

## ESSAY

### CORPORATE LIABILITY FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS REVISITED: THE FAILURE OF INTERNATIONAL COOPERATION

DANIEL AGUIRRE\*

#### INTRODUCTION

Corporate human rights responsibility has become central to global governance. My 2004 article, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*,<sup>1</sup> addressed the gap in international human rights law between the growth in corporate power and the erosion of state regulatory sovereignty. It asserted that corporate control over government policy meant that transnational corporations (TNCs)<sup>2</sup> as well as states must be held

---

\* Dr. Daniel Aguirre is a lecturer in International Law and Human Rights at Webster's Graduate School, Regent's College London. He may be contacted at [aguirred@regents.ac.uk](mailto:aguirred@regents.ac.uk).

1. Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53 (2004) [hereinafter Aguirre, *Multinational Corporations*].

2. This essay will use the term "transnational corporation" (TNC) to define "an economic entity operating in more than one country, or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." U.N. Comm. on Human Rights, Sub-Comm. on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Sess., Agenda Item 4, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Norms]. TNC is the term used by the United Nations Special Representative to refer to all corporate business activity. See Comm'n on Hum. Rts. Res. 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises, 59th Sess., Apr. 20, 2005 [hereinafter 2005 Mandate], available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-69.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc) (original mandate to the Special Representative); Hum. Rts. Council Res. 8/7,

responsible for economic, social, and cultural rights (ESCR). But the problem has always been that states are either unwilling or unable to fulfil their ESCR obligations. Despite economic globalization, states still have the obligation to respect, promote, and protect human rights law. Instead, they consistently limit their own ESCR policy space through investment and trade agreements guaranteeing corporate rights.

As the human rights impact of globalization became apparent in the 1990s, civil society called for an accountability shift from states to TNCs as the state-centric system seemed exclusionary and increasingly irrelevant.<sup>3</sup> The target for human rights advocates became obvious: wealthy TNCs that take advantage of double standards in the “home” and “host” state to profit amidst human rights violations.<sup>4</sup>

There is no doubt that TNCs must be held accountable for their direct violations of human rights either under national or international law. Nonetheless, corporate responsibility for the positive obligations to fulfil ESCR is more complex as these commitments are tailored to states. *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights* called for direct obligations on TNCs for ESCR in addition to state obligations. This was a naïve assertion in an era of neoliberal economic globalization that undermines the willingness and ability of 160 state parties<sup>5</sup> to fulfil their obligations

---

Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 28th Sess., June 18, 2008 [hereinafter 2008 Mandate], available at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_8\\_7.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf) (renewing the Special Representative’s 2005 mandate until 2011).

3. See generally Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45 (1964); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 6 (2006); HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999); DAVID KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995).

4. For further analysis of the role of home and host state see *infra* Part III and note 67.

5. *Treaty Status: International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited Oct. 17, 2011) [hereinafter *Treaty Status*]. For the full text of the Convention see International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19,

under the International Covenant on Economic Social and Cultural Rights.<sup>6</sup> How can responsibility be extended to hundreds of thousands of TNCs if states are increasingly unwilling and unable to regulate them? The logistics of an international regulatory system seem unfeasible. There is no central international body capable of monitoring the myriad activities of countless TNCs. My previous paper proposed corporate responsibility, but in hindsight, the realisation of ESCR requires the regulation of TNCs and should remain the gambit of governments.

Reliance on state responsibility alone has failed to secure ESCR. These rights can only be realised through international cooperation. Rather than shifting responsibility to TNCs alone, this essay proposes an obligation that states regulate ESCR as part of a comprehensive commitment that includes voluntary corporate initiatives, national legislation, and international cooperation to reduce globalization's deregulatory pressures. It concedes, however, that a lack of political will on the part of the international community will likely undermine this strategy.

This revisit to my 2004 article also reviews the challenge of corporate liability for ESCR, the complications of which I originally underestimated. My prior position was based on an adversarial activist point of view that left little room for progressive discourse on the subject, despite its moral force. The work of the United Nations Special Representative for Business and Human Rights has done much to reconcile civil society with corporate interests and states. This essay examines the U.N. "Protect, Respect and Remedy" framework (U.N. Framework)<sup>7</sup> and the U.N. Guiding Principles on

---

1966, 993 U.N.T.S. 14531 [hereinafter ICESCR].

6. Article 2.1 of the covenant requires states to "take steps, individually and through international assistance and co-operation...to the maximum of its available resources," to progressively fulfil ESCR. See ICESCR, *supra* note 5. It recommends the adoption of legislative measures. On the impact of economic globalization on the willingness and ability of states, see DANIEL AGUIRRE, *THE HUMAN RIGHT TO DEVELOPMENT IN A GLOBALIZED WORLD* 19-24 (2008) [hereinafter AGUIRRE, *GLOBALIZED WORLD*].

7. U.N. Special Rep. of the Sec'y-Gen. on the Issue of Human Rights & Transnat'l Corps. & Other Bus. Enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Human Rights Council, 8th Sess., Agenda Item 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter U.N. Framework].

Implementing the U.N. Framework (U.N. Guiding Principles).<sup>8</sup> Despite advances in the new U.N. approach, it does not alter the underlying problem for ESCR, that is, a lack of commitment to international cooperation for their achievement. On the contrary, states have taken steps through bilateral and regional investment agreements that potentially limit their ability to fulfil ESCR.

#### I. CORPORATE, STATE, AND INTERNATIONAL RESPONSIBILITY TO REGULATE THE UNREGULATED ECONOMY

A comprehensive system of responsibility undertaken at the corporate, national, and international levels is required to fulfil ESCR in a global economy. Corporate social responsibility (CSR) initiatives are not enough to ensure ESCR.<sup>9</sup> National regulation and international organisations need human rights oversight and coordination. States must coordinate CSR, national regulation, and international treaties so that they are congruent with human rights law. This comprehensive approach gleans the practicable elements of CSR, direct corporate liability, the human rights obligations of both home and host states, as well as the duties of the international community.

Without international cooperation, many states are unable or unwilling to hold TNCs liable or assert domestic regulations, preferring national deregulation and international investment protection agreements. Likewise, in the absence of national regulations in both the home and host states, CSR can be reduced to a mere public relations exercise. Unless TNCs recognize the business case for addressing human rights impacts, national and international political motivation evaporates.

The state remains the only full subject of international human rights law. Whether acting individually or collectively, it is the state

---

8. U.N. Special Rep. of the Sec'y-Gen. on the Issue of Human Rights & Transnat'l Corps. & Other Bus. Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, 17th Sess., Agenda Item 3, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter U.N. Guiding Principles].

9. See generally Daniel Aguirre, *Corporate Social Responsibility and Human Rights Law in Africa*, 5 AFR. HUM. RTS. L.J. 239 (2005) [hereinafter Aguirre, *Corporate Social Responsibility*].

that ultimately controls international relations.<sup>10</sup> It creates the framework and rules in which TNCs operate—a “realist world” of competitive national interests within a neoliberal global economy.<sup>11</sup> It is important for human rights advocates to clearly outline why rights-based global governance is in the interest of states, as direct regulation of TNCs has repeatedly failed at the international level.<sup>12</sup>

International human rights regulations for business are opposed by states and TNCs. In its recent effort to regulate business conduct between 2000 and 2004, the United Nations Commission on Human Rights organized the Draft Norms on the Responsibility of Transnational Corporations and Other Enterprises with regard to Human Rights (U.N. Norms).<sup>13</sup> These were an ambitious attempt to assign direct responsibility to TNCs for the full range of human rights. The Norms were applauded as a progressive “step forward”<sup>14</sup> in accountability and for providing a valuable tool for civil society to measure corporate performance.<sup>15</sup> In addition to the State’s primary

---

10. AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6, at 223-69.

11. DAVID P. FORSYTHE, *HUMAN RIGHTS IN INTERNATIONAL RELATIONS* 251 (2d ed. 2006).

12. For example, the United Nations has previously tried to create binding norms. The first was through the creation of The Commission on Transnational Corporations that was mandated to draft regulations. See Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 897-98 (1994). The Commission produced draft codes in 1978, 1983, 1988, and 1990. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 902 (2003). All of these draft codes were discarded and the Commission disbanded in 1992 citing irreconcilable “north-south” differences in an era of deregulation.

13. U.N. Comm. on Human Rights, Sub-Comm. on the Promotion & Prot. of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: Draft Norms Submitted by the Working Group on the Working Methods and Activities of Transnational Corporations Pursuant to Resolution 2002/8*, 55th Sess., Prov. Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003) [hereinafter U.N. Draft Norms]. For the final version of the U.N. Norms see U.N. Norms, *supra* note 2.

14. Aguirre, *Multinational Corporations*, *supra* note 1, at 75.

15. See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 276-302 (3d ed. 2008); Upendra Baxi, *Market Fundamentalisms: Business Ethics at the Altar of Human Rights*, 5 HUM. RTS. L. REV. 1 (2005).

responsibility, the U.N. Norms would bestow upon TNCs obligations to “promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.”<sup>16</sup> However, the all-inclusive and adversarial approach of the Norms made them unworkable in practice as states and TNCs refused to accept them. The failure of the U.N. Norms reflected the polarized discourse between civil society and TNCs with states backing TNCs. The Commission on Human Rights, perhaps wisely, decided to call for further study of the matter.<sup>17</sup>

In 2005, the United Nations turned to Special Representative for Business and Human Rights, John Ruggie, to identify and clarify the standards of corporate responsibility.<sup>18</sup> Ruggie’s approach combined international law with the economic reality. He set about clarifying standards of CSR, elaborating on the role of states in effectively regulating TNCs, exploring complicity, developing impact assessments, and compiling best practice on the issues. He criticized the strategic direction of the U.N. Norms and in doing so faced opprobrium from civil society.<sup>19</sup> Ruggie affirmed primary state responsibility for ESCR,<sup>20</sup> reiterating the state’s long-standing legal

---

16. U.N. Draft Norms, *supra* note 13, at Art. 1; *see also* U.N. Norms, *supra* note 2, at Art. 1.

17. *See* U.N. Comm’n on Human Rights, Draft Report of the Comm’n, 60th Sess., Agenda Item 21(b), ¶ 2004/116, U.N. Doc. E/CN.4/2004/L.11/Add.7 (Apr. 22, 2004).

18. *See* 2005 Mandate, *supra* note 2.

19. For the full text of submissions and commentary on the U.N. Framework as well as the U.N. Guiding Principles, *see U.N. Sec’y-Gen. Spec. Rep. on Bus. & Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., <http://www.business-humanrights.org/SpecialRepPortal/Home> (last visited Nov. 8, 2011). For background on the initial framework, *see U.N. Sec’y-Gen. Spec. Rep. on Bus. & Human Rights, The U.N. “Protect, Respect, and Remedy” Framework for Business and Human Rights*, REPORTS-AND-MATERIALS.ORG, *available at* <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf>; U.N. Sec’y-Gen. Spec. Rep. on Bus. & Human Rights, *Introduction by the Special Representative*, REPORTS-AND-MATERIALS.ORG, *available at* <http://www.reports-and-materials.org/Ruggie-introduction-to-portal-Jul-2009.doc>. *See also* 2005 Mandate, *supra* note 2.

20. *See* U.N. Comm. on Hum. Rts., *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 62d Sess., Prov. Agenda Item 17, ¶ 7, U.N. Doc: E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter

obligations.<sup>21</sup>

Special Representative Ruggie left behind the adversarial “broad brush” approach of the 2003 U.N. Norms<sup>22</sup> and prepared a three-pillar framework based on the traditional state “duty to protect human rights, the business obligation to respect human rights, and the need for effective remedies.”<sup>23</sup> The Human Rights Council unanimously approved the U.N. Framework in 2008, and extended the Special Representative’s mandate until 2011, with the task of “operationalizing” and “promoting” the U.N. Framework.<sup>24</sup> Then, in March 2011, Special Representative Ruggie issued the U.N. Guiding Principles, which were endorsed by the Human Rights Council in June 2011.<sup>25</sup> Despite claims that voluntary, self-regulating CSR was no longer sufficient,<sup>26</sup> no binding international framework ensuring that corporate activities fulfil human rights obligations emerged despite recent economic turmoil that “seems to provide proof that the existing international and national orders have failed to place meaningful regulation on corporate actors.”<sup>27</sup>

## II. CORPORATE RESPONSIBILITY FOR ESCR

TNCs have legal personality and have rights and obligations

---

Interim Report].

21. *See id.* at ¶ 9.

22. Josh Curtis & Shane Darcy, *The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation*, in *EXPLORING FUTURE RIGHTS, REDISCOVERING FORGOTTEN RIGHTS: HUMAN RIGHTS LAW IN THE 21ST CENTURY* (David Keane & Yvonne McDermott eds.) (forthcoming Jan. 2012) (manuscript, at 7) (on file with authors) [hereinafter Curtis & Darcy].

23. *Id.*; *see also* U.N. Guiding Principles, *supra* note 7, at (I) B (“States should . . . [e]nforce laws . . . requiring business enterprises to respect human rights . . .”).

24. 2008 Mandate, *supra* note 2.

25. U.N. Guiding Principles, *supra* note 8.

26. *See* John Ruggie, Spec. Rep. of the Sec’y-Gen. on Human Rights and Transnational Corps. and Other Bus. Enters., Address to the 65th Sess. of the U.N. Gen. Assemb. 3 (Oct. 26, 2010) [hereinafter Ruggie Statement], *available at* <http://www.business-humanrights.org/media/documents/ruggie-statement-to-un-gen-assembly-26-oct-2010.pdf>; Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., U.N. Doc. A/HRC/RES/17/4 (June 16, 2011).

27. Curtis & Darcy, *supra* note 22.

under international law.<sup>28</sup> Yet, possession of legal personality does not entail a full range of international legal duties.<sup>29</sup> Certainly, private actors have legal duties not to directly violate human rights.<sup>30</sup> The quandary concerns positive duties of TNCs to fulfil ESCR. A dichotomy exists between extending ESCR responsibility to TNCs, while ensuring the state's original—and largely unfulfilled—responsibility. A recalcitrant state may be pleased to transfer ESCR responsibility to TNCs. States are already reluctant to legalize ESCR duties for themselves, calling them political goals instead. Because ESCR are considered political aspirations, requiring redistribution of resources from the rich to the poor, they cannot be divorced from politics. ESCR penetrate state sovereignty, and as a result are extremely sensitive.

Despite this sensitivity, TNCs should still be held responsible for ESCR violations, particularly where governments show political will, enact strict laws, and develop judicial systems capable of adjudicating ESCR cases.<sup>31</sup> This is how regulation is meant to work—where

---

28. See August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 70 (Philip Alston ed., 2005).

29. See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, at 179 (Apr. 11).

30. See Reinisch, *supra* note 28.

31. See U.N. Comm. On Economic, Social and Cultural Rights, *Day of General Discussion Organized in Cooperation with the World Intellectual Property Organization (WIPO), "The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of which He is the Author (Art.15.1(C) Of The Covenant)," Monday, 27 November 2000, The Limburg Principles on the Implementation of the International Covenant on Economic, Social And Cultural Rights, The Maastricht Guidelines on Violations of Economic, Social And Cultural Rights, Background Paper Submitted by the International Commission of Jurists, 24th Sess., Prov. Agenda Item 3, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000) [hereinafter Maastricht Guidelines]; U.N. Comm. On Economic, Social and Cultural Rights, *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights, 22d Sess., Agenda Item 3, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Note by the Secretariat, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (May 13, 2003) [hereinafter General Comment No. 14]; U.N. Comm. On Economic, Social and Cultural Rights, *General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, 29th***



victims of direct violations by TNCs, through either negligence or other unlawful behaviour, have access to national courts or other remedial mechanisms.<sup>32</sup>

Many plaintiffs from developing states have attempted to bring their cases to foreign courts where the state is connected with the corporation and the state is willing to use some form of extra-territorial application of its own or international law.<sup>33</sup> However, only cases alleging violations of the most serious forms of customary international law or with an indisputable link to the foreign jurisdiction have resulted in legal standing. Of these cases, none have found the defendant corporation in violation of human rights law.<sup>34</sup> Even limited avenues for holding TNCs accountable in their host states for the most grievous violations of human rights are under review with some calling for its dismissal.<sup>35</sup> For example, under the Alien Tort Claims act in the United States,<sup>36</sup> corporations have been open to civil liability for violations of customary international law for

---

Sess., Agenda Item 3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), *reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Note by the Secretariat*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (May 13, 2003) [hereinafter General Comment No. 15].

32. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS* 1349 (2d ed. 2000).

33. *See Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001); *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009); *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd* 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987); *Lubbe v. Cape Plc.*, [2000] UKHL 41, [2000] 1 W.L.R. 1545, 1559 (H.L.) (appeal taken from Eng.); Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS*, *supra* note 3, at 161-65. *See generally* AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6, at 246-60. *See also* UPENDRA BAXI, *MASS DISASTER AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* (1986) (collection of documents from *In re Union Carbide*).

34. On the extraterritorial application of national and international law, see AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6, at 251-60.

35. *See* Curtis A. Bradley & Jack L. Goldsmith, *Judicial Foreign Policy We Cannot Afford*, *WASH. POST* (Apr. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702859.html>.

36. 28 U.S.C. § 1350 (2011). The Alien Tort Statute, also called the Alien Tort Claims Act (ATCA), states: “[t]he district courts [of the United States] shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*

almost two decades.<sup>37</sup> But it is now uncertain whether corporations will be held liable for acts abroad in United States' courts in the future.<sup>38</sup> Later this year, the United States Supreme Court will decide if TNCs can continue to be held liable in this way. It is clear that home states do not wish to put their TNCs at a competitive disadvantage.

However, corporate responsibility for ESCR would increase business costs. TNCs would have to enact social welfare programmes or pay the high taxes associated with them to the state. Therefore, states enacting ESCR regulations would reduce their global economic competitiveness, and TNCs would relocate to states without these onerous regulations. States have spent decades reducing regulation in order to attract investment and encourage economic growth. Thus, corporate responsibility for ESCR is antithetical to neoliberal economics. Corporate investment is the prominent engine of economic growth, and that growth is necessary to increase the resources available for ESCR fulfilment. States often face economic incentives, particularly in developing states, either to forgo regulation or decline to enforce it.<sup>39</sup>

Yet, CSR is a voluntary response to civil society and consumer concerns over human rights that are increasingly viewed as beneficial by corporations.<sup>40</sup> Increasingly, corporations view CSR as essential to

---

37. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.* 504 F.3d 254, 258 (2d Cir. 2007); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-104 (2d Cir. 2000); *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996); *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); *Estate of Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250, 1258 (N.D. Ala. 2003); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 20 (D.D.C. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

38. See *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d Cir. 2011). For commentary on this case, see Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking* 51 VA. J. INT'L L. 353 (2011).

39. See AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6, at 226-242.

40. See *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, INT'L COUNCIL ON HUM. RTS. POL'Y (Feb. 2002),

risk aversion and as good public relations. It may even be profitable in the long term.<sup>41</sup> CSR initiatives, at best, complement human rights law and, at worst, distract from it. For example, the initiatives do not address globalization's political and structural challenges to ESCR. TNCs do not have a public mandate. In prosperous economic times, costly CSR can work. Voluntary measures are quickly revoked upon an economic downturn. A corporation can go bankrupt or divest. While TNCs have accepted a certain level of social responsibility, this acceptance has not yet crystallized into international legal obligations concerning ESCR.

Nevertheless, few commentators in 2004 could have guessed that chief executive officers of TNCs around the world would voluntarily consider their corporate impact on human rights at board meetings with shareholders. In 2011, many major TNCs have responded to external pressures and put in place CSR frameworks.<sup>42</sup> For example, the U.N.'s Global Compact, "the world's largest corporate citizenship and sustainability initiative," boasts over 6,000 business participants,<sup>43</sup> while newspapers regularly cover issues related to business and human rights.<sup>44</sup> The growth of CSR indicates it is good for business.<sup>45</sup> This new bottom line may ease state perceptions that social regulation drives away foreign investment, thereby freeing policy room for ESCR realisation.

Despite advances associated with voluntary CSR initiatives, the international community, led by the U.N. Special Representative, has

---

[http://www.ichrp.org/files/reports/7/107\\_report\\_en.pdf](http://www.ichrp.org/files/reports/7/107_report_en.pdf); Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 28, at 177-78.

41. See generally Marc Vilanova, Josep Maria Lozano & Daniel Arenas, *Exploring the Nature of the Relationship Between CSR and Competitiveness*, 87 J. BUS. ETHICS 57 (2009); Michael E. Porter & Mark R. Kramer, *The Big Idea: Creating Shared Value*, HARV. BUS. REV., Jan. 1, 2011, at 2.

42. See generally Aguirre, *Corporate Social Responsibility*, *supra* note 9, at 263-65.

43. U.N. *Global Compact Participants*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last updated July 28, 2011).

44. For information on the plethora of business and human rights issues, see the news summaries at BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org> (last visited Oct. 18, 2011).

45. Steinhardt, *supra* note 40, at 180.

attempted to delineate responsibility and provide guidance for corporate operations in conjunction with human rights. The U.N. Guiding Principles outline a “corporate responsibility to respect human rights.”<sup>46</sup> The term “responsibility” rather than “duty” indicates that there are not currently direct corporate obligations under human rights law. Nevertheless, “respect” suggests a duty to mitigate indirect impacts linked to their operations.<sup>47</sup> TNCs also should go beyond respect to “know and show” that they are meeting their human rights responsibilities.<sup>48</sup> This requires a rights-based due diligence process involving impact assessments, integration of human rights across corporate operations, as well as tracking and communicating performance. As indicated in the U.N. Guiding Principles, the corporate responsibility to respect human rights is distinct from issues of legal liability and enforcement, as these remain defined by national law in relevant jurisdictions.<sup>49</sup>

However, because it is not economically feasible for the state to regulate all corporate activity within its jurisdiction, states rely on corporate self-regulation. Self-regulation is voluntary and unlikely to address corporate indirect impacts or positive obligations for ESCR that remain the gambit of states.<sup>50</sup> Although TNCs increasingly recognize the interdependence between themselves and the community,<sup>51</sup> few are willing to accept the positive obligations of ESCR. This lack of regulatory coordination at the state and international level means that TNCs can choose which host in which to do business, avoiding any meaningful protection of ESCR. Each state still needs to regulate foreign investment within its jurisdiction to ensure compatibility with ESCR policy.<sup>52</sup>

---

46. See U.N. Guiding Principles, *supra* note 8, at (II).

47. *But see id.* at para. 11 (“Business enterprises . . . should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”).

48. Ruggie Statement, *supra* note 26.

49. U.N. Guiding Principles, *supra* note 8, at para. 12.

50. See Aguirre, *Corporate Social Responsibility*, *supra* note 9, at 263-65.

51. *Id.* at 246.

52. MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 113-14 (1995).

### III. STATE RESPONSIBILITY TO PROTECT ESCR

Human rights law imposes duties on states to protect, promote, and fulfil all human rights,<sup>53</sup> which, in a global economy, require the regulation of non-state actors such as TNCs. There is mounting pressure on states to hold TNCs responsible if they violate human rights.<sup>54</sup> The U.N. Guiding Principles indicate in Article A.1 that “[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” In order to do so, the U.N. Guiding Principles explain that states must enforce human rights laws on business, ensure that corporate law does not constrain business’s ability to respect human rights, provide guidance, and encourage TNCs to share best practices.<sup>55</sup>

The responsibility to horizontally regulate TNCs was outlined clearly in *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*.<sup>56</sup> The African Commission’s ruling on the case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*<sup>57</sup> demonstrated this legal responsibility. The Commission found the Nigerian government had violated ESCR by failing to prevent conduct that inhibits ESCR realisation. As is the case with most international human rights bodies, however, the recommendations of the African Human Rights Commission have no binding force in international law. In the absence of international human rights courts with enforcement capability, national level regulations, enforceable through national courts, remain the most effective mechanisms for ESCR

---

53. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 95-96 (1994).

54. See FORSYTHE, *supra* note 11, at 218; MALCOLM N. SHAW, INTERNATIONAL LAW 276 (6th ed. 2008).

55. U.N. Guiding Principles, *supra* note 8, at para. 3.

56. See Aguirre, *Multinational Corporations*, *supra* note 1, at 65-69.

57. Soc. & Econ. Rts. Action Center (SERAC) and the Center for Econ. & Soc. Rts. v. Nigeria, Comm. No. 155/96, Summary of Facts, at paras. 46-57 (Afr. Comm’n on Hum. & Peoples’ Rts. 2001), available at [http://www.achpr.org/english/Decison\\_Communication/Nigeria/Comm.155-96.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.155-96.pdf).

realisation.<sup>58</sup> Governments can impose liability on those who violate the law<sup>59</sup> regardless of the corporate context. Thus, human rights law enforcement requires attuning domestic procedures with international law.

States must ensure that foreign TNCs contribute to and do not prevent the progressive realisation of ESCR. Failure to do so is not the failure of international law but the failure of states to implement it. The United Nations Special Representative finds that the role of states in relation to human rights is critical: “[t]he debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations.”<sup>60</sup> Without binding international mechanisms, the reluctance of states to make ESCR justiciable makes these rights even more difficult to enforce.

Despite its lack of direct enforcement, the majority of states have ratified the International Covenant on Economic, Social and Cultural Rights.<sup>61</sup> Accordingly, the state has a due diligence responsibility to ensure TNCs do not deprive individuals of their ESCR.<sup>62</sup> If the state fails to control the behaviour of TNCs, the state should be held responsible.<sup>63</sup> Treaty body commentaries from the past decade now pressure states to fulfil this duty in relation to corporate activities. For example, the Committee on Economic Social and Cultural Rights has outlined the obligation to regulate private actors in relation to the right to water<sup>64</sup> and health.<sup>65</sup>

Yet, home states and host states have clear economic disincentives to regulate TNCs.<sup>66</sup> Host states are dependent on TNCs for capital

---

58. STEINER & ALSTON, *supra* note 32, at 987.

59. Stephens, *supra* note 3, at 60.

60. Interim Report, *supra* note 20, at para.79.

61. *See* Treaty Status, *supra* note 5.

62. Maastricht Guidelines, *supra* note 31, at para. 18.

63. *Id.*

64. General Comment No. 15, *supra* note 31, at ¶ 23.

65. General Comment No. 14, *supra* note 31, at ¶ 35.

66. *See* AGUIRRE, GLOBALIZED WORLD, *supra* note 6, at 31; Mathias Koenig-Archibugi, *Introduction: Globalization and the Challenge of Governance*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 4 (David Held & Mathias Koenig-Archibugi eds., 2003); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 23-25 (2003).

investment and economic growth and home states are reluctant to impose stringent regulations that would hamper corporate competitiveness.<sup>67</sup> All states are subject to the threat of corporate relocation, yet unregulated economic globalization risks undermining the U.N. human rights protection system.

This system is further undermined by the neoliberal agenda of investment deregulation, and privatization of government services. TNCs are increasingly involved in providing services key to ESCR, such as the maintenance and provision of water infrastructure and health and education services. According to the U.N. Guiding Principles, the protect function of states does not end at privatization or in partnership with the private sector: “[s]tates do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.”<sup>68</sup> Additional steps to protect human rights are required for TNCs that are owned or controlled by the state, by requiring human rights due diligence.<sup>69</sup> Where states contract with or legislate for business enterprises to provide services that may impact upon the enjoyment of human rights, they must exercise oversight in order to meet their international human rights obligations.<sup>70</sup>

Much academic discourse has focussed on the increased independence of TNCs from states and the difficulty of regulating them as though this is an inevitable evolution of national and international politics. Yet TNCs are not independent from states. They depend upon states to deregulate the economy and to privatize services in order to operate. Moreover, the corporation remains physically headquartered in the home state and dependent on it for sales.<sup>71</sup> It reflects the managerial culture of its home state and is viewed in the host-state as an instrument of the home state.<sup>72</sup> The corporation remains reliant on its home states to facilitate investment

---

67. For more on the home and host state conundrum, see Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETH. INT'L L. REV. 171, 176-78 (1999).

68. U.N. Guiding Principles, *supra* note 8, at para. 5, cmt.

69. *Id.* at para. 4.

70. *Id.* at para. 5.

71. See AGUIRRE, GLOBALIZED WORLD, *supra* note 6, at 243.

72. JOHN RALSTON SAUL, THE COLLAPSE OF GLOBALISM AND THE REINVENTION OF THE WORLD 83 (2005).

protection abroad through trade agreements, bilateral investment treaties, and domestic liberalization. TNCs depend upon host-states to provide protection and rule of law, well-regulated markets, and a stable political environment. Host-states adopt concessionary policies in free trade packages, such as tax breaks, lax regulations, and other conditions favourable to corporate investment, thus making the rules for the global economy. TNCs carry out the transactions within these rules. The problem is that these rules are structured to facilitate trade and investment but may prevent the realisation of ESCR.

#### IV. INTERNATIONAL RESPONSIBILITY FOR ESCR

Corporate initiatives and state responsibility must be supported internationally. All bilateral and multilateral agreements should take into account human rights law as they impact other states and their citizens. International institutions must be judged by the manner in which they are accountable to those affected. Therefore, globalization's exclusion of large populations from ESCR indicates a failure of global governance.

In order to promote legitimacy and accountability, responsibility for ESCR must be determined within a poorly-governed but increasingly global world.<sup>73</sup> An international legal framework is needed to govern "institutions for a polity of unprecedented size and diversity."<sup>74</sup> In practice, human rights are not central to the governance of globalization. If international economic cooperation is in conflict with human rights, then the international community's institutions are flawed and should be revamped. The states that uphold institutions that undermine ESCR are in violation of their commitment to international cooperation.

Unregulated economic globalization results in an ideological market fundamentalism that prevails over all other concerns.<sup>75</sup> States utilize their sovereignty to prevent human rights law from impacting

---

73. See generally Robert O. Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE, *supra* note 66, at 130-59.

74. Robert O. Keohane, *Governance in a Partially Globalized World*, 95 AM. POL. SCI. REV. 1, 12 (2001).

75. See STIGLITZ, *supra* note 66, at 54-59.



economic policy.<sup>76</sup> By contrast, investment and trade law are simultaneously crystallized.<sup>77</sup> This is because the purpose of globalization is to maximize efficient resource allocation through market interactions in order to benefit individuals.<sup>78</sup> Other goals, such as ESCR often are not considered as important as economic growth and are not enforceable in international law. They may even conflict with corporate property rights.

However, global governance must be based on the rule of law. Political will aside, legal obligations for states exist. Beginning with the League of Nations following World War One,<sup>79</sup> and built into the U.N. Charter,<sup>80</sup> the international community has made state cooperation to fulfil human rights a priority. The Charter of the United Nations similarly sets this principle at the heart of the organisation, which has the stated purpose of seeking “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion[.]”<sup>81</sup>

The United Nations system was formulated to guide international cooperation toward ensuring security, development, and to promote and protect human rights.<sup>82</sup> Articles 55 and 56 of Chapter IX of the U.N. Charter on International Economic and Social Cooperation obliges states to promote “solutions of international economic, social, health, and related problems; and international cultural and educational cooperation” and “universal respect for, and observance of, human rights” through “joint and separate action in co-operation

---

76. LOUIS HENKIN, *THE AGE OF RIGHTS* 47-48 (1990).

77. See Samrat Ganguly, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 167 (1999). See generally AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6.

78. See SAUL, *supra* note 72 at 17-18.

79. See League of Nations Covenant art. 23.

80. A. GLEN MOWER, JR., *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS* (STUDIES IN HUMAN RIGHTS, No. 6) 11 (1985).

81. U.N. Charter art. 1, para. 3.

82. See U.N. Charter pmbi.

with the Organization” for their achievement.<sup>83</sup> The International Court of Justice, the resolutions of the General Assembly, and the writings of eminent scholars support the position that the Charter creates binding human rights obligations for member states. The U.N. Charter probably entails “a collective duty of member states to take responsible action to create reasonable living standards both for their own peoples and for those of other states.”<sup>84</sup>

The 1968 Tehran Declaration<sup>85</sup> and the 1993 Vienna Declaration and Programme of Action<sup>86</sup> have also elaborated on the concept of international cooperation. In 2005, the international community reaffirmed the U.N. Charter’s principle of international cooperation to solve economic and social problems.<sup>87</sup> This includes collective action to enhance national capabilities for protecting human rights<sup>88</sup> through technical and financial assistance.<sup>89</sup> Notwithstanding this international legal pedigree, the concept of cooperation is still considered a political aspiration and not implemented in practice.<sup>90</sup>

Following from the United Nations Charter, the requirement for international cooperation on human rights is codified in Article 28 of the Universal Declaration of Human Rights.<sup>91</sup> Article 28 links global governance and human rights, stating that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”<sup>92</sup>

---

83. U.N. Charter art. 55, 56.

84. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 256 (5th ed. 1998).

85. International Conference on Human Rights, Tehran, Iran, Apr. 22–May 13, 1968, *Proclamation of Teheran*, U.N. Doc. A/CONF.32/41.

86. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, Part I, ¶ 20, U.N. Doc. A/CONF.157/23 (July 12, 1993).

87. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 5, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

88. *Id.* ¶ 24.

89. *Id.* ¶ 21.

90. *See generally* Curtis & Darcy, *supra* note 22.

91. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 28, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

92. *Id.* The preamble of the 1993 Vienna Declaration elaborated on the requirements of an international order based on human rights and solidarity. World Conference on Human Rights, *supra* note 86.

Despite these requirements, the international duties of states to cooperate in line with Article 28 have not been achieved in practice and states are reluctant to clearly define them. Sovereignty remains paramount in international law. Yet, the acceptance of international human rights law means that sovereignty is no longer exclusive. Human rights are increasingly part of international relations. This influence, however, falls short of that afforded other areas of international law and the international bodies that govern them and have binding dispute resolution mechanisms, such as the World Trade Organization or the International Centre for Investment Disputes. In international economic law, in contrast to their approach to human rights law, states have proven willing to cooperate internationally, regulate TNCs, and reduce their national sovereignty over domestic and international political and economic decision-making.

These efforts to address the impact of globalization on human rights have brought the need for a just social and international order in line with Article 28 to the forefront of discussion. For example, in his Report to the General Assembly in 2000, the U.N. Secretary-General considered that “an international and social order is one that promotes the inherent dignity of the human person, respects the right of people to self-determination and seeks social progress through participatory development and by promoting equality and non-discrimination in a peaceful, interdependent and accountable world.”<sup>93</sup> Without international cooperation, the realisation of ESCR is unlikely and the ability to regulate TNCs in line with ESCR obligations is weakened.

The role of TNCs is central to the impact of globalization, and international regulation has lagged behind corporate influence and the protection of corporate interests in international law. The ongoing problems associated with corporate human rights abuses and global inequalities caused by the lack of an international economic regulatory system clearly indicate a failure to achieve a social and international order in which the Universal Declaration of Human Rights can be

---

93. U.N. Secretary-General, *Globalization and its Impact on the Full Enjoyment of All Human Rights: Preliminary Report of the Secretary-General*, ¶ 7, U.N. Doc. A/55/342 (Aug. 31, 2000); see also High Commissioner for Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32*, ¶ 9, E/CN.4/2002/54 (Jan. 15, 2002).

implemented.

The realisation of Article 28 would provide the foundation upon which ESCR rights can be secured in a global economy.<sup>94</sup> As this is currently not the case, the concept of a right to a just social and international order is a revolutionary one. This requires a “radical change in power relations both domestically and internationally,” as current international relations often inhibit the enjoyment of human rights.<sup>95</sup> Neoliberal globalization has not ushered in an era congruent with Article 28. In fact, the negative impacts of an unjust international system are often “exacerbated by the negative impacts of globalization.”<sup>96</sup> In order for international human rights cooperation to be legitimate, it must confront and transform the power relations that impede it.<sup>97</sup>

In this context, my work on the right to development built upon the description of Article 28 as the “embryo” for the 1986 Declaration on the Right to Development.<sup>98</sup> The preamble of the Declaration on the Right to Development links itself with the entitlement to a “social and international order in which the rights and freedoms . . . can be fully realized.”<sup>99</sup> The right to development is the embodiment of this radical approach to international law and international relations.<sup>100</sup> It recognizes that the realisation of this right requires changes to the existing international order. Article 3.3 of the Declaration lays the primary responsibility upon states to cooperate for the creation of national and international conditions favourable to human rights fulfilment.

Yet, globalization ensures that the realisation of ESCR is not

---

94. See Victor Sidel, *The Right to a Just and Peaceful Social and International Order*, 3 HEALTH & HUM. RTS. 110, 111 (1998).

95. Stephen P. Marks, *Foreword* to MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS – WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW, at vii, x (2007).

96. *Id.*

97. See Curtis & Darcy, *supra* note 22, at 8-9.

98. Asbjørn Eide, *Human Rights Requirements to Social and Economic Development*, 21 FOOD POLICY 23, 25 (1996). See generally AGUIRRE, GLOBALIZED WORLD, *supra* note 6.

99. Declaration on the Right to Development, G.A. Res. 41/128, pmb1, ¶ 3, U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

100. AGUIRRE, GLOBALIZED WORLD, *supra* note 6, at 87-118.

exclusively within a state's own control. The Committee on Economic, Social and Cultural Rights, in the context of poverty reduction, has stated that it is "deeply aware" of the "structural obstacles to the eradication of poverty in developing countries," some of which "lie beyond [states'] control in the contemporary international order."<sup>101</sup> It links these obligations entailed in Article 28 of the Universal Declaration of Human Rights and the Declaration on the Right to Development to address the exigencies of globalization.<sup>102</sup>

The common preambular statement of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) emphasizes cooperation for achieving human rights.<sup>103</sup> The obligation of international cooperation for ESCR in the ICESCR recognizes that states would be unable to fulfil obligations independently. Analysis of the ICESCR's cooperative responsibilities suggests that states should take into account the impact of their economic policy on ESCR in other states.<sup>104</sup>

Altering economic policy to ensure that investment and trade agreements benefitted ECHR would fundamentally change the nature

101. U.N. Comm. on Econ., Soc., & Cultural Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, Statement adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001*, Econ. & Soc. Council, 25th Sess., Agenda Item 5, ¶ 21, U.N. Doc. E/C.12/2001/10 (May 10, 2001).

102. *See id.*

103. See common preambular statements in International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316, at 49 (Dec. 16, 1966) and International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316, at 52 (Dec. 16, 1966). In addition, Article 2, ¶ 1 of the ICESCR states: "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (emphasis added).

104. 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, 191-92 (1987).

of the global economy. It would require a radical rethink of international economic cooperation that would affect all economic policies enacted between states and by international organisations on behalf of states. This would require changes to all levels of investment and trade laws, international organisations, and global economic policy that negatively impacts ESCR. It would have a major impact on the ability of states to attract investment and would possibly slow economic growth in the short term as a result. It would mean regulating globalization in direct opposition to the principles of neoliberal global governance and market based global capitalism.

#### V. UNREGULATED GLOBALIZATION: INVESTMENT PROTECTION LAW

The international community does not regulate economic globalization according to ESCR law. Instead, a lack of regulation prevails, allowing states to cooperate bilaterally and regionally to create investment agreements and treaties protecting corporate rights.<sup>105</sup> These agreements have an immediate impact on national economic policy making<sup>106</sup> and have become central to international relations.<sup>107</sup> States seek foreign investment as a means for economic development. Although this produces wealth, the system can be incongruent with ESCR if governments cannot or will not regulate.

Investment protection treaties are contracts between states that place a priority on protecting property rights of foreign investors from adverse regulation.<sup>108</sup> These treaties prohibit regulations that impact investor's property rights and ability to make profits. They also outlaw expropriation without compensation, including indirect expropriation, which can mean regulations that inhibit the investor's corporate activity. These treaties also prohibit performance requirements that place undue responsibility on investors to share technology or knowhow, to contribute to infant industry development,

---

105. On the proliferation of these agreements and their impact on the right to development and economic cooperation see AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6, at 119-32.

106. MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY AND THE NEW WORLD ORDER* 24 (2d ed. 2003).

107. ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* 18 (2001).

108. AGUIRRE, *GLOBALIZED WORLD*, *supra* note 6, at 132.

or to transfer capital to domestic populations.<sup>109</sup> They can also prevent regulation derived to fulfil positive human rights law obligations that may require restrictions tantamount to indirect expropriation or performance requirements.<sup>110</sup> Overall, various investment treaty provisions may prohibit regulations that address market failures in protecting collective goods such as water, food, the environment, public health, or even a social welfare system.

While bilateral agreements are intended to encourage investment by protecting the basic interests of both the capital-importing and capital-exporting states in international law,<sup>111</sup> international relations are often characterized by dependency. Investment is conducted under oligopolistic conditions in imperfect markets that afford the investor, often a corporation, unique opportunities for the exploitation of resources. This model of international cooperation appears to dislocate citizens from their ESCR entitlements.

Democracy requires a state to control social and economic conditions within its jurisdiction, regulating to reflect the will of the populace. But investment law can take essential political choices out of the state's hands, much the way that human rights law attempts to make norms non-negotiable for governments. The proliferation of these bilateral agreements has the adverse effect of rendering states more accountable to foreign investors than to local populations.

States are not able to choose their allegiance in terms of accountability. International investment law compels states to enact legislation ensuring domestic enforcement of corporate rights. Under the 1965 Convention on the Settlement of Disputes Between States and Nationals of Other States,<sup>112</sup> TNCs have standing in tribunals concerning the terms of investment treaties. A number of cases have raised worrying questions about the legitimate sphere of host state

---

109. *Id.* at 132-39.

110. See generally Amr A. Shalankany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism* 41 HARV. INT'L L.J. 419 (2000).

111. SHAW, *supra* note 54, at 838.

112. Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID Convention), art. 63, Mar. 18, 1965, 4 I.L.M. 524. For commentary, see CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001).

regulation.<sup>113</sup> For example, a fee schedule for health care or education targeted at ensuring equal access and participation could be prohibited as a performance requirement, or as indirect expropriation, both prohibited under investment treaties.<sup>114</sup> Investors could also challenge the provision of subsidized public services, affirmative action policies, or a public insurance system as indirect expropriation of market opportunity.

Discourse on the interaction of the investment law with ESCR is embryonic. The impact of foreign investment on ESCR has been neglected due to the fact that it is conducted by TNCs—non-state actors—and mostly conducted bilaterally. Bilateral investment treaties purport to be politically neutral and economic in nature, despite their potential impact, both positive and negative, on the realisation of ESCR.

Investment agreements and treaties provide the only binding legal framework for the transfer of private capital between states. This legal framework for TNCs is devoid of human rights law. In order to remain relevant, human rights must protect those marginalized by the exigencies of globalization by empowering local peoples.<sup>115</sup> In other words, it must form a bottom line below which no one can fall, no matter the economic justification. Human rights should be guided by the entitlements of those alienated by the globalization process, rather than the property rights of those benefiting from it.<sup>116</sup>

## CONCLUSION

This essay has examined the important and interrelated roles of the CSR movement, the role of the state in regulating TNCs, and the obligation of the international community to promote a social and economic order in which ESCR can be achieved. The international community is at a critical juncture as the consequences of unregulated globalization are becoming clear. ESCR are in danger of being forgotten in a desperate attempt to shore up global capital by strengthening the rights of corporations vis-à-vis states through

---

113. See AGUIRRE, GLOBALIZED WORLD, *supra* note 6, at 163-77.

114. See *id.* at 9.

115. See Koen De Feyter, HUMAN RIGHTS: SOCIAL JUSTICE IN THE AGE OF THE MARKET 3 (2005).

116. See *id.*



investment treaties. The regulatory ability of the state is crucial to the realisation of ESCR. The international community, if serious about fulfilling these rights, needs to ensure states are able to do so when willing.

What began in 2004, with *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, as research into the inadequacy of human rights law pertaining to TNCs became a study on economic globalization and the unwillingness of states to discharge their human rights obligations both domestically and through international relations. Human rights law developed at a time when international relations were the domain of states alone. The world community envisioned a centrally organized system for governing security and economic and social development, where states had responsibility towards their own inhabitants. Little recognition was given to the scope of interference with human rights by non-state actors and the international community. The state was the only actor considered to have the capacity to violate and protect these rights at the national level. Although the world is now more polycentric than the post-war climate in which human rights law was designed, it is states that have created it:

[W]hat may appear in a static analysis as a disempowerment of the states confronted with a new form of sovereignty competing with theirs is, it should be remembered, the result of the emergence of a global marketplace which is initially the creation of the states. Less than ever should we exculpate states from their alleged inability to tame the new leviathans.<sup>117</sup>

The progress in improving corporate human rights performance has come from the realistic business-oriented case for promotion of corporate responsibility for ESCR.<sup>118</sup> It may be morally repugnant to base human rights implementation on its profitability, but it is the bottom line that inspires action in the current international community. A neoliberal economic order in which governments are to play a minimal role reduces the scope of government regulation for ESCR.

---

117. Oliver De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra* note 28, at 314.

118. See Aguirre, *Multinational Corporations*, *supra* note 1, at 76-81.

TNCs are increasingly relevant as privatization and deregulation occur. What is more, corporate investment is the primary engine of economic growth and most states are dependent upon it. Civil society must now advocate to TNCs directly, making the case that it is profitable to be sustainable and socially responsible. Binding obligations for global cooperation on non-market initiatives are considered unrealistic.

Pressure on states for the implementation of human rights law must be maintained. States are the most accountable entity in international relations. The monitoring and enforcement of human rights law remains nationally based and subject to national interests. States have the legal and political responsibility to fulfil ESCR and must regulate TNCs accordingly. TNCs—and their home states—should respect ESCR rights and, in particular, the ability of host-states to enact ESCR policy. TNCs do not, and perhaps should not, have a legal responsibility to progressively realise these rights by themselves.

In order to ensure that corporate activity contributes to ESCR, a fundamental change in international relations must occur. This requires economic, social, and cultural cooperation. States will have to accept the redistribution of resources at the national and international levels. This change does not appear imminent. Instead, TNCs are given full reign to make as much profit as possible while addressing human rights in the least expensive way. Given the political reluctance of states and the scarce resources available for ESCR, it is unlikely that TNCs will fill the void.