

MULTINATIONAL CORPORATIONS AND THE REALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

DANIEL AGUIRRE*

INTRODUCTION

Although the traditional view of human rights law concerns the relationship between the state and the individual,¹ increasing attention has been focused on private actors and their effect on human rights. Private actors have duties under international law.² This has been confirmed through judicial decisions and treaty interpretation, and highlighted by academic commentators.³ Concerning the realisation of Economic, Social and Cultural Rights (ESCR), the Multinational Corporation (MNC)⁴ is a relevant actor.

This article will address the current gap in international human

* PhD Fellow, Irish Centre for Human Rights, National University of Ireland, Galway, Ireland. L.L.M., International Human Rights Law, Irish Centre for Human Rights, National University of Ireland; B.A., University of Waterloo, Ontario, Canada. Mr. Aguirre is co-founder of Human Rights for Change, a non-governmental organization based in Ireland that seeks to provide legal expertise for NGOs and activists for human rights. The author would like to thank his parents and the Staff of the Irish Centre for Human Rights.

1. John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 75 (1973), reprinted in RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 1 (Richard A. Epstein et al. eds., 3d ed. 1995).

2. Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 *HARV. HUM. RTS. J.* 51, 51 (1992).

3. *Id.*

4. There are various combinations of two sets of terms to refer to this entity: transnational/multinational and corporation/enterprise. The various combinations of these four terms are then abbreviated as MNCs, MNEs, TNCs and TNEs. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12-15 (1995) (explaining history and content of the disagreements); Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: An Introduction*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 1, 1-4 (Menno T. Kamminga & Saman Zia-Zarifi, eds., 2000) (comparing varying usages of multinational, transnational, corporation and enterprises).

rights law dealing with MNCs and ESCR. It is submitted that MNCs have considerable influence on ESCR through their control over governmental economic and social policy. The following sections will examine state and private obligations under international law regulating ESCR within this contemporary paradigm and concludes that the state remains the primary duty holder in terms of ESCR. However, this article suggests this has little or no relevance within a global system dominated by economic factors and appeals to the bottom line of profit maximisation and economic growth⁵ in order to facilitate change regarding the realisation of ESCR.

The MNC is an established and adaptable entity. The MNC benefits from the doctrine of neo-liberal economics as well as the “home and host” state quagmire, which combines with limited liability and decentralised decision-making to allow for double standards in human rights promotion to take place internationally.⁶ Furthermore, the policies of the International Economic Institutions (IEIs) such as the International Monetary Fund (IMF), World Bank, and the World Trade Organization (WTO), have allowed the MNC to gain a position of considerable influence on the ESCR agendas of nation states.⁷ The corporate sector is extremely influential with national governments.⁸ MNCs use this influence to coerce governments to become “more competitive” by implementing national policy conducive to attracting international business. Often this means enacting policies less conducive to the realisation of ESCR.

This article considers the close relationship between the operations of multinational corporations and the realisation of ESCR. The MNCs’ uniquely powerful and influential position within the international community gives rise to contradictory capabilities. This position can be used to promote or undermine the realisation of ESCR, which will either enhance or inhibit the development of an international community based on stable local communities. This article examines the obligations of host nations to regulate the activities of all

5. Sigrun I. Skogly, *Economic and Social Human Rights, Private Actors and International Obligations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 239, 246 (Michael K. Addo ed., 1999).

6. Michael K. Addo, *Human Rights and Transnational Corporations—an Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 3, 3 (Michael K. Addo ed., 1999); Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. L. REV. 219, 231 (1999).

7. Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 259 (Michael K. Addo ed., 1999).

8. Voon, *supra* note 6, at 234-41.

groups and individuals within their jurisdiction in order to ensure an environment conducive to socio-economic development and also outlines the obligations of MNCs as emerging subjects of international human rights law.

Realistically, this article concedes it makes little difference whether legal obligations on the part of host governments or MNCs exist or not. With little or no enforcement and implementation, international law relies heavily on moral and voluntary reasons for compliance. With this in mind, the article will outline the business case for the promotion of ESCR, appealing to the motive of profit maximisation in order to demonstrate to international businesses the importance of such reinvestment in the development of the societies in which they conduct operations. This concession is made because it is imperative to harness the unrivalled abilities of the international business community to promote change in the international community towards the enjoyment of ESCR, and to counter the negative impact of economic globalisation.

I. BACKGROUND: MNCs AND NATIONAL SOVEREIGNTY CONCERNING ESCR

While MNCs have not replaced the State as the international power, the MNCs' activities hold considerable sway over the nation-state's policy making process.⁹ This is not a new phenomenon, but is increasingly visible as the MNCs grow disproportionately in terms of economic and political might.¹⁰

The vast economic and geographic expansion of MNCs has presented a plethora of difficulties for regulation and accountability. Famously, MNCs have now become larger economies than many states. One outstanding example is of General Motors, which is a larger economy than all but seven nations.¹¹ This economic clout is reflected across the board and the trend is towards even more expansion. The last ten years have seen unprecedented growth of multinationals.¹²

9. Addo, *supra* note 6, at 4.

10. *Id.*

11. Only the economies of the United States, Germany, Italy, the United Kingdom, Japan, France and the Netherlands are larger than General Motors. See Global Policy Forum, *Comparison of Revenues Among States and TNCs*, at <http://www.globalpolicy.org/soecon/tncs/tncstat2.htm> (May 10, 2000).

12. Responses to the Challenges of Globalisation: A Study on the International Monetary and Financial System and on Financing for Development, SEC(2002)185 final at 17, available at http://europa.eu.int/comm/economy_finance/publications/globalisation/r2002_185en.pdf (Feb. 13, 2002).

Increasing MNC involvement in the public domain has focused the public's attention on their activities. The public, who are the shareholders, employees, consumers and local populations, suffer the environmental and social impact of the operations of MNCs. The effects of a neo-liberal economic order of deregulation and minimal government have accentuated the need for the regulation of MNCs.¹³ In particular, regulation is called for in order to exert control over public policy affecting ESCR, an area in which MNCs hold particular sway.¹⁴

The ability of national governments to implement policies designed to fulfil ESCR obligations has been reduced by the expansion of global trade and the race to be competitive.¹⁵ Economic reforms of deregulation, privatization and increased export production are imposed by the IMF and World Bank in order to improve competitiveness within the global trade system.¹⁶ This structural adjustment compels states to limit the government's role in policy making and reduce national standards as they may discourage foreign investment.¹⁷ Unfortunately, the reduction of these standards can lead to an erosion of state sovereignty of policy making, which directly affects the ability to determine development priorities¹⁸ and fulfil ESCR obligations. In order to ensure the fulfilment of ESCR when national governments are afforded a reduced role, both international and non-state actor cooperation is required.¹⁹

The narrow traditional view of international human rights law is being increasingly challenged as unrealistic in relation to the world in which people live.²⁰ It is not viable to merely dismiss human rights law responsibility of corporations simply because it has not been directly codified within international law and was not traditionally envisioned. The international community and its laws must adapt to a dy-

13. Skogly, *supra* note 5, at 248; Voon, *supra* note 6, at 219.

14. Skogly, *supra* note 5, at 244.

15. These include, for example, trade union freedoms, the right to work and the right to social security. It also may have a disproportionate effect on minorities. *Statement on Globalization and Economic, Social and Cultural Rights: Unedited Version*, U.N. Comm. on Econ., Soc. and Cult. Rts., 18th Sess., para. 3 (May 1998), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/adc44375895aa10d8025668f003cc06e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/adc44375895aa10d8025668f003cc06e?Opendocument).

16. GARY TEEPLE, *GLOBALIZATION AND THE DECLINE OF SOCIAL REFORM 92-97* (Robert Clarke ed., 2000).

17. Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 992 (1995).

18. Addo, *supra* note 6, at 3-4.

19. Daniel Aguirre, Human Rights for Change, *Global Trade, Competitiveness and Human Rights*, at <http://humanrightsforchange.org/pospap01.htm> (Oct. 2003).

20. Skogly, *supra* note 5, at 239.

dynamic world and create regulation that protects all sectors of society. The reasons for this challenge are twofold. First, the effects of human rights violations upon the individual are the same whether perpetrated by states or private actors. Secondly, a narrow application of human rights law is not conducive to furthering the protection of human rights, and subtracts from its credibility.²¹ Nevertheless, it is imperative that by extending the scope of human rights law to private actors such as MNCs, the primary responsibility of states for enforcing human rights law is not diminished.

II. PROBLEMS WITH TRADITIONAL NOTIONS OF INTERNATIONAL LAW IN RELATION TO MNCs

The international legal system seems completely inadequate to regulate powerful non-state actors, such as MNCs. As nations battle over sovereignty, they are reluctant to give up power to international regulatory bodies and care more for the bottom line of economic growth and profit maximisation than for human rights.

MNCs consist of international entities extending beyond national jurisdictions in terms of economic resources and decision-making responsibility.²² This legal conundrum has been obvious for at least thirty years, yet there have been only minor improvements in accountability.²³ The outmoded regulation system and the dynamic MNCs' considerable economic and political power combine to create a problematic regulatory task. The MNC has transcended national legal systems and ignored the feeble international system to make the imposition of human rights norms nearly impossible.

The negative impact that the phenomenon of economic globalisation has had on state regulation and peoples' lives is becoming apparent. The move to more "competitive nations" often means moving to states that have less regulation in order to attract the fickle eye of MNCs.²⁴ This in turn means other countries must regulate less in order to attract investment and employment.²⁵ It has become impossible

21. *Id.*

22. Deltev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 740-43 (1969).

23. Over thirty years ago, Professor Vagts pointed out "the present legal framework has no comfortable, tidy receptacle for such an institution," producing a tension between the legal theory of independent corporate units, each "operating as a native within the country of its incorporation," and the reality of the "economic interdependence" of the multinational corporation. *Id.*

24. Van Wezel Stone, *supra* note 17, at 992.

25. *Id.* at 992-93.

for nations, even if they are willing, to impose any obligations upon MNCs to contribute to the communities from which they are extracting resources and making vast profits. Any attempt to do so would reduce that nation's competitiveness. The nation has been weakened in terms of managing human rights obligations, and the first to be abandoned are ESCR, as the provision of these rights costs money and implementation remains disputable under international law.

The traditional approach to human rights law dictates human rights protect the individual against the State.²⁶ This doctrine was developed in a time when international business was less prominent and international economic interdependence was far less important.²⁷ Since international business is now mobile enough to avoid stringent national regulations,²⁸ or influential enough to persuade against the adoption of such regulation, international law must move beyond the traditional view towards regulating all of the organs of the international community. This requires ensuring states fulfil their international commitments for ESCR, which are the foundation of human dignity and equality.

This historical bias of international law concerning the regulation of interstate relations has begun to give way to emerging trends conferring rights and duties on non-state actors such as supranational institutions²⁹ and other actors, including insurgent or rebel groups,³⁰ individuals and corporations.³¹ This new type of non-state actor liability and responsibility under international law is emerging in two ways. The first entails indirect accountability through the horizontal application of international law and the other through the application of inter-

26. Skogly, *supra* note 5, at 244.

27. *Id.*

28. See PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 168 (1993).

29. See, e.g., Advisory Opinion No. 4, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (describing the capacity of the U.N. to bring an international claim on behalf of an agent injured while on duty).

30. For example, Common Article 3 to the Geneva Conventions enjoins insurgent groups and state armies to protect prisoners and to respect prohibitions relating to attacks of civilians, hostage taking, terrorist attacks or the use of starvation as a mode of combat. *The Convention Relative to the Treatment of Prisoners of War*, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Aug. 12, 1949). *The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, adopted by the UN General Assembly on November 16, 2000 also places an obligation on armed groups including rebel forces to prevent children from participating in armed conflict. E.S.C. Draft Res., U.N. ESCOR, 39 I.L.M. 1285, 1286-90, U.N. Doc.A/54/L.84 (2000). It also prohibits the recruitment of children into their forces. *Id.*

31. See, e.g., *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990), 12 Eur. H.R. Rep. 485 (1990).

national law directly to the non-state actors in question.

The lethargic response regarding ESCR by the international community has been a failure in its duty to enact laws to regulate for the good of humanity as a whole, particularly in the field of development. This is in part due to the fact that lawmakers consider the “globalisation” phenomena to be a socio-economic problem they are not capable of dealing with.³² Politicians are equally hesitant to alter the status quo, as they fear discouraging profit-maximisation and growth, and thereby impairing their nation’s economic competitiveness.³³ The realisation of ESCR generally implies positive obligations on the part of the state and private actors such as MNCs, which cost money, and therefore reduce profit maximisation. Furthermore, multinational financing operations and joint ventures have combined with decreasing national control over international commerce to weaken states within the global system, thereby making regulation even more difficult.³⁴

Until recently, this gap in international law was increasingly widening. As both cause and effect of growing corporate economic power, the international and domestic political systems have increasingly relinquished their control over business.³⁵ Economic power holds political influence. The MNCs dominate national planning on issues such as trade, patent, social and economic policy.³⁶ While governments remain divided by conflicting interests, such as competitiveness versus social reform,³⁷ MNCs have a clear, concise purpose of profit maximisation.³⁸ This speaks loudly and clearly with influential members of national populations.

International and national laws have begun to adapt in order to regulate effectively in an increasingly dynamic world. There now exists a wealth of international regulation that reflects a move away from the traditionalist view of international law,³⁹ whereby actions within one state’s jurisdiction are subject to domestic sovereignty only.⁴⁰ Internationally, these include GATT, draft Multilateral Agreement on Investment,⁴¹ anti-corruption,⁴² environmental regulations,⁴³ the Inter-

32. Skogly, *supra* note 5, at 248.

33. Addo, *supra* note 6, at 31.

34. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT’L L. & POL’Y 1, 8 (1993).

35. Skogly, *supra* note 5, at 248.

36. Addo, *supra* note 6, at 7.

37. Vagts, *supra* note 22, at 757.

38. Skogly, *supra* note 5, at 246.

39. *Id.* at 247.

40. *Id.* at 244.

41. *Id.* at 247.

national Criminal Court, and advances concerning individual responsibility for war crimes and crimes against humanity in the international tribunals for Yugoslavia and Rwanda.⁴⁴ Regulations within domestic systems have advanced as well, with the adaptation of the Alien Tort Claims Act in the U.S.,⁴⁵ and the relaxation of *forum non conveniens* rules in Great Britain which allow for MNCs to be held liable for actions of their subsidiaries committed abroad.⁴⁶ However, the gap in international law regarding MNC operations clearly still exists. It is time to move toward solutions. Solutions are imperative in this regard due to the enormous impact of MNCs on the enjoyment of ESCR.

III. IMPACT OF MNCs' OPERATIONS ON ESCR

The prominence of an international economic system based on conservative market-based philosophy which reduces the role of government in development has become intolerable and is preventing the realisation of ESCR in the developing world.⁴⁷ This system allows for MNCs to exert significant control over development policy. This impacts directly on the enjoyment of ESCR rights as MNC priorities are not equivalent to those of human rights realisation. MNCs have:

massive budgets, . . . [and are] driven essentially by profit, use[] the smallest number of workers possible, move[] from jurisdiction to jurisdiction with relative ease, import[] labour to the detriment of local labour, and they [do] not always take into account the social needs of the country in which they [are] operating.⁴⁸

ESCR require particular aid in promotion and observance as they do not conform to market demands and may inhibit a market-based development programme in the short-run. For this reason, developing

42. See, e.g., *United Nations Convention Against Corruption*, U.N. GAOR, 58th Sess., Supp. No. 49, U.N. Doc. A/Res/58/4 (2003).

43. Skogly, *supra* note 5, at 247.

44. *Id.* at 251.

45. Jenny B. Davis, *Old Law Bares Its Teeth: Alien Tort Claims Act Bites International Firms*, 89 A.B.A. J. 20 (2003); Federal Tort Claims Act, 28 U.S.C.S. §§ 1346 et seq. (Law. Co-op. 1978 & Supp. 2004).

46. David Rolph, *Before the High Court: The Message, Not the Medium: Defamation, Publication and the Internet in Dow Jones & Co., Inc v. Gutnick*, 24 SYDNEY L. REV. 263, 278, n.92 (2002).

47. *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations*, U.N. ESCOR Hum. Rts. Comm., Sub-Comm'n on the Promotion and Protection of Hum. Rts., 54th Sess., Agenda Item 4 at 5, U.N. Doc. E/CN.4/Sub.2/2002/13 (2002) [hereinafter *Working Group*, 54th Sess.].

48. *Id.*

nations need international regulation of private actors in order to respond effectively to this situation.⁴⁹

ESCR have habitually taken a back seat to civil and political rights. Despite this categorization of human rights into civil/political and ESCR, all human rights are interdependent and indivisible, as the United Nations consistently stresses.⁵⁰ However, ESCR are particularly relevant to MNC operations in the developing world and the ability of national governments to fulfil their obligations.

The significance of ESCR to the operations of MNCs is clear. These private actors encounter and occasionally violate ESCR rights during the course of their operations.⁵¹ Moreover, competitiveness for MNC investment often demands the scaling down of social and cultural policy. Furthermore, MNCs extract massive profits with relatively little reinvestment in local communities, despite the fact natural resources belong to them.⁵² The failure to provide for the realisation of ESCR, or in influencing or conspiring with local governments to deny the realisation of ESCR, often initiates a chain of events that cause problems with civil and political rights, as they are interdependent.⁵³

One example of this downward spiral can be seen in the crisis in Nigeria in the mid-nineties, which continues today.⁵⁴ Shell's failure to enact positive measures promoting ESCR, and its complicity with the Nigerian government in failing to promote ESCR brought about social conditions that were not in line with the amount of profit made through the extraction of resources from the local community's land.⁵⁵ Those ESCR include the rights to a safe working environment,⁵⁶

49. *Id.*

50. Skogly, *supra* note 5, at 241.

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

U.N. World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993).

51. Skogly, *supra* note 5, at 240-41.

52. *See generally* Voon, *supra* note 6, at 222 (describing the objective of MNEs as "the unbridled pursuit of competitive advantage and the maximization of profits").

53. *Working Group*, 54th Sess., *supra* note 47, at 5, para. 21.

54. Press Release, Amnesty International, Nigeria: Are Human Rights in the Pipeline? (Nov. 9, 2004), available at <http://web.amnesty.org/library/print/ENGAFR440312004>.

55. Skogly, *supra* note 5, at 242-43.

56. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 Annex (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 7, opened for signature Dec. 16,

food,⁵⁷ self-determination,⁵⁸ freedom from discrimination,⁵⁹ adequate health,⁶⁰ education,⁶¹ an adequate standard of living (including adequate social services),⁶² work,⁶³ development,⁶⁴ and freedom of association.⁶⁵ These “social circumstances” are actually legal circumstances, because the Nigerian government has ratified and is legally bound by the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, and the African Charter on Human and Peoples’ Rights, thus creating a legal obligation to prevent this scenario.⁶⁶

In response to these unfair and inadequate circumstances, the local Nigerian population attempted to exercise their civil and political rights.⁶⁷ These rights included freedom of opinion, association, expression,⁶⁸ and right to engage in political participation.⁶⁹ To counter this movement the government used techniques that further desecrated human rights laws by violating the right to personal security, freedom from torture, arbitrary arrest, unfair trials, and unlawful killing,⁷⁰ all of which caused international outrage.⁷¹ Unfortunately, the world’s focus on the violations of civil and political rights overlooked the root cause of these violations, namely the failure to provide for the realisa-

1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

57. *Id.* art. 11.

58. *Id.* art.1(1).

59. International Covenant on Civil and Political Rights, G.A. Res. 2200 Annex (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, arts. 20, 24 & 26, U.N. Doc. A/6316 (1966), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; ICESCR, *supra* note 56, art. 2(2); African [Banjul] Charter on Human and Peoples’ Rights, June 27, 1981, pmbl. & art. 28, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter ACHPR].

60. ICESCR, *supra* note 56, art.12

61. ACHPR, *supra* note 59, arts. 17 & 25; ICESCR, *supra* note 56, art. 13.

62. ACHPR, *supra* note 59, art. 25; ICESCR, *supra* note 56, art. 11.

63. ACHPR, *supra* note 59, art. 15; ICESCR, *supra* note 56, art. 6.

64. ACHPR, *supra* note 59, art. 24.

65. ACHPR, *supra* note 59, art. 10; ICCPR, *supra* note 59, art. 22.

66. Skogly, *supra* note 5, at 243 n.17.

67. *See generally*, Amnesty International, *Nigeria: A Travesty of Justice: Secret Treason Trials and Other Concerns* (Oct. 26, 1995), available at <http://www.amnestyusa.org/regions/africa/document.do?id=2F6789997B756A3B802569A50071588E> (discussing how friends and relatives of the individuals that had been denied these rights, as well as journalists and human rights activists, exposed the injustices of the arrests and trials of these individuals) [hereinafter *Travesty of Justice*].

68. ICCPR, *supra* note 59, arts. 19 & 22.

69. ACHPR, *supra* note 59, art. 13; ICCPR, *supra* note 59, art. 25.

70. ACHPR, *supra* note 59, arts. 4-7; ICCPR, *supra* note 59, arts. 6-7.

71. Amnesty International Nigeria: *The Ogoni Trials and Detentions* (Sept. 15 1995), available at <http://www.amnestyusa.org/countries/nigeria/document.do?id=9ACBC70D18955C7E802569A5007156BE>; *Travesty of Justice*, *supra* note 67.

tion of social, economic and cultural rights,⁷² which Shell, a private actor, was in a uniquely effective position to do.⁷³

The international community has historically emphasized civil and political rights despite the fact all human rights are universal and interdependent.⁷⁴ The international community was quick to blame the Nigerian government for not respecting people's civil and political rights.⁷⁵ The international community should have condemned the government and Shell for environmental degradation and the denial of development and lack of revenue filtering back to the local community from natural resource exploitation. All of the human rights organisations addressed civil and political rights, including Amnesty International and Human Rights Watch.⁷⁶

The repudiation of ESCRs caused the slide towards violence, miscarriage of justice and killing.⁷⁷ MNCs are directly related to the enjoyment of the rights enshrined in the ICESCR. The chain reaction caused by the denial of these rights results in wider violations of human rights, including the civil and political rights enshrined in the ICCPR. In turn, the consequence can be political turmoil and instability, which is clearly injurious or even fatal to the local business operations of MNCs. In the case of Shell, it has been forced to reduce operations to a bare minimum, thereby forfeiting vast profits.⁷⁸ However, it does not have to be like this. MNCs are in a unique position to promote the realisation of all human rights, and are especially able to promote a foundation of social, economic and cultural rights. This can provide the stability they require in order to conduct operations.

72. Skogly, *supra* note 5, at 243.

73. *See id.* at 243-44.

74. *Id.* at 241-42; S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 110 (1997).

75. *See generally* Amnesty International, *Nigeria: Time to End Contempt for Human Rights* (Nov. 1996), available at <http://www.amnesty.org/ailib/intcam/nigeria/contoc.htm> (accusing the Nigerian government of various human rights violations) [hereinafter *Amnesty International, Nigeria*].

76. Skogly, *supra* note 5, at 243 & n.22. In addition, FIAN addressed the Ogoni's right to food, and Environmental Organisations addressed issues of the environmental degradation of the land. *Id.*

77. *See* Amnesty International, *Nigeria*, *supra* note 75.

78. Bloomberg, *Unrest Has Big Impact on Nigeria Oil Output*, INT'L HERALD TRIB., June 11, 2004, available at <http://www.iht.com/articles/524461.html> (stating "Shell Group may have to quit onshore production in Nigeria . . . because of escalating civil strife").

IV. MNCs UNIQUE POSITION FOR PROMOTION OF ESCR

While there is no doubt the diplomacy and influence of the international community is fundamental to changing corrupt regimes, MNCs are in a unique position to promote change and persuade governments to abide by their human rights obligations. MNCs can and should exert positive influences such as increasing employment, increasing available capital, technology, knowledge, improved management and positive contributions to labour relations and administration. The standards MNCs bring to developing nations should be higher than the incumbent ones.

MNCs can further pressure the governments of such nations by threatening to withdraw their operations. The world has witnessed this powerful negotiation technique as many nations have been forced to alter national policy making in order to privatise, deregulate, create tax incentives, lower operating costs and provide an international system conducive to corporate profit maximisation, and to be more "competitive."⁷⁹ If governments and established developed world democracies fail to comply with corporate demands, they risk the withdrawal of corporate activity, which has become increasingly mobile.⁸⁰ This results in increased unemployment and economic woes, which can mean political suicide. In this way, corporations and their benefactors have demonstrated their immense ability to influence and even control nations and the international community.⁸¹ With this sort of power, capable of altering the world's economic and political systems, it must be possible to promote human rights in general.

In particular, the promotion of ESCR is within the MNCs' reach. They are present on the ground in developing nations' communities and engaged with the people who live there. The MNCs are often extracting massive profits either from natural or human resources.⁸² In this situation, an obvious moral duty exists to reinvest some of these profits in order to construct a decent life for the local communities. Also, local governments are often unable or unwilling to invest in ESCR, which are the foundation of stability. The MNC is therefore often the only entity able to contribute to this stability building proc-

79. Skogly, *supra* note 5, at 248.

80. *Id.*

81. See Sarah Joseph, *An Overview of the Human Rights Accountability of Transnational Corporations: The Role of UNCTAD*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 75, 78 (Menno T. Kamminga & Saman Zia-Zarifi, eds., 2000); Voon, *supra* note 6, at 235.

82. Voon, *supra* note 6, at 222.

ess resulting from the realisation of ESCR. While this is not the traditional role of the MNC, this article argues there exists a sound business case for this sort of reinvestment in ESCR. This is particularly because it creates a stable and content society, which is not likely to descend into political instability and violence that is significantly detrimental to MNC activity.

Furthermore, the revealing spotlight of a developed civil society, which should accompany MNCs' operations in the developing world, can force changes in the developing "host" nations.⁸³ The exploitation by local producers of workers can go unnoticed, but if high profile MNCs engage in such activities, NGOs and activist groups will sound alarm bells around the world. MNCs engaged in these societies have the opportunity to demand adherence to human rights, which local governments will have little choice but to comply with.

V. RESPONSIBILITY FOR THE REALISATION OF ESCR

It is important to note the primary responsibility for this development rests with the national governments.⁸⁴ However, for reasons such as competitiveness, host governments are unable or unwilling to do so.⁸⁵ MNCs, who have tremendous influence with these governments, can use this ability to induce "host" states to abide by their duties under international law instead of inducing them to merely deregulate, and conform to the dominant international economic system of the day.⁸⁶

A. Obligation of Governments to Regulate MNCs in Accordance with International Law through Horizontal Application

The Chairperson of the sessional working group on the working methods and activities of transnational corporations stressed the relationship between states and transnational corporations.⁸⁷ He recalled that the International Covenants on Human Rights and the Declaration on the Right to Development established that States are the primary duty bearers of human rights and, as a consequence, each State needed to regulate foreign investment within its jurisdiction.⁸⁸

83. See generally *id.* (discussing the interaction and evolving relationships between host states and MNCs and the resulting impact of MNCs on state sovereignty).

84. Joseph, *supra* note 81, at 77.

85. Skogly, *supra* note 5, at 248.

86. *Id.*

87. Working Group, 54th Sess., *supra* note 47, at 5, para. 12.

88. *Id.*

It is imperative to search for methods of regulating MNC operations so as to benefit local communities, in terms of ESCR, as well as the international economic system. In this regard, the strategy involves existing international regulation implemented and enforced nationally, as little political will exists for international regulation. The international covenants on civil and political rights as well as the social, economic and cultural rights are ratified by the majority of states,⁸⁹ and impose an obligation on these governments to regulate the conduct of MNCs within their jurisdiction in order to uphold the principles contained within them.⁹⁰

With respect to implementing ESCR, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights inform that a State is responsible to ensure MNCs do not deprive individuals of these rights.⁹¹ The U.N. Committee on ESCR clearly articulates a State's responsibility extends to the actions of agents of the State, as well as third parties over whom the State has control.⁹² The duty of governments is clearly expressed in the preamble and Article I of the International Covenant on Economic, Social and Cultural Rights. The Preamble affirms all parties to the Covenant agree to the principles:

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,
Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms⁹³

The relationship between this governmental duty to promote human rights and the regulation of private actors such as MNCs within their sphere is elucidated in Article 1 of the Covenant. MNCs often undermine local communities' development of ESCR by exploiting local resources without returning adequate percentages of the profit.⁹⁴

89. As of June 9, 2004, 149 States have ratified the ICESCR and 152 States have ratified the ICCPR. See Office of the U.N. High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Nov. 23, 2004).

90. See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Jan. 22-26, 1997, paras. 6 & 7, available at http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html.

91. *Id.* para. 18.

92. MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 113 (Ian Brownlie ed., 1995).

93. ICESCR, *supra* note 56 (emphasis added).

94. See, e.g., *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998) (Texaco/Ecuador);

Clearly, according to Article 1, the government is obliged to temper this situation. Article 1 of the ICESCR states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Again, the case of Shell and the Nigerian government concerning the problems with the Ogoni people provides an excellent example. The Nigerian government's failure to protect the population from private actors and exploitation resulting in deprivation of ESCR was challenged before the African Commission of Human and Peoples Rights (The Commission).⁹⁵ In the case of *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*,⁹⁶ the Commission tendered a landmark ruling, which represents a step forward in the promotion of ESCR in Africa. The case followed the execution of Ken Saro-Wiwa and eight other members of the Movement for the Survival of the Ogoni People (MOSOP).⁹⁷ The Communication included allegations against Nigeria of discrimination, violations of the right to property, health, family and the freedom to dispose of their wealth and resources, as well as degradation of the environment causing health problems to the Ogoni, and condoning and facilitating violations of human rights by the Nigerian government against the Ogoni.⁹⁸ The Communication also alleged the Nigerian government failed to provide for the realisation of these rights, including ESCR.⁹⁹

The Commission came to the important conclusion the Nigerian

Ashley Seager, *Nigerian fighting pushes oil price to record high*, THE GUARDIAN, Sept. 28, 2004.

95. Soc. & Econ. Rts. Action Ctr. for Econ. & Soc. Rts. v. Nigeria, Comm. No. 155/96 (Oct. 2001), Fifteenth Annual Activity Report of the African Comm'n on Human and Peoples' Rights, 2001-2002, at 31-44, available at http://www.achpr.org/english/_doc_target/documentation.html?..activity_reports/activity15_en.pdf (last visited Nov. 8, 2004) [hereinafter Nigeria].

96. *Id.*

97. The charges and trial against the members of MOSOP are widely considered to be contrary to due process and a cover-up to implicate them for standing up to the Nigerian government and Shell's exploitation of the environment and the Ogoni people. Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, at <http://www.hrw.org/reports/1999/nigeria/index.htm> (Jan. 1999).

98. *Nigeria*, Comm. No. 155/96, paras. 1-10.

99. *Id.*

government was in breach of the African Charter, which states “[e]very individual shall have the right to enjoy the best attainable state of physical and mental health[] [and] States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick,”¹⁰⁰ and that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”¹⁰¹ The Commission ruled “[t]hese rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and the safety of the individual.”¹⁰²

Importantly, Nigeria was held to be in violation of Article 21 of the Charter.¹⁰³ Article 21 states:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.¹⁰⁴

The content of Article 21 of the African Charter clearly resembles the intent of Article 1 of the ICESCR. This jurisprudence displays the clear linkage between the operations of MNCs, the self-determination of peoples to freely dispose of its natural resources, and the denial of ESCR that can result. Furthermore, it indicates a government can be held accountable under international law for failing to ensure private actors and state actors together provide a setting in which ESCR can be achieved. To prove this substantive law connection, the plaintiffs cited the cases of *Union des Jeunes Avocats/Chad*,¹⁰⁵ *Velasquez Rod-*

100. ACHPR, *supra* note 59, art. 16.

101. *Id.* art. 24.

102. *Nigeria*, Comm. No. 155/96, para. 51.

103. *Id.* at 43.

104. ACHPR, *supra* note 59, art. 21.

105. Communication 74/92, Comm'n Nationale des Droits de l'Homme et des Libertes

*riguez v. Honduras*¹⁰⁶ and *X and Y v. The Netherlands*.¹⁰⁷ Significantly, the plaintiffs cited international law in order to prove Nigeria violated its duty to protect citizens from damaging acts done by private parties through enacting appropriate legislation and effective enforcement, contrary to the minimum conduct expected of governments and therefore contrary to the African Charter.¹⁰⁸

The ICESCR includes measures that imply international obligations as well as domestic obligations. In Article 2, the Covenant states:

Each 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 realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁰⁹

This indicates governments are obligated to seek binding regulation promoting the realisation of social, economic and cultural rights on an international basis. Considering the close proximity in which MNCs interact with the attainment of these rights, it seems appropriate they would be included in such international technical and economic cooperation. A holistic approach to interpreting these events indicates a method of addressing the current problem facing states. This indicates governments must take action to uphold, protect and promote ESCR. They must ensure an environment conducive to fulfilling ESCR commitments by regulating the activities of private parties affecting the enjoyment of these rights in order to ensure the development of society with social, economic and cultural rights as the foundation. If this regulation is achieved, it will go a long way towards realising such ideals.

V. INTERNATIONAL LAW AS BINDING ON NON-STATE ACTORS SUCH AS LEGAL PERSONS

In addition to bestowing responsibilities on national governments for regulating MNCs and their activities affecting ESCR, the international community has devised human rights norms applicable directly

de la Federation Nationale des Unions de Jeunes Avocats de France v. Chad (1995).

106. Velasquez Rodriguez Case, Inter-Am C.H.R. (ser. C) No. 4, (1988), available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm (last visited Nov. 10, 2004).

107. *X and Y v. The Netherlands*, App. No. 8978/80, 8 Eur. H.R. Rep. 235 (1985).

108. *Nigeria*, Comm. No. 155/96, paras. 43-48.

109. ICESCR, *supra* note 56, art. 2(1).

to corporations.¹¹⁰ While enforcement of these norms, the other pillar of regulation, remains problematic, the existence of these human rights standards represents an important foundation for the corporate accountability movement to build upon.¹¹¹ The view that international law binds only states is incorrect and outdated by developments in international law.¹¹² In the past, international law has prohibited piracy and slave trading, which were committed by non-state actors. Today, human rights law is expanding to bring powerful MNCs into its scope.

It is widely accepted there are international minimum standards for the rights in this field that are justiciable.¹¹³ In fact, considerable international and U.S. precedent indicates corporations are potentially liable for violations of international law.¹¹⁴ Most MNCs would already have policies that conform to such standards but do not conceptualise these as complying with human rights law. This may cause difficulty for some MNCs, but obeying human rights law is a legal duty.

All individuals within the international community must uphold economic, social, and cultural rights. The preamble to the ICESCR determines “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present covenant.”¹¹⁵ Therefore, all individuals, including legal persons such as MNCs, have the duty to abide by this covenant and promote its fulfilment. Furthermore, the covenant expressly recognises it cannot be interpreted to imply for any “group or person” any right to destroy or limit the rights of others to a greater extent than is provided.¹¹⁶ The Committee on ESCR has stated in its general comments that non-state actors, such as those within the private business sector, have responsibilities and obligations for the fulfilment of these rights.¹¹⁷ This

110. See, e.g., Skogly, *supra* note 5, at 249 (discussing the trend of corporations adopting “ethical business standards,” some of which relate to human rights).

111. *Id.* at 251.

112. *Id.* at 239-40.

113. Michael K. Addo, *Justiciability Re-examined*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT* 93 (Ralph Beddard & Dilys M. Hill eds., 1992).

114. See Joseph, *supra* note 81, at 79-80; HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 225 (2d ed. 2000) (citing *Oppenheim's International Law* vol. 1, at 4 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992)).

115. ICESCR, *supra* note 56, pmbl.

116. *Id.* art. 5(1).

117. See, e.g., General Comment 12, The Right to Adequate Food (Art. 11), U.N. ESCOR Comm. on Econ., Soc. and Cult. Rts., 20th Sess., Agenda Item 7, para. 20, U.N. Doc. E/C.12/1999/5 (1999); General Comment 14, The Right to the Highest Attainable Standard of

line of reasoning seems to indicate a duty of non-state actors to go beyond respect for the law and into the realm of positive obligations.

Perhaps the most comprehensive explanation of who has human rights responsibility comes in the preamble of the Universal Declaration of Human Rights itself.

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.¹¹⁸

There can be little or no doubt this statement applies to corporations.¹¹⁹

MNCs' operations are conducted within a complex web of conventions and treaties that make up international law. MNCs cannot be selectively subject to certain international laws and not others. Therefore they must respect all basic human rights principles. The United Nations has set many rules for corporations over the years, thereby indicating they are indeed subject to international law. For example, corporations had to follow certain rules for trading with Iraq during sanctions¹²⁰ and were forbidden from trading with South Africa during the Apartheid.¹²¹

The application of international law to individuals is established

Health (Art. 12), U.N. ESCOR Comm. on Econ., Soc. and Cult. Rts., 22nd Sess., Agenda Item 3, para. 42, U.N. Doc. E/C.12/2000/4 (2000).

118. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), pmbl., U.N. Doc. A/810 (1948) [hereinafter UDHR].

119. "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Louis Henkin, *The Global Market as Friend or Foe of Human Rights: The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999).

120. S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (1995); *Letter dated 26 July 2001 from the Chairman of the Security Council Committee established by Resolution 661 (1990) Concerning the Situation Between Iraq and Kuwait Addressed to the President of the Security Council*, U.N. SCOR, paras. 7-13, at 3-4, U.N. Doc. S/2001/738 (2001).

121. The General Assembly passed a resolution deploring "the continued co-operation by certain States and foreign economic interests with South Africa in military, economic, political and other fields, as such co-operation encourages the Government of South Africa in the pursuit of its inhuman policies." *The Policies of Apartheid of the Government of South Africa*, G.A. Res. 2671(F), U.N. GAOR, 25th Sess., 1921st plen. mtg. at 33-34, U.N. Doc. A/8028 (1970). Thus, "[w]hile it may appear that sanctions obligations are confined to UN member states, the reality has suggested otherwise." Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 484 (2001).

in the modern system.¹²² *The Apartheid Convention* established the crime of apartheid could be committed by “organizations, institutions and individuals”¹²³ The Convention on the Prevention and Punishment of the Crime of Genocide (*Genocide Convention*), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all apply to individuals as well as states.¹²⁴ While these conventions and covenants do not expressly regulate corporations, they certainly cover the conduct of corporations, as they “do not distinguish between natural and juridical individuals”¹²⁵ Corporations have many rights under international and domestic laws, including limited liability.¹²⁶ Therefore, they should also be subject to the corresponding obligations implied by international law. It is unlikely a modern interpretation of the law would protect a corporation engaged in serious violations of international law. These aforementioned conventions do not have international enforcement mechanisms. Instead, they compel states to enact legislation ensuring domestic enforcement. Therefore, international law is capable of defining norms applicable and enforceable on corporations.¹²⁷

122. See generally Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45 (2002) (discussing corporate human rights regulation in the context of the nature of corporate entities and the government’s power to impose limits on such entities).

123. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068, U.N. GAOR, 28th Sess., 2185th plen. mtg., Annex, at 75, Art. I(2), U.N. Doc. A/2645 (1973).

124. Article 4 of the *Genocide Convention* states “[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” *The Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260(III)A, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), available at <http://www.preventgenocide.org/law/convention/text.htm>. The preamble to the *Universal Declaration of Human Rights* states “every individual and every organ of society” should promote respect for basic human rights. UDHR, *supra* note 118, pmb1. Both the ICCPR and the ICESCR recognize private obligations in their preambles, in the following terms: “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant” See ICCPR, *supra* note 59, pmb1.; ICESCR, *supra* note 56, pmb1.

125. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 316 (S.D.N.Y. 2003).

126. Stephens, *supra* note 122, at 54-56. See generally Kamminga, *supra* note 4 (discussing MNC liability for violation of international legal standards).

127. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 139, 178 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

Several international declarations support the concept of private-actor responsibility regarding the realisation of ESCR. For example, the U.N. Declaration on the Elimination of All Forms of Racial Discrimination,¹²⁸ the Rio Declaration on Environment and Development¹²⁹ and the Copenhagen Declaration on Social Development and Programme of Action¹³⁰ all require active promotion of their mandate from non-state actors.

International human rights law has since developed to be applicable to private actors.¹³¹ The European Court of Human Rights (ECHR) and the U.S. legal system have confirmed duties of private individuals and groups exist under international law.¹³² Humanitarian law has also evolved to include private actors, for example Common Article 3 of the Geneva Conventions sets minimal rules applicable to all parties engaged in combat, including private parties.¹³³ Furthermore, Protocol II also applies to private parties.¹³⁴ It is therefore apparent in the aforementioned examples as well as many other treaties that do not directly express this sentiment, but can be interpreted in a light favourable to human rights promotion, that individuals as well as states bare duties under international human rights law.

The African Charter on Human and Peoples Rights,¹³⁵ the African Charter on the Rights and Welfare of the Child¹³⁶ and the American

128. G.A. Res. 1904 (XVIII), U.N. GAOR, 18th Sess., 1261st plen. mtg., Agenda Item 43 at 35, U.N. Doc. A/RES/1904 (1963) (stating in Article 2 “No State, institution, group or individual shall make any discrimination in matters of human rights . . .”).

129. *Report of the United Nations Conference on Environment and Development*, Rio Declaration on Environment and Development, Annex I, U.N. Doc. A/CONF.151/26 (Vol. I) (1992).

130. *Report of the World Summit for Social Development*, World Summit Res. 1, 1st plen. mtg. ch. 1, at 4 U.N. Doc. A/CONF.166/9 (1995), available at <http://www.un.org/documents/ga/conf166/aconf166-9.htm> (last posted Jan. 25, 2000).

131. See generally ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 99-02 (Ian Brownlie ed., 1993) (discussing the UN and its attempts concerning private actors).

132. Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 814 (2002); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

133. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518-20, 75 U.N.T.S. 287, 288-89; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318-21, 75 U.N.T.S. 135, 136; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3220-22, 75 U.N.T.S. 85, 86; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 3116-18, 75 U.N.T.S. 31, 32.

134. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13, 1125 U.N.T.S. 609, 611.

135. ACHPR, *supra* note 59.

136. African Charter on the Rights and Welfare of the Child, O.A.U. Doc.

Declaration of the Rights and Duties of Man¹³⁷ impose duties directly on non-state actors. These actors specifically include individuals and communities, and some duties concern social, economic and cultural rights.¹³⁸ All of the above mentioned charters and declarations demonstrate private actors have duties and responsibilities within international law.

Numerous international treaties impose liability directly upon corporations.¹³⁹ Several treaties similarly impose liability not upon states, but upon private, often corporate, actors.¹⁴⁰ International law applies directly to corporations in areas other than human rights.¹⁴¹

CAB/LEG/24.9/49, (1990) (entered into force Nov. 29, 1999).

137. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), *available at* <http://www1.umn.edu/humanrts/iachr/general.html>.

138. Danwood Mzikenge Chirwa, *Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights Under the South African Constitution*, 7 MEDITERRANEAN J. HUM. RTS. 29, 38 (2003).

139. For example, the 1960 Paris *Convention on Third Party Liability in the Field of Nuclear Energy* states "The operator of a nuclear installation shall be liable" for, *inter alia*, "damage to or loss of life of any person; and . . . damage to . . . property." July 29, 1960, art. 3, 956 U.N.T.S. 263, 266. The *International Convention on Civil Liability for Oil Pollution Damage* states "the owner of a ship at the time of an incident . . . shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident." Nov. 29, 1969, art. 3(1), 26 U.S.T. 765, 769, 973 U.N.T.S. 3, 5. The 1963 *Vienna Convention on Civil Liability for Nuclear Damage* reads "[t]he operator of a nuclear installation shall be liable for nuclear damage upon proof that such damage has been caused by a nuclear incident." May 21, 1963, art. 2(1), 1063 U.N.T.S. 265, 266. An "operator" includes "any private or public body whether corporate or not." *See id.* art. 1(a). All of these impose liability for breaches.

140. *See, e.g.*, Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255, 256; Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, Dec. 17, 1976, *in* Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations: Final Act and Text of Convention, *opened for signature* May 1, 1977, 16 I.L.M. 1450, 1452.

141. For example, the *United Nations Convention Against Transnational Organized Crime* defines the crimes of participation in an organized criminal group, money laundering, corruption and obstruction of justice, all of which apply to corporations as well as natural persons. G.A. Res. 55/25, U.N. GAOR, 55th Sess., 62d plen. mtg., Annex 1 at arts. 5, 6, 8 & 23, U.N. Doc. A/Res/55/25 (2001), *available at* http://www.unodc.org/unodc/crime_cicp_signatures_convention.html.

Many provisions in the treaties that address bribery and corruption apply to legal as well as natural persons. *See, e.g.*, Council of Europe: Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, Europ. T.S. No. 173, 38 I.L.M. 505, 509 (active bribery, trading in influence and money laundering); Organization of American States: Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, 730 (prohibiting offering an article of monetary value to a government official of another state); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1, 37 I.L.M. 1, 4 (entered into force Feb. 15, 1999); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22,

These conventions do not all expressly concern human rights but indicate conclusively that MNCs are subject to international law. All of these treaties impose corporate liability for actions or omissions by companies having detrimental effects. Presumably, these Conventions were made applicable to corporations because corporations are capable of violating them. It has been explained corporations can violate human rights and therefore applicable conventions should apply to them as well.¹⁴² Furthermore, if corporations can be held liable for unintentional torts resulting from contravening the international law described above, then it would be reasonable for them to be held liable for torts resulting from intentional violations of international law, such as human rights abuses.¹⁴³

The U.N. Human Rights Norms for Business¹⁴⁴ represent a major step forward in the process of establishing a common global framework for understanding the responsibilities of business enterprises with regard to human rights. The Working Group of the Sub-Commission for the Promotion and Protection of Human Rights developed them “through an open process of consultation with governments, businesses, NGOs and unions over a period of nearly four years.”¹⁴⁵ They provide “coherence to . . . human rights obligations of non-state economic actors.”¹⁴⁶ “The Norms do not create new legal obligations, but simply codify and distill existing obligations under international law as they apply to companies.”¹⁴⁷ They clearly state companies have responsibilities “[w]ithin their respective spheres of activity and influence.”¹⁴⁸ By bringing together the voluntary initiatives, universal human rights law and labour standards, the U.N. Norms have set a solid foundation for binding law to develop. It is

1989, 28 I.L.M. 657, 662 (entered into force May 5, 1992) (applies to legal persons).

142. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308-09 (S.D.N.Y. 2003).

143. *Id.*

144. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, approved by G.A. Res. 2003/16, U.N. ESCOR Hum. Rts. Comm., Sub-Comm’n on the Promotion and Protection of Hum. Rts., U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003) [hereinafter Norms on the Responsibilities of Transnational Corporations].

145. *Report of the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. Hum. Rts. Comm., 60th Sess., Agenda Item 16, at 1 (2004).

146. *Id.*

147. *Id.*

148. *Norms on the Responsibilities of Transnational Corporations*, *supra* note 144, at 3; Chris Avery, *Business and Human Rights in a Time of Change*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 17, 33 (Menno T. Kamminga & Saman Zia-Zarifi eds., 1999).

difficult to seriously oppose this instrument if companies and governments are already in principle adhering to the Norms provisions through other initiatives. Again, it seems difficult to argue MNCs should be subject only to certain international laws, while evading responsibility for international laws they are capable of violating.

VI. THE REALISTIC BUSINESS ORIENTATED CASE FOR PROMOTION OF ESCR

Regulation must be based on a framework of fair global accountability, which promotes economic growth without victimising the MNCs. Corporate policy makers must turn away from the notion of the MNC as a purely economic entity with profit maximisation as its only responsibility. MNCs have just as much responsibility as private citizens to uphold human rights ideals within a modern liberal society.¹⁴⁹ MNCs are in a unique position to promote human rights by influencing local “host” governments and by providing funds and expertise towards developing stable and peaceful local communities.¹⁵⁰ This is within the MNCs’ best interests, as direct liability is rapidly developing in domestic courts and through efforts at regulation.

The regulation concerning multinational corporations and human rights suffers from the same malady that afflicts all of international law, that is, the lack of enforcement mechanisms.¹⁵¹ The result is that implementation and compliance are subject to political desire and based on a moral foundation. MNCs and states, even if bound by international law, are themselves responsible for implementing or taking responsibility for their actions in all but a few high profile cases. It is therefore imperative to convince national governments and MNCs of the merits and advantages of enacting a system of regulation guaranteeing ESCR.

MNCs and the nations capable of regulating their activities, namely western developed states, have not yet shown the political will to endorse and enforce regulation concerning human rights in this area.¹⁵² Despite the prevailing opposition to regulation within the international business community, regulation has been effective and implemented on an international level when the political desire exists.

149. Addo, *supra* note 6, at 8-9.

150. *Id.* at 8.

151. *Id.* at 31.

152. See, e.g., Eric Schlosser, Commentary, *Human Rights are Dying on the Vine*, L.A. TIMES, Mar. 5, 2003, at B15 (describing how the state of Florida and Taco Bell failed to take responsibility for the treatment of migrant workers).

Obligations concerning anti-trust, corruption, free trade, terrorism and criminal actions have all regulated the activities of MNCs. Realistically, it is impossible to formulate and implement an effective regulation system without the resolve of MNCs and their “home” states, as these are the most influential organs of society. Unfortunately, change cannot occur without their consent.

Presently, the MNCs and their host nations seem to respond only to the bottom line, that is, profit maximisation and economic growth.¹⁵³ The failure of the voluntary regime in place within the international community regarding the realisation of ESCR suggests mandatory and enforceable regulation is imperative. Voluntary initiatives such as the OECD Guidelines¹⁵⁴ and the ILO’s Tripartite declaration¹⁵⁵ have been around for nearly thirty years and many MNCs have now had private codes of conduct for nearly a decade. However, human rights abuses associated with the conduct of corporations have not subsided and ESCR are clearly being sidelined. This has prompted the United Nations to go beyond its voluntary Global Compact¹⁵⁶ and move towards binding norms for business.¹⁵⁷ The challenge, therefore, is to convince these essential components of society that it is not only in their best interests regarding the bottom line to abide by such regulation, but it is also imperative they be the driving force behind the move toward such binding international regulation for the realisation of human rights.

Fortunately, the international political climate is changing and a more demanding, informed and active public is putting pressure on the aforementioned powers to consider international human rights law in their economic and political policies.¹⁵⁸ A new global civil society consisting of Non-Governmental Organisations (NGOs), activist groups and consumer rights groups has risen and is increasingly focusing on the activities of MNCs, calling for international regulation in response to information that is readily available concerning massive

153. Skogly, *supra* note 5, at 246.

154. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 19, 21 (2000), available at http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html.

155. International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, (1977), available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm>.

156. Press Release, Address of U.N. Secretary-General Kofi A. Annan, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, In Address to World Economic Forum in Davos (Feb. 1, 1999), available at <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>.

157. *Norms on the Responsibilities of Transnational Corporations*, *supra* note 144.

158. For further details see Avery, *supra* note 148, at 17.

human rights violations around the globe.¹⁵⁹ They have employed strategies such as boycotts, demonstrations and the use of negative publicity to shame offending corporations and warn other MNCs as to the dangers of such morally corrupt conduct.¹⁶⁰ They have forced recognition by financial institutions, investment banks, credit rating agencies, insurers and pension funds that supporting companies with poor human rights records negatively affect the value of their investments.¹⁶¹ MNCs have taken notice of the change in the business environment and, concerned about their reputations, progressive corporations have taken steps in the right direction, implementing ethical standards and codes of conduct concerning good corporate citizenship. In turn, the international community has begun to respond by moving steadily towards international regulation, as mentioned above.

Progressive MNCs on the leading edge of social responsibility could be punished for adhering to strict codes of conduct that would forbid them from conducting operations in nations with human rights violations occurring within them. Eventually, civil society will force western MNCs to ensure ESCR realisation in developing nations. Less scrupulous MNCs from nations without government support for human rights or an active demanding civil society would then be able to step up and conduct operations in that area, to the further detriment of human rights and the MNCs willing to promote them. This article suggests, with this scenario in mind, western MNCs should exert their vast influence to assist in the movement to formulate and enforce binding human rights regulations on corporate conduct. Western MNCs are under the discerning glare of a demanding global civil society and could suffer boycotts, damage to their reputation, or even lawsuits in extreme cases while their counterparts from areas with less active civil society do not operate under the same degree of scrutiny. It is in the best interests of high profile western MNCs and the powerful developed nations who benefit from their activities to support regulation and even the playing field before the competition overtakes them and affects the economic growth in those nations.

Furthermore, it is imperative for MNCs, and the western states in which they are incorporated, that the promotion of ESCR be a mandatory duty included in this binding international regulation. It is a well-known fact the lack of an environment conducive to the enjoyment of ESCR, such as health, education and environment, leads to an unsta-

159. *Id.* at 37-43.

160. *Id.*; Skogly, *supra* note 5, at 249.

161. *See generally* Avery, *supra* note 148.

ble, unsatisfied and potentially violent community. This intolerable scenario often degenerates into political instability and repression resulting in violations of civil and political rights that attract the attention of the powerful global civil society.¹⁶² Furthermore, civil and criminal liability may also be a consequence, as Shell, Exxon, Chevron, Unocal and Texaco, for example, have discovered.¹⁶³

These types of developments can result in MNCs being forced to halt or reduce operations and give up potential profit to competition not monitored by industry codes of conduct, western-based civil society, or direct liability. It is time to learn from the aforementioned examples. In Nigeria, political tensions in the oil producing region has resulted in the loss of just under half of the nation's output of oil.¹⁶⁴ If Shell had insisted upon the realisation of ESCR, which is not beyond the realm possibility, it could be extracting resources from that society and profiting at a much higher rate. Furthermore, it would not have suffered the immense reputational damage that has tarnished its operations and the operations of all resource extraction industries.

With competition from Asia and elsewhere not yet having to abide by such stringent civil society regulation, western MNCs are therefore running at a potential competitive advantage.¹⁶⁵ The western governments must step up the pressure for international regulation, and MNCs must use their considerable influence to ensure the success and implementation of such measures if they wish to remain competitive and maximise profits.

Aside from these compelling and urgent reasons for regulation of MNCs and promotion of socio-economic human rights, verification has emerged that a good human rights record makes good business sense.¹⁶⁶ The benefits of avoiding adverse publicity and avoiding litigation are obvious, but increasingly, businesses are focusing on an improved corporate reputation and performance. It is clear from the corporate perspective protecting and promoting all human rights is becoming an advantageous tool for improving business performance. MNCs with good human rights records earn an enhanced reputation

162. See *supra* notes 75-78 and accompanying text.

163. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91-92 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (Shell/Nigeria); *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998) (Texaco/Ecuador); *Nat'l Coalition Gov't of the Union of Burma v. Unocal*, 176 F.R.D. 329, 345 (C.D. Cal. 1997).

164. Seager, *supra* note 94 ("Once again the security situation in Nigeria is proving to be a real concern," said Simon Wardell, oil analyst at World Markets Research Centre in London").

165. Avery, *supra* note 148, at 21-27, 31.

166. Avery, *supra* note 148, at 25-27.

and image, a secure “licence to operate,” improved recruitment and retention of employees, reduced risk of civil society conflicts and boycotts, and therefore a competitive advantage. Furthermore, they do not put the operations of the MNC at risk by supporting regimes that can throw the local society into turmoil, creating an impossible business climate. On the contrary, they will help promote the rule of law, and stabilise civil society and sustainable socio-political development with a healthy, educated, trusting local workforce.¹⁶⁷ The ability to attract and retain talented employees is regarded as the single most reliable predictor of overall excellence in a corporation.¹⁶⁸ Shell indicated its decreased ability to attract the best employees was the most important and noticeable side effect of the Brent Spar and Ogoni “difficulties.”¹⁶⁹ Its policy shift regarding human rights and the environment were a direct result of this fact.¹⁷⁰

The Universal Declaration of Human Rights advocates the creation of a stable rule-based society essential to the long-term operations of international business.¹⁷¹ Human rights law can facilitate this scenario by consistently and impartially applying laws, which are universal and indivisible. This application of human rights law to MNCs would promote the development of an unbiased international legal system in which business can be carried out with contracts enforced fairly, bribery and corruption less prevalent, and affording equal access of all MNCs to legal process and protection under the law. Basically, a stable international human rights regulatory regime, based on the realisation of all human rights, including ESCR would promote a stable international business environment. Predictability is vital to investment and prosperous business. Denial of human rights in any form often leads to political and social instability, which results in unpredictable circumstances.¹⁷² Labour strife, restrictions on access to resources, delays in production and delivery all result from lack of ESCR and hamper a prosperous business environment.

Failure to address human rights concerns further inhibits international business by obstructing international trade agreements. Sanctions are imposed on areas rich in resources, resulting in lost reve-

167. PETER FRANKENTAL & FRANCES HOUSE, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? 25 (2000).

168. Avery, *supra* note 148, at 13-14.

169. FRANKENTAL & HOUSE, *supra* note 167, at 95.

170. *Id.*

171. UDHR, *supra* note 118.

172. Pierre Sane, *Why Human Rights Should Matter to the Business World*, EARTH TIMES NEWS, Jan. 8, 2001, available at <http://www.globalpolicy.org/reform/2001/0108ps.htm>.

nues.¹⁷³ Efforts to promote trade liberalisation by organisations like the IMF, World Bank and WTO are blighted by massive popular protests at every turn, and this scenario affects all trade initiatives, for example the foiled Multilateral Agreement on Investment.¹⁷⁴ MNCs are in a unique position to influence governments to address human rights problems before they result in such sanctions. They can actively promote human rights and rights-based development before the image of international business is corrupted further. The system of world trade cannot suffer many more blows to its reputation like the “battle of Seattle,” which permanently blighted the image of the World Trade Organization and led to dramatic downward effects on the shares of implicated corporations.¹⁷⁵

The massive public protests against the exploitative environmental and labour practice of some multinational firms had huge implications. Investors reacted strongly to the developments. Specifically, firms with a reputation for responsibility to the community, its employees, and the environment were protected from a significant decline in market value in response to the WTO’s failure in Seattle.¹⁷⁶ Firms that were not considered socially responsible suffered huge losses.¹⁷⁷ There is now evidence that a reputation for the promotion of ESCR pays huge dividends for MNCs and shareholders.¹⁷⁸

CONCLUSION

In order to restore civil society’s confidence in the world trade system and to ensure all business acts as a force for good, international regulation is required. Without this, the MNCs that promote human rights will be at a competitive disadvantage. It is unfair that high profile, U.S. and European-based MNCs would be subject to regulations, civil society pressures and liability if the rest of the world’s MNCs are allowed to disrespect human rights law. Legislation should harness the initiatives taken by corporate leaders to ensure an impartial, fair and unbiased system with reasonable monitoring and effective enforcement. This would ensure proactive measures taken

173. Ratner, *supra* note 121, at 473.

174. *Id.* at 536-37.

175. Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 424-35 (2002); Marc J. Epstein & Karen E. Schnietz, *Social and Environmental Responsibility Does Pay Off*, ETHICAL CORP. MAG., at 2, Nov. 28, 2002.

176. Epstein & Schnietz, *supra* note 175, at 2.

177. *Id.*

178. *Id.*

by exemplary companies are rewarded instead of punished by setting them back against the competition.

Human rights law is expanding and dynamic. Since the end of the Cold War, ESCR are rapidly being considered in their rightful place as inseparable and indivisible with civil and political rights. Furthermore, new actors, such as MNCs have emerged and the law is coming to terms with the social impacts of their operations and their ability to protect, promote or deny human rights. A regulatory regime makes sense for business, as it would avoid confusion and afford international business a respected influence in the development and implementation of the law. Furthermore, the stability brought about by developing communities that enjoy ESCR is a fundamental requirement for conducting operations. Without this stability, civil and political instability and even violence in the long term can result, causing serious disruptions to operations for MNCs. The world is rapidly moving towards regulation, and it is vital to have a stable and reliable system of human rights regulation for industry to develop within. MNCs wishing to cash in on the reputational enhancement of being perceived as an industry leader in a developing sphere of international business must take the initiative immediately and press for regulation and promote human rights within all aspects of their operations.