was inflexible, and the applicants’ argument on this score too must fail.” *Id.* at ¶ 97. See also *Nokotyana and Others v. Ekurhuleni Metropolitan Municipality and Others* 2009 (1) SA 1 (CC) at 23 (S. Afr.); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 473 (1992).

<sup>115</sup> *Grootboom* (1) SA 1 (CC) at ¶ 41.



**Figure 4:** The concept of reasonable minimum core of socioeconomic rights

However, such an approach also has quite a few disadvantages, one being nontransparent state policy. A policy could be deemed as reasonable by the state and reverse the burden of proof, which would cause difficulties in showing that state policy was in fact unreasonable in an international tribunal.<sup>116</sup> Therefore, a combination of both approaches can overcome these deficiencies.<sup>117</sup>

Yeshanew observes that the minimum core model “more or less concentrates on the content of the rights to identify minimum obligations,” while the reasonableness test “focuses on the obligations of states or measures to realize rights.” The two-tiered approach can effectively address deficiencies of both approaches. In the same way, courts and human rights bodies can apply such an approach toward negative and positive obligations under social and economic rights.<sup>118</sup>

“The concept of a reasonable minimum core identifies minimum core obligations to respect, protect[,] and fulfil economic and social rights.”<sup>119</sup> It has been illustrated that an economic crisis often affects the ability of a state to comply even with this minimum core obligation to provide economic and social rights.<sup>120</sup>

#### *B. THE EUROPEAN COURT OF HUMAN RIGHTS AND STATE OBLIGATIONS DURING ECONOMIC CRISIS*

<sup>116</sup> See SISAY ALEMAHU YESHANEW, *THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM* 289–90 (2013).

<sup>117</sup> See *id.* at 294.

<sup>118</sup> Černič, *supra* note 22, at 6 (internal citations omitted).

<sup>119</sup> Černič, *supra* note 24, at 146.

<sup>120</sup> See Carlos Espósito et al., *Introduction: The Search for Common Principles, in SOVEREIGN FINANCING AND INTERNATIONAL LAW 3* (Carlos Espósito et al. eds., 2013). See also Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing* 17 (United Nations Conference on Trade & Dev., Discussion Paper No. 198, 2010), available at [http://unctad.org/en/Docs/osgdp20102\\_en.pdf](http://unctad.org/en/Docs/osgdp20102_en.pdf).

The European Court of Human Rights (ECtHR) monitors the forty-seven member states of the Council of Europe for compliance with the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), whereas the Committee of Ministers supervises the execution of ECtHR judgments in domestic jurisdictions.<sup>121</sup> The ECHR has been defined as a “constitutional instrument of the European public order.”<sup>122</sup> Judge Jambrek described it in the same way in his concurring opinion in the case *Fischer v. Austria*.<sup>123</sup> The ECtHR can therefore be viewed as a European constitutional court. Regarding the protection of human rights, the ECHR system is one of the most efficient and effective in the world. The ECHR lays out ten fundamental human rights, and it was the first binding treaty that specifically addressed human rights when it came into force in 1953.<sup>124</sup> The court in *Tyrer v. United Kingdom* described the ECHR as “a living instrument which . . . must be interpreted in light of present-day conditions.”<sup>125</sup> Although the wording of the ECHR only protects civil and political rights, the ECtHR has repeatedly held that the ECHR indirectly protects most of the economic and social human rights as well.<sup>126</sup>

The judges of the ECtHR both interpret and develop the articles of the ECHR.<sup>127</sup> They formulate the content of the ECHR through a “living process” in their judgments and in separate concurring and dissenting opinions. The ECHR is a normative document for the protection of human rights with maximum legal value and force, but it is also a political document that contains a number of [open] legal concepts. Such legal concepts can be interpreted by people—judges—who decide in concrete cases with different levels of knowledge and experience.<sup>128</sup>

It is therefore essential to present and analyze the role of the ECtHR in protecting socioeconomic rights. The Court hearing the 1978 case of *Airey v Ireland* remarked,

[T]he further [realization] of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions . . . and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.<sup>129</sup>

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<sup>121</sup> See *Questions & Answers*, ECHR, [http://www.echr.coe.int/Documents/Questions\\_Answers\\_ENG.pdf](http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf) (last visited Jan. 23, 2014).

<sup>122</sup> *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at ¶ 75 (1995).

<sup>123</sup> See *Fischer v. Austria*, 312 Eur. Ct. H.R. (ser. A) at 39 (1995) (Jambrek, J., concurring).

<sup>124</sup> See James W. Hart, *The European Human Rights System*, 102 LAW LIBR. J. 533, 537 (2010).

<sup>125</sup> *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at ¶ 31 (1978).

<sup>126</sup> *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at ¶ 26 (1979).

<sup>127</sup> See Erik Kotlarik, *European Court of Human Rights (ECHR), European Court of Justice (ECJ) and Their Interaction with Selected National Constitutional Courts from the Separation of Powers Perspective* (Aug., 2012) (unpublished LL.M. thesis, Central European University), available at [http://www.etd.ceu.hu/2012/kotlarik\\_erik.pdf](http://www.etd.ceu.hu/2012/kotlarik_erik.pdf).

<sup>128</sup> Jernej Letnar Černic, *Pitfalls of the National Selection Processes of Judges to the ECtHR*, VERFASSUNGSBLOG (Sep. 25, 2014), <http://www.verfassungsblog.de/en/pitfalls-national-selection-processes-judges-ecthr/>.

<sup>129</sup> *Airey v. Ireland*, 32 Eur. Ct. H.R. at ¶ 26.

The Court has previously examined several problematic issues relating to the enjoyment of socioeconomic rights, specifically where it has recognized the difference between socioeconomic, civil, and political rights, with the former depending almost entirely on the availability of financial resources.<sup>130</sup> The Court further observed in *Hirsi Jamaa and Others v. Italy* that “[t]he economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.”<sup>131</sup>

Recent case law from the ECtHR concerning human rights and the economic crisis is, however, quite telling. Ever mindful of the difficult financial positions of most European governments, the ECtHR granted those governments, in most cases, a wide margin to lower the standards of socioeconomic rights, while still maintaining a respect for their reasonable core. For instance, the ECtHR observed in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*,

As it recently did in similar circumstances relating to austerity measures adopted in Greece, . . . the Court considers that the cuts in social security benefits provided by the 2012 State Budget Act were clearly in the public interest within the meaning of Article 1 of Protocol No. 1. Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory.<sup>132</sup>

The ECtHR found that a decrease in the salaries of public officials does not amount to unjustified violations of socioeconomic rights.<sup>133</sup> Therefore, it declared the complaint inadmissible, explaining that “in the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and the temporary effect of the reduction of their holiday and Christmas subsidies, the Court considers that the applicants did not bear a disproportionate and excessive burden.”<sup>134</sup> The economic crisis rendered the Portuguese government unable to financially maintain the privileges of public employees.<sup>135</sup> Similarly, in *Koufaki and Adedy v. Greece*, the ECtHR agreed with the Supreme Administrative Court, which “held that the fact that the cuts in wages and pensions were not merely temporary was justified, since the legislature’s aim had been not only to remedy the acute budgetary crisis at that time but also to consolidate the State’s finances on a

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<sup>130</sup> Françoise Tulkens, *The European Convention on Human Rights and the Economic Crisis: The Issue of Poverty* 5 (Eur. Univ. Inst., Working Paper No. 8, 2013), available at <http://cadmus.eui.eu/handle/1814/28099>.

<sup>131</sup> *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 154.

<sup>132</sup> *Da Conceição Mateus v. Portugal*, App. Nos. 62235/12 & 57725/12, Eur. Ct. H.R. at ¶ 26 (2013), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128106#{"itemid":\["001-128106"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128106#{).

<sup>133</sup> *See id.* at ¶ 28.

<sup>134</sup> *Id.* at ¶ 29.

<sup>135</sup> *See id.*

lasting basis.”<sup>136</sup> Here again the availability of financial resources was at stake, but the court held, “Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature’s discretion should have been exercised in another way.”<sup>137</sup> Furthermore, concerning redundancy payout, the ECtHR held in *N.K.M. v Hungary*,

In the Court’s view, the applicant, together with a group of dismissed civil servants . . . , was made to bear an excessive and disproportionate burden, while other civil servants with comparable statutory and other benefits were apparently not required to contribute to a comparable extent to the public burden, even if they were in the position of leadership that enabled them to define certain contractual benefits potentially disapproved by the public. Moreover, the Court observes that the legislature did not afford the applicant a transitional period within which to adjust herself to the new scheme.<sup>138</sup>

Against this background, the Court finds that the measure complained of entailed an excessive and individual burden on the applicant’s side. This is all the more evident when considering the fact that the measure targeted only a certain group of individuals, who were apparently singled out by the public administration in its capacity as employer. Assuming that the impugned measure served the interest of the State budget at a time of economic hardship, the Court notes that the majority of citizens were not obliged to contribute, to a comparable extent, to the public burden.<sup>139</sup>

It would therefore go on to conclude,

[T]he specific measure in question, as applied to the applicant, even if meant to serve social justice, cannot be justified by the legitimate public interest relied on by the Government. It affected the applicant (and other dismissed civil servants in a similar situation) being in good-faith standing and deprived her of the larger part of a statutorily guaranteed, acquired right serving the special social interest of reintegration. In the Court’s opinion, those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons. Therefore the measure cannot be held reasonably proportionate to the aim sought to be realised.<sup>140</sup>

Because of this ruling, the ECtHR thus far has not found austerity measures to be in violation of the ECHR, as states have been given a wide margin to determine an individual’s socioeconomic rights in accordance with the available financial resources of the state. However, states still must exercise diligent care to not infringe on the core of socioeconomic rights.

States have positive obligations to ensure respect of individual’s socioeconomic rights. For instance, in his concurring opinion in *Guerra and Others v. Italy*, regarding the operation of the Italian government, which

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<sup>136</sup> Koufaki v. Greece, App. Nos. 57665/12 & 57657/12, Eur. Ct. H.R. at ¶ 44 (2013), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627#{"itemid":\["002-7627"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627#{).

<sup>137</sup> *Id.* at ¶ 48.

<sup>138</sup> *N.K.M. v Hungary*, App. No. 66529/11, Eur. Ct. H.R. at ¶ 71 (2013), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119704#{"itemid":\["001-119704"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119704#{).

<sup>139</sup> *Id.* at ¶ 72.

<sup>140</sup> *Id.* at ¶ 75. See also *R.Sz. v Hungary*, App. No. 41838/11, Eur. Ct. H.R. at ¶ 60 (2013), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-121958#{"itemid":\["001-121958"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-121958#{).

failed to inform the population of the possibility of potential environmental pollution by a factory, Judge P. Jambrek noted that states have a positive obligation to inform residents of potential environmental risks. He remarked,

I am therefore of the opinion that such a positive obligation should be considered as dependent upon the following condition: that those who are potential victims of the industrial hazard have requested that specific information, evidence, tests, etc., be made public and be communicated to them by a specific government agency. If the government did not comply with such a request, and gave no good reasons for not complying, then such a failure should be considered equivalent to an act of interference by the government, proscribed by Article 10 of the Convention.<sup>141</sup>

In his concurring opinion, Judge P. Jambrek proceeded from the application of the law and a broad understanding of the rights protected by the ECHR, stressing that states have both negative and positive obligations in the implementation of the ECHR.<sup>142</sup> States have to take measures to ensure that the reasonable core of socioeconomic rights will be respected not only between the individual and the state but also between private actors.

#### C. THE EUROPEAN SOCIAL CHARTER AND STATE OBLIGATIONS DURING ECONOMIC CRISIS

At the regional level, the European Social Charter provides the only quasi-judicial complaint mechanism for enforcing economic and social rights.<sup>143</sup> The Charter offers only the right to lodge collective complaints, while the European Social Rights Committee issues only non-binding recommendations.<sup>144</sup> However, the European Committee of Social Rights has previously developed extensive case law stemming from collective complaints arising from the economic crisis.<sup>145</sup> From these complaints, it has confirmed that the state shall guarantee the enjoyment of economic and social rights.<sup>146</sup> In 2009, the Committee noted,

. . . [T]he economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need protection.<sup>147</sup>

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<sup>141</sup> *Guerra v. Italy*, 1998-I Eur. Ct. H.R. 223 (Jambrek, J., concurring).

<sup>142</sup> *See id.*

<sup>143</sup> *See* Olivier de Schutter & Matthias Sant'ana, *The European Committee of Social Rights, in* HUMAN RIGHTS MONITORING MECHANISMS OF THE COUNCIL OF EUROPE 71, 99 (Gauthier de Beco, ed., 2012).

<sup>144</sup> *See id.* at 77.

<sup>145</sup> *See* *GENOP-DEI and ADEDY v. Greece*, Complaint No. 65/2011, Eur. Comm. Soc. Rights at ¶ 16 (2012); *IKA –ETAM v. Greece*, Complaint No. 76/2012, Eur. Comm. Soc. Rights at ¶ 75 (2012).

<sup>146</sup> *See* *GENOP-DEI and ADEDY v. Greece*, 65/2011 at ¶ 16; *IKA –ETAM v. Greece*, 76/2012 at ¶ 75.

<sup>147</sup> European Comm. of Soc. Rights, *General Introduction to EUROPEAN SOCIAL CHARTER (REVISED) CONCLUSIONS* 2009, at ¶ 17 (2009).

Such a pronouncement follows the principle of non-retrogression deriving from the CESCR.<sup>148</sup> The European Social Rights Committee also dealt with the issue of socioeconomic rights in times of crisis in decisions stemming from collective complaints.<sup>149</sup> For instance, the European Committee of Social Rights explained in *GENOP-DEI and ADEDY v. Greece* that spending cuts due to the crisis “should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter.”<sup>150</sup> It mentioned “stability,” which refers to the idea that states should not offer a lower standard of protection if stable individuals would be harmed. It further noted that “a greater employment flexibility . . . should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labor law, protecting them from arbitrary decisions by their employers or from economic fluctuations.”<sup>151</sup> The Committee further held that “doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems.”<sup>152</sup> In a similar decision against Greece, the Committee emphasized that any spending cuts “should not undermine the core framework of a national social security system or deny individuals the opportunity to enjoy the protection it offers against serious social and economic risk.”<sup>153</sup>

Such reasoning mirrors the minimum core concept of the CESCR, albeit without including the reasonableness test. The European Social Rights Committee further elaborated on economic and social rights in five other complaints against Greece, where it adopted the combination of the minimum core approach and reasonableness test when determining state compliance with economic and social rights obligations.<sup>154</sup> In *IKA-ETAM v. Greece*, the Committee held,

. . . [E]ven when reasons pertaining to the economic situation of a state party make it impossible for a state to maintain their social security system at the level that it had previously attained, it is necessary . . . for that state party to maintain the social security system on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security.<sup>155</sup>

The Committee does not require a state party to maintain an equal level of rights during times of crisis. During those periods, the Committee takes a more cautious, reasonable, and human approach when analyzing the

<sup>148</sup> See *General Comment No. 3*, *supra* note 93, at ¶ 9.

<sup>149</sup> See *GENOP-DEI and ADEDY v. Greece*, 65/2011 at ¶ 17.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at ¶ 18.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at ¶ 47.

<sup>154</sup> See *IKA-ETAM v. Greece*, Complaint No. 76/2012, Eur. Comm. Soc. Rights at ¶ 69 (2012); *POPS v. Greece*, Complaint No. 77/2012, Eur. Comm. Soc. Rights at ¶ 64 (2012); *I.S.A.P. v. Greece*, Complaint No. 78/2012, Eur. Comm. Soc. Rights at ¶ 64 (2012); *POS-DEI v. Greece*, Complaint No. 79/2012, Eur. Comm. Soc. Rights at ¶ 64 (2012); *ATE v. Greece*, Complaint No. 80/2012, Eur. Comm. Soc. Rights at ¶ 64 (2012).

<sup>155</sup> *IKA-ETAM v. Greece*, 76/2012 at ¶ 69.

difficulties faced by governments. Nonetheless, the Committee held against Greece by finding, “[T]he Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.”<sup>156</sup>

“[S]tates often invoke [the country’s creditworthiness] in order to justify the adoption of the austerity measures” that curtail economic and social rights enjoyed by citizens.<sup>157</sup> In a lending agreement between two private actors, the “debtor would be obliged to repay her debt to the creditor, unless she declares insolvency” and is subsequently granted relief.<sup>158</sup>

In a sovereign financing context, a state is also liable to repay its debt to its creditor, being another state, international organisation[,] or corporation. However, states are often faced with multiple obligations they need to address. What is more, the most equitable ranking of payment obligations is often difficult to determine. As Dowell-Jones and Kinley aptly noted, “[H]uman rights are intimately tied up with the economic health of the state, as well as, of course, much else besides.”<sup>159</sup>

In seeking policy guidelines that account for these realities, a dilemma arises: When a state’s obligations to creditors come into conflict with the state’s ability to provide a minimum standard of economic and social welfare, which priority should take precedence? The delayed implementation of already agreed upon austerity measures illustrates the difficulties encountered by many states in balancing these two conflicting priorities.<sup>160</sup> States want to keep their sovereign debt obligations from “undermin[ing] the protection of economic and social human rights, and must consider whether the protection of fundamental human rights may impede the repayment of, or terminate, state sovereign debt obligations.”<sup>161</sup> To help states balance these priorities, the CESCR has provided the following instruction:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>162</sup>

The precise meaning of “every effort” remains unclear. Either way, states must show their willingness to meet

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<sup>156</sup> *Id.* at ¶ 79.

<sup>157</sup> Černič, *supra* note 24, at 146.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (internal citations omitted).

<sup>160</sup> See Theofanis Exadaktylos & Nikolaos Zahariadis, *Policy Implementation and Political Trust: Greece in the Age of Austerity*, 42 POL. & POL’Y 160, 161 (2014).

<sup>161</sup> Černič, *supra* note 24, at 146.

<sup>162</sup> See *General Comment No. 3*, *supra* note 93, at ¶ 60. See also CESCR, *General Comment No. 19: The Right to Social Security*, ¶¶59–61, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).

their debt obligations in order to retain access to international credit markets.<sup>163</sup>

“Traditionally, the protection of human rights has always concentrated on balancing the interests of the individual with those of society as whole, which include its international obligations to repay its debt to creditors.”<sup>164</sup> Some argue that requiring states to repay debts that were used to support oppressive regimes amounts to a violation of economic and social rights.<sup>165</sup> This would call for a middle-ground approach that strikes a balance between the economic and social rights of individuals and the rights of international creditors, but such a solution is often difficult to achieve. Nevertheless, the current “practice of financial market[] [participants] and investment arbitration panels illustrates that economic and social rights are not only [underappreciated,] but that they do not play any slightly significant role” in negotiations at all.<sup>166</sup> “However, it is argued that the reasonable minimum core of [] human right[s] . . . is untouchable.”<sup>167</sup> Scholars argue that “in the context of [economic crises], “states are obliged to non-discriminately provide at least a reasonable minimum core of economic and social rights[,]” and the issue of whether this conflicts with the state’s debt obligations is “a false dilemma.”<sup>168</sup> Similarly, Kunibert Raffer

argues that “the right of creditors to interest and repayments collides and the principle recognized generally (not only in the case of loans) by all civilized legal systems that no one must be forced to fulfil contracts if that leads to inhumane distress, endangers one’s life or health, or violates human dignity.” All in all, states . . . must guarantee at least the reasonable minimum core of economic and social rights . . . .<sup>169</sup>

#### IV. EXTRATERRITORIAL OBLIGATIONS OF HOME STATES OF CORPORATIONS<sup>170</sup>

Territorial states have an obligation to ensure the protection of one’s enjoyment of human rights via the tripartite obligation to respect, protect, and fulfil human rights. This article advances the argument that home states have an obligation to respect, protect, and fulfil human rights within and outside a national context. Such obligations therefore provide strong evidence that home countries should enforce laws against human rights violations that their corporations perpetrate abroad. Rather weakly, Ruggie’s Guiding Principles assert that

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<sup>163</sup> See Amar Bhide & Edmund S. Phelps, *The Root of All Sovereign-Debt Crises*, PROJECT SYNDICATE (Aug. 4, 2011), <http://www.project-syndicate.org/commentary/the-root-of-all-sovereign-debt-crises#sfMuDj1OX9mB1mRT.99>.

<sup>164</sup> Černič, *supra* note 24, at 147.

<sup>165</sup> Michalowski, *supra* note 20, at 63.

<sup>166</sup> Černič, *supra* note 24, at 147.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* See PARTY OF EUROPEAN SOCIALISTS, FIVE GUIDELINES FOR A FAIR, SOCIAL AND SUSTAINABLE EUROPE, available at [http://www.europaforum.public.lu/fr/actualites/2013/10/pse-epsco-ecofin/pes\\_ecofin\\_epsco\\_ministers\\_declaration\\_15\\_october.pdf](http://www.europaforum.public.lu/fr/actualites/2013/10/pse-epsco-ecofin/pes_ecofin_epsco_ministers_declaration_15_october.pdf).

<sup>169</sup> Černič, *supra* note 24, at 147 (internal citations omitted).

<sup>170</sup> See Mark Gibney, *On Terminology – Extraterritorial Obligations*, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 44 (Malcolm Langford et al. eds., 2013).

“states should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>171</sup> In his commentary, he writes, “At present[,] States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.”<sup>172</sup> However, the idea that states also have extraterritorial obligations to respect, protect, and fulfil human rights is gradually becoming the consensus view.<sup>173</sup> David Kinley has argued for international and domestic pressure on home states to fill the enforcement gap left by foreign countries with more relaxed regulatory schemes.<sup>174</sup> The European Court of Human Rights noted in *Kovačič v. Slovenia* that “acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged.”<sup>175</sup> Extraterritorial human rights obligations of home states therefore arise in the commission of acts or omissions by its authorities to effectively regulate corporations in order to prevent their involvement in human rights violations against individuals.<sup>176</sup>

Such reasoning is supported by the general comments and concluding observations of state reports of international human rights bodies. The CESCR has authoritatively expressed in its 2011 statement that “States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.”<sup>177</sup> The Committee further noted that “States Parties home to companies active abroad shall also encourage such companies to assist, as appropriate, including in situations of armed conflict and natural disaster, host States in building capacities needed to address the corporate responsibility for the

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<sup>171</sup> *Guiding Principles*, *supra* note 57, at 7.

<sup>172</sup> *Id.*

<sup>173</sup> See *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{“dmdocnumber”:[“887952”],“itemid”:[“001-105606”]}; Al-Jedda v. United Kingdom</a>, App. No. 27021/08, Eur. Ct. H.R. (2011), available at <a href=).

<sup>174</sup> David Kinley, *Civilising Globalisation: Human Rights and the Global Economy*, 42 GEO. WASH. INT'L L. REV. 459, 460 (2010).

<sup>175</sup> *Third Section Decision as to the Admissibility of Application nos 44574/98, 45133/98 and 48316/99 by Ivo KOVAČIĆ, Marjan MRKONJIĆ and Dolores GOLUBOVIĆ against Slovenia*, GLOBE 24H, <http://caselaw.echr.globe24h.com/0/0/slovenia/2003/10/09/kovacic-and-others-v-slovenia-23835-44574-98.shtml> (last visited Jan. 24, 2015).

<sup>176</sup> See Daniel Augenstein & David Kinley, *When Human Rights ‘Responsibilities’ become ‘Duties’: The Extraterritorial Obligations of States that Bind Corporations*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT 271, 288 (2013). The authors argue that “what is decisive for the determination of extraterritorial obligation to protect against corporate violations is not the state's exercise of *de jure* authority, but its assertion of *de facto* over the individual rights-holder.” *Id.*

<sup>177</sup> CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, ¶ 5, U.N. Doc. E/C.12/2011/120 (May 2011).

observance of economic, social[,] and cultural rights.”<sup>178</sup> The same Committee observed in its *General Comment No. 14* concerning the right to health, “States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means . . . .”<sup>179</sup> Similarly, it noted in its *General Comment No. 15: The Right to Water*, “International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.”<sup>180</sup> Further, the UN Committee on the Rights of the Child has noted in its *General Comment No. 16*,

Home States also have obligations, arising under the CRC and its protocols, to respect, protect[,] and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.<sup>181</sup>

Additionally, the Committee on the Elimination of Racial Discrimination has also noted the following in its report on the United Kingdom:

[T]he State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party’s courts when such violations are committed outside the State party. The Committee reminds the State party to sensitize corporations registered in its territory to their social responsibilities in the places where they operate.<sup>182</sup>

The Committee also made similar observations regarding Australia, Canada, and the United States.<sup>183</sup> Such statements and comments illustrate that international human rights organizations recognize that home states have extraterritorial obligations to respect, protect and fulfil human rights of individuals against corporate violations abroad. These extraterritorial obligations also derive from various national laws on reporting and

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<sup>178</sup> *Id.* ¶ 6.

<sup>179</sup> CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>180</sup> CESCR, *General Comment No. 15: The Right to Water*, *supra* note 105, at ¶ 31. See CESCR, *General Comment 19: The Right to Social Security*, *supra* note 162, at ¶ 54.

<sup>181</sup> Comm. on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights*, ¶ 43, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013).

<sup>182</sup> Comm. on the Elimination of Racial Discrimination [CERD], Report Submitted by the Equality and Human Rights Commission (EHRC) in Response to CERD/C/GBR/CO/18-20/Add.1, ¶ 29, 82nd Sess., Feb. 11–Mar. 1, 2013, U.N. Doc. CERD/C/GBR/CO/18-20. See CERD, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, ¶14, 80th Sess., Feb. 13-Mar. 9, 2012, U.N. Doc. CERD/C/CAN/CO/19-20 (Mar. 9, 2012).

<sup>183</sup> CERD, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia, ¶ 13, 77th Sess., Aug. 2-27, 2010, U.N. Doc. CERD/C/AUS/CO/15-17 (Aug. 27, 2010); CERD, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, ¶ 17, 70th Sess., Feb. 19-Mar. 9, 2007, U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007); CERD, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States, ¶ 30, 72nd Sess., Feb. 18-Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

procurements.<sup>184</sup> Several stock exchanges demand assurances on human rights before companies are permitted to list on the stock exchange. For instance, the Hong Kong Stock Exchange rules provide that a mineral company must, *inter alia*, inform about “project risks arising from environmental, social, and health and safety issues.”<sup>185</sup> These extraterritorial obligations appear to suggest that states must undertake due diligence to ensure that they not only comply with a basic minimum standard of human rights, but also that they do everything reasonably possible to avoid human rights violations abroad.<sup>186</sup> A state’s obligation to protect is a duty of conduct and requires the state to adopt protective measures that help prevent human rights violations by its corporations overseas.<sup>187</sup> The home state may also be expected to protect against corporate violations when host states may be unable or unwilling to effectively control the activities of corporations when they interfere with human rights.<sup>188</sup> An extraterritorial state may become the main party responsible to prevent human rights violations by its corporate actors in a failed state, especially where there is no efficient governmental control or authority. This may be the only way to protect human rights in these areas.

## V. SOME PREDICTIONS

In recent years, Europe has experienced a deep economic and social crisis that has led to the erosion of democratic values. This has been characterized by a lack of transparency in decision-making at the highest levels of government. Can the recent financial crisis really destroy the social advances that European societies have made in the last few decades? Either way, the crisis can certainly undermine the foundations of European integration. The spirit of European unity and cohesion that arose after the shocking experiences of the Second World War is almost no longer present. It is not too far-fetched to suggest that the future of the European and global economy is in danger. We are facing crucial decisions about how European societies should manage interactions between rule of law, democracy, and human rights. If national governments will be unable to provide basic public services in education, health, culture, and social security, social tensions should be

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<sup>184</sup> See, e.g., Restricted Purchase List; Persons Doing Business with Burma (Myanmar), MASS. GEN. LAWS ANN. ch. 7, § 22J (West 1996).

<sup>185</sup> HONG KONG STOCK EXCHANGE, RULES GOVERNING THE LISTING OF SECURITIES ON THE STOCK EXCHANGE OF HONG KONG LIMITED § 18.05, available at [http://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/documents/chapter\\_18.pdf](http://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/documents/chapter_18.pdf).

<sup>186</sup> See Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat’?*, 5 MELBOURNE J. INT’L L. 37, 52 (2004); Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT’L & COMP. L. J. 123, 140-44 (1996).

<sup>187</sup> Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 J. OF BUS. ETHICS 493, 494 (2012).

<sup>188</sup> Analía Marsella Sende, *The Responsibilities of States for Actions of Transnational Corporations Affecting Social and Economic Rights: A Comparative Analysis of the Duty to Protect*, 15 COL. J. EUR. L. 33, 38 (2009).

expected to grow. The protests against government austerity measures in Greece and Spain would likely be only the first harbingers of the social unrest, which would be expected in the majority of European countries if the worst-case scenario were realized.

The fear of repeating past mistakes should be sufficient for both Northern and Southern European countries to agree on a long-term solution for the European economy. Economic cooperation is not only a key factor in further integrating the continent; it is the linchpin that allows all other sectors of society to function. Currently, the European society seems to have reversed its trend of further integration and has regressed towards increasing isolationism. However, a solution to the seemingly hopeless situation has long been known: The Euro area must establish a fiscal and banking union. Joint European authorities that oversee the fiscal and banking policies of each member state should govern the union. Such measures could help gradually reduce, and later prevent, the glaring public debts of the Eurozone's southern members. The calm before the storm will not last forever, and it would be naive to hope that the storm will avoid Northern Europe. The fact that the storm has already commenced in Southern Europe should be sufficient for authorities to take action. If no action is taken, the storm will likely have enough force to shake the social pillars of European society, which were erected over decades of painstaking effort. The continent can only emerge from its current predicament through prudent management of public finances, while highlighting and strengthening the fundamental values of the European enlightenment, accountability, and democracy.

## VI. CONCLUSIONS

Discussion of socioeconomic rights during times of economic crisis is often shaped by deeply rooted emotions that suppress argumentative dialogue and reasoning, which has led to European societies becoming increasingly polarized. There are no simple answers to the fundamental questions raised by the European debt crisis. In seeking answers to these questions, states and corporations must be careful not to undermine socioeconomic rights and the pluralistic democratic process. This article has attempted to argue that states and corporations should employ a reasonable minimum standard approach when examining potential violations of socioeconomic rights. Additionally, courts should strike a better balance by assessing the *real* level of threat to the democratic order represented by austerity measures and by protecting fundamental human rights and freedoms.

The enjoyment of economic and social rights is crucial for the survival and well-being of individuals. States and corporations have obligations to respect, protect, and fulfil these rights, and thus should be held to observe a

reasonable minimum standard of socioeconomic well-being. This minimum standard should apply not only to restructuring pre-existing negotiations, but also before anything is borrowed in the first place.

The aim of this article was to examine the obligations of states and corporations as to the economic and social rights of individuals. While one can more easily conclude that states have domestic obligations to respect, protect, and fulfil a reasonable minimum standard of economic and social rights, the idea that those obligations extend extraterritorially is not as straightforward. States and corporations must be held accountable when they fail to maintain a minimum standard of economic and social rights. If Eastern and Southern European states are unable to provide a reasonable minimum standard of economic and social rights, then a duty must arise on the part of more developed home states to verify that their corporations are observing a minimum standard in their overseas operations. Ordinary people in Eastern and Southern Europe should not be used as sacrificial lambs to atone for the mismanagement of public and private banking officials. The equitable solution would provide that states and corporations must observe a reasonable minimum standard of economic and social rights in their efforts to confront the obstacles facing the Eurozone.