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The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?

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ABSTRACT *In recent years, non-state actors (NSAs) such as transnational corporations, civil society groups, international organisations (including the World Trade Organisation, the World Bank and the International Monetary Fund) as well as armed opposition or terrorist groups have assumed major roles in relation to the progressive enjoyment throughout the world of all human rights, and economic, social and cultural rights in particular. Despite this development, NSAs are still not bound directly by existing international human rights treaties which apply to states parties. The fact, however, is that the growth in the wealth and power of NSAs has meant an enhanced potential for NSAs to promote or undermine respect for human rights. This raises two fundamental questions examined in this article: (1) how should international human rights law ensure that the activities of NSAs are consistent with international human rights standards? (2) How should accountability of NSAs be promoted effectively when violations of international human rights law occur? It is concluded that in order to ensure more accountability for human rights violations by NSAs, it is relevant to consider the adoption of a Statute of an International Court of Human Rights, to which NSAs could also become parties in addition to states.*

Introduction

Making space in the international legal regime to take account of the role of non-state actors (NSAs) in the realisation of Economic, Social and Cultural Rights (ESCR), and their accountability for the violations of ESCR, remains a critical challenge facing international human rights law today. Under traditional approaches to human rights generally, and to ESCR in particular, NSAs are considered to be beyond the direct reach of international human rights law.[1] Traditionally, human rights relations are conceptualised as 'vertical' in the sense that they involve the obligation of a governing actor (the state or agents of the state) towards individuals (or groups of individuals) within a state's jurisdiction.[2] This is based on the principle of state responsibility to guarantee human rights on

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the basis that the state/individual relationship involves unequal power dynamics between the parties.[3] A state's potential to abuse its position of authority to the detriment of an individual's interests was the basis for human rights to insulate the latter against state interference.

The United Nations (UN) Charter,[4] widely considered as the centre of an international 'constitutional order',[5] imposes obligations on member states to achieve international co-operation in promoting and encouraging respect for human rights.[6] In this context, human rights are viewed primarily as being exercisable against the state, and the state has the primary responsibility to respect, protect and fulfil human rights. For example, under the two principal human rights treaties—the International Covenant on Civil and Political Rights (ICCPR)[7] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[8]—it is only each 'State party' to the each Covenant that undertakes human rights obligations.[9] All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the state.[10]

It is, therefore, clear that human rights treaties are principally addressed to states[11] and that NSAs cannot, at present, be parties to the existing human rights treaties. The general obligations under Article 2(1) of the ICCPR and the ICESCR 'are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law'.[12] As such, NSAs are currently only bound to the extent that obligations accepted by states can be applied to them by states. The result is that a wide range of actors other than states, including international financial institutions, notably the International Monetary Fund (IMF) and the World Bank; international organisations concerned with trade such as the World Trade Organisation (WTO); and transnational corporations (TNCs),[13] along with many others, are generally considered not to be bound directly by human rights law. This means that NSAs are only indirectly accountable through states, while the states will be directly liable for human rights violations committed by NSAs within their respective jurisdictions. NSAs are thus, by definition, placed at the margins of the international human rights legal regime. The major argument against the direct application of human rights obligations to NSAs stresses that this would carry the risk that states might defer their responsibility to these actors, which might diminish existing state obligations and accountability.[14]

This situation threatens to make a mockery of the international system of protecting human rights generally, and ESCR in particular, and accountability for human rights violations. This is especially so, given the fact that since the end of the cold war, there has been a trend in all regions of the world to reduce the role of the state through privatisation of functions previously performed by governments and to rely on private actors to resolve problems of human welfare, most of which directly relate to ESCR: work, social security, adequate food, education, health, housing, and water.[15] By virtue of the increasing powers of NSAs, they are uniquely positioned to affect, positively and/or negatively, the level of enjoyment of ESCR. Despite this, the means by which NSAs might be held accountable for human rights violations remain unclear.[16]

This article attempts to examine the role of NSAs in the progressive realisation of ESCR. As a subject of enormous complexity and variation, examination is restricted to two highly contentious questions: (1) how should international human rights law ensure that the activities of NSAs are consistent with international human rights standards with

respect to ESCR? (2) How should accountability of NSAs be promoted effectively when violations of international human rights law occur? The article is divided into four sections. Section II defines the term 'non-state actors'. While contextualising the debate on issues surrounding state obligation to protect against human rights violations by NSAs, section III examines the scope and limits of the state-centred approach. Section IV discusses the direct human rights responsibilities of NSAs with respect to ESCR. The final section provides a number of concluding observations. Before examining the questions set out above, it is useful by way of context, to first define the term non-state actors as used in this article.

Defining Non-State Actors

The term 'non-state actor' is virtually open-ended.[17] Its meaning depends on the context in which it is used. For example, the International Campaign To Ban Landmines has used the term NSAs to refer to 'armed opposition groups who act autonomously from recognised governments'.[18] In this context (of arms control), NSAs include 'rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, and de facto territorial governing bodies'.[19]

There have been several attempts to define NSAs.[20] According to Josselin and Wallace, NSAs include all organisations meeting the following three characteristics.[21] First, NSAs include organisations (emanating from civil society, or from the market economy, or from political impulses beyond state control and direction) that are largely or entirely autonomous from central government funding and control. It is not clear, however, what level of governmental funding or control might disqualify an organisation as a NSA. Secondly, NSAs include organisations operating or participating in networks which extend across the boundaries of two or more states. Therefore, they engage in 'transnational' relations, linking political systems, economies, and societies. Under this criterion, actors engaged solely at the domestic level in one state are not part of the definition since the focus is limited to those actors with a transnational dimension. Thirdly, NSAs include organisations acting in ways which affect political outcomes, either within one or more states or within international relations—either purposefully or semi-purposefully, either as their primary objective or as one aspect of their activities. This is very widely defined and has the potential to include a diverse range of actors.

According to the African Commission on Human and Peoples Rights (ACmHPR), the term 'non-state actors' has been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the state and its organs.[22] NSAs are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.[23] In this article, the term NSA is used broadly to refer to all 'actors other than states'. This includes TNCs, professional bodies, civil society groups and other non-governmental organisations. It also extends to the UN agencies, other international organisations, and other relevant bodies within the UN system.[24] It further includes international organisations concerned with trade such as the WTO, and international financial institutions, notably the World Bank, the IMF and regional development banks.[25]

State Obligation to Protect against Human Rights Violations by NSAs

State Obligation to Protect

Both the universal and regional human rights systems emphasise that states have a duty to protect those living within their jurisdictions from human rights violations and this duty is also generally agreed to exist under customary international law.[26] By Article 2(1) of the ICESCR each 'State Party' to the Covenant undertakes the obligation:

> 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 recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Thus, states are required by Article 2(1) to adopt legislative measures[27] and/or non-legislative measures (e.g. the provision of judicial or other effective remedies, administrative, financial, educational/informational campaigns and social measures) to protect ESCR.[28] Legislative measures include not only the adoption of new legislation, but also the duty to reform, amend and repeal legislation manifestly inconsistent with the progressive realisation of ESCR.[29] In *Purohit and Moore v. The Gambia*[30] the African Commission on Human and Peoples' Rights found the Lunatics Detention Act (LDA) of The Gambia incompatible with several provision of the African Charter on Human and Peoples' Rights (ACHPR)[31] because it failed, inter alia, to 'meet standards of anti-discrimination and equal protection of the law'.[32] The Commission strongly urged the Government of The Gambia to repeal the LDA and replace it with a new legislative regime for mental health compatible with the ACHPR.

It should be recalled that the formal consensus at a global level is that civil and political rights and ESC rights are 'universal, indivisible and interdependent and interrelated' and should be 'treated on the same footing, and with the same emphasis'.[33] However, 'the ambivalence of many States in dealing with economic, social and cultural rights' affects the state obligation to protect this category of rights.[34] To cite one example, while applicants for membership of the Council of Europe must undertake to ratify the European Convention on Human Rights (ECHR) protecting mainly civil and political rights, they are not required to undertake to ratify the European Social Charter which deals with ESCR. The debate about ESCR has continued,[35] and some states still do not recognise ESCR as human rights because no state can allegedly 'fulfil' such rights. In 2003, for example, the United States delegate remarked that 'the communist system promised to fulfil economic, social and cultural rights but failed to deliver them'.[36] Thus the US government continues to oppose ESCR within the UN and has claimed:

> At best, economic, social and cultural rights are *goals* that can only be achieved progressively, *not guarantees*. Therefore, while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development rather than subjects in control of their own destiny.[37]

Despite this, it is clear that the goal of full realisation of ESCR, like other human rights, imposes three types or levels of obligations on states parties: the obligations to respect,

protect and fulfil.[38] This approach has been applied by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comments,[39] and the African Commission on Human and Peoples' Rights in its decisions.[40]

The state obligation to protect requires states to take measures that prevent NSAs (third or private actors/parties)[41]—individuals, groups, corporations and other entities as well as agents acting under their authority[42]—from interfering with ESCR. For example, the protection of the freedom of action and the use of resources against other, more assertive or aggressive subjects—more powerful economic interests, such as the protection against the marketing and dumping of hazardous or dangerous products,[43] or the protection against the use of inhuman or degrading disciplinary measures such as corporal punishment or public humiliation in the (public or private) schools so as to protect the child's dignity and right to education.[44]

The obligation to protect, therefore, generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws, regulations and other measures so that individuals and groups will be able freely to realise their rights and freedoms. This demands that the state has to protect against harmful activities carried out by NSAs and to prevent violations by NSAs through creating and implementing the necessary policy, legislative, regulatory, judicial, inspection and enforcement frameworks. For example, as regards the right to social security under Article 9, ICESCR, where social security schemes, whether contributory or non-contributory, are operated or controlled by NSAs, states parties to the ICESCR retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security.[45] To prevent such abuses an effective regulatory system must be established, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.[46]

With respect to the right to work, under Article 6(1) of the ICESCR, states parties 'recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'. To this end, the CESCR has noted:

> Obligations to protect the right to work include, inter alia, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers' rights. Specific measures to increase the flexibility of labour markets must not render work less stable or reduce social protection of the worker. The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors.[47]

It follows that a state's 'failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others' amounts to a violation of the right to work.[48] For example, the failure to protect workers against unlawful dismissal or against being subjected to forced or compulsory labour, slavery or servitude by NSAs would be a clear violation of a state's positive obligation to protect as held by the European Court of Human Rights (ECtHR) in the case of *Siliadin v. France*.[49] In this case the ECtHR considered the issue whether France had fulfilled its positive obligations to effectively protect the Siliadin (the applicant) against forced labour or servitude as required by Article 4 of the European Convention on Human Rights (ECHR).[50]

The applicant (a Togolese national), Ms Siliadin, who was an adolescent girl and a minor (fifteen and a half years old) at the relevant time, had worked for years for Mr and Mrs B. almost 15 hours a day and seven days a week, without respite, against her will, and without being paid. The applicant was unlawfully present in a foreign country and was afraid of being arrested by the police. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

In these circumstances, the Court considered that Ms Siliadin had, at the least, been subjected to forced labour and had been held in servitude (i.e. obliged to provide services under coercion) within the meaning of Article 4 of the ECHR at a time when she was a minor. The Court considered that the criminal-law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. In paragraph 112 of the judgment, the Court noted 'in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation [slavery, servitude and forced or compulsory labour]'. It emphasised (in paragraphs 121 and 148) that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies. Consequently, the Court concluded that France had not fulfilled its positive obligations under Article 4. This decision marks the first recognition by the Court that Article 4 of the ECHR, concerning slavery, servitude and forced labour, imposes positive obligations on states to protect individuals from being subjected to forced labour by NSAs.[51]

Perhaps one of the most recent controversial cases on state responsibility for human rights violations by NSAs is the case decided by the African Commission on Human and Peoples' Rights in *Zimbabwe Human Rights NGO Forum v Zimbabwe*.[52] The complaint in this case related to acts which took place in the aftermath of the Constitutional Referendum held in Zimbabwe in February 2000 in which the majority of Zimbabweans voted against a constitution proposed by the Zimbabwean government. Political violence ensued and escalated into the invasion of farms by war veterans who operated groups of militias made up of youths and supporters of the ruling party, the Zimbabwe African National Union Patriotic Front (ZANU (PF)), and other landless peasants. During the period between February and June 2000 when Zimbabwe held its fifth parliamentary elections, it was alleged that ZANU (PF) supporters engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties. The complainant further alleged that there were reports of 82 deaths as a result of organised violence between March 2000 and 22 November 2001. On 6 October 2000, a General Amnesty for Politically Motivated Crimes was gazetted, which absolved most of the perpetrators from prosecution. On these and other facts, the Zimbabwe Human Rights NGO Forum argued that human rights standards guaranteed in the African Charter on Human and Peoples Rights had been violated.[53]

Among others, the Commission's decision addressed the responsibility of Zimbabwe for the violations of human rights committed by the ZANU (PF) and other militia. The Commission absolved Zimbabwe from responsibility for human rights violations committed by the ruling political party, ZANU (PF), and its associated militia on the ground that they were 'non-state actors'.[54] The Commission drew a thin line of distinction between the

ruling party, ZANU (PF) as a non-state actor, and the Zimbabwean government. In its opinion, ZANU (PF) was a political party in Zimbabwe, just like any other party in the country, which was distinct from the government. According to the Commission: 'It [ZANU] has an independent identity from the government with its own structures and administrative machinery, even though some of the members of the Zimbabwe Government—cabinet ministers, also hold ranking positions in the party. For example, President Robert Mugabe is the President and First Secretary General of the Party.'[55]

The Commission's manner of attribution of responsibility under the special regime of human rights law is open to question. While purporting to apply the decision of the Inter-American Court of Human Rights (IACtHR) in *Velásquez Rodríguez v Honduras*,[56] in which that court held that a state fails to comply with its duty to protect human rights when it allows private persons or groups to act freely and with impunity to the detriment of the enjoyment of human rights, the African Commission adopted an elastic view of the effect of that decision.[57] The Commission reasoned that what would otherwise be wholly private conduct is transformed into a constructive act of a state if there is a lack of due diligence to prevent the violation or respond to it as required by the African Charter. On this faulty premise, the Commission concluded that the complainant had not demonstrated collusion by the Zimbabwean state to either aid or abet the NSAs in committing violations of human rights, and equally had failed to show that Zimbabwe remained indifferent to the violence that took place. Consequently, the Commission failed to find that Zimbabwe had not fulfilled its obligations within Article 1 of the African Charter. The correct interpretation of the findings of the IACtHR in *Velásquez Rodríguez*, however, is that the responsibility of the state for human rights is engaged when there is failure to prevent violations by NSAs where the possibility of such violation is reasonably foreseeable.[58] Transformation of private conduct into a constructive act of the state is not the point and the search for evidence of collusion was unnecessary.[59] The possibility of violations of human rights was clearly reasonably foreseeable in the aftermath of the referendum when violence broke out in Zimbabwe. It was not disputed that such violations had taken place. Instead, the dispute centred on the attribution of such responsibility. The Commission ignored its own resolution condemning Zimbabwe for violating human rights under the Charter with impunity[60] and it gave no weight at the merits stage to the statement it had made when deciding the admissibility of the complaint. The requirement for collusion before holding a state responsible for human rights violations by NSAs is likely to undermine the effectiveness of a state-centred approach to protect individuals and groups within a state's jurisdiction against human rights violations whether emanating from the state or other actors. In practice, various problems arise from a state-centred approach to protect against human rights violations by NSAs, without holding NSAs directly liable for human rights violations. States, especially developing states, are often reluctant to take (costly) measures necessary to ensure human rights compliance by NSAs in order to attract investment from NSAs.

Protection against Discrimination

Protection against human rights violations by NSAs is essential in the area of discrimination since the elimination of discrimination is fundamental to the enjoyment of all human rights, including ESCR, on a basis of equality. Women in particular are often denied equal enjoyment of their human rights, by virtue of the 'lesser status ascribed to them by tradition and

custom or as a result of overt and covert discrimination'.[61] It is an indisputable fact that 'many women experience distinct forms of discrimination, due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage'.[62]

In the context of non-discrimination and equality, Article 2(2) of the ICESCR states a guarantee of non-discrimination on the basis of sex among other grounds.[63] Discrimination includes 'any distinction, exclusion, restriction or preference' between individuals or groups of individuals, made on the basis of any of the prohibited ground(s),[64] 'unless the distinction is based on objective criteria'.[65] Therefore, discrimination might arise when 'States treat differently persons in analogous situations without providing an objective and reasonable justification'.[66] A distinction will not be based on objective and reasonable justification if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[67] Discrimination might also arise 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[68] Discrimination might also arise as a result of a state's failure to monitor and regulate the conduct of NSAs in relation to ESCR. This might arise where a state fails to ensure that NSAs do not treat differently persons in analogous situations without providing an objective and reasonable justification, and where a state fails to ensure that NSAs, without an objective and reasonable justification, do not fail to treat differently persons whose situations are significantly different. Thus, Article 2(1)(d) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires each state party to prohibit racial discrimination by 'any persons, group or organisation'.

The principle of non-discrimination mentioned in Article 2(2) of the Covenant is immediately applicable and is neither subject to progressive implementation nor dependent on available resources.[69] It is reinforced by Article 3 of the ICESCR, which provides for the equal right of men and women to the enjoyment of the ESCR it articulates.[70] This provision is founded on Article 1(3) of the UN Charter and Article 2 of the Universal Declaration of Human Rights (UDHR).[71] In relation of NSAs, the CESCR noted in its General Comment 16:

> 19. The obligation to protect requires States parties to take steps aimed directly towards the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women. States parties' obligation to protect under Article 3 of the ICESCR includes inter alia, the respect and adoption of constitutional and legislative provisions on the equal right of men and women to enjoy all human rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination ***and to prevent third parties from interfering directly or indirectly with the enjoyment of this right;*** the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.
>
> 20. ***States parties have an obligation to monitor and regulate the conduct of non-state actors to ensure that they do not violate the equal right of men and women to***

> ***enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatised***.[72]

It is thus clear that while only states are parties to international human rights instruments protecting ESCR and held accountable for its compliance, states are nevertheless required to consider regulating the responsibility resting on NSAs to respect ESCR.[73] A state's failure, for example, to prohibit racial discrimination in the admission of students to private educational institutions would be a clear violation of the obligation to protect the right to education.[74]

Global Actors/Institutions

The main international institutions which form the backbone of the current international economic system and which have had an impact on ESCR are: the IMF,[75] the World Bank[76] and the WTO.[77] It is noteworthy that '[t]oday the IMF and World Bank lend exclusively to developing and emerging economies. Furthermore, their loans are linked to [externally imposed] conditions that increasingly impinge on the domestic policies of the state'.[78] Similarly, the unfair trade rules and policies of the WTO (such as dumping of products of interest to African states, such as cotton; lack of duty-free, quota-free access to rich-state markets for Least Developed Countries; overly complex rules of origin; and non-tariff barriers) impede developing states' capacity to raise resources from trade to invest in ESCR.[79] With respect to such global actors, it has been observed that:

> States determine the policies of some global actors, including the World Bank, the IMF and the WTO. When determining the policies of such global actors, a State must conform to its international human rights duties and must be respectful of other States' international human rights obligations. How a State discharges its duties when determining the policies of global actors must be subject to monitoring and accountability procedures as outlined in the preceding section.[80]

Therefore, influential states parties to human rights treaties as members of the IMF, the World Bank and the WTO, are obliged to do all that they can 'to ensure that the policies and decisions of those organisations are in conformity with the obligations of states parties under the Covenant [ICESCR]'.[81] This may be achieved by, for example, voting against policies sought to be implemented by states seeking IMF/World Bank loans, such as Structural Adjustment Policies (SAPs) and Poverty Reduction Strategy Papers (PRSPs), where such policies fail to adequately integrate ESCR and make provision for adequate social safety nets (SSNs) or human rights impact assessments in implementing all the programmes. As a matter of law, a state's failure to take into account its human rights obligations when entering into agreements with NSAs would amount to a violation of the obligation to respect human rights. To this end, the CESCR noted with respect to the right to work that:

> The failure of States parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements with other States, international organisations and other entities, such as multinational entities, constitutes a violation of their obligation to respect the right to work.[82]

Similarly, when states are dealing with NSAs, the obligation to protect demands that states take into account their domestic and international human rights obligations in all their activities with NSAs (including global actors like the World Bank, the IMF and the WTO) to ensure that the ESCR, in particular, of the most vulnerable, disadvantaged and marginalised groups of society, are not undermined.[83] In a highly indebted state, this would mean that the state must give priority to the obligation to respect, protect, and fulfil its international human rights obligations than the obligations relating to membership and agreements with the IMF and the World Bank.[84] It follows, therefore, that it is legitimate, for example, for a debtor state to 'integrate fully human rights, including economic, social and cultural rights, in the formulation of the Poverty Reduction Strategy Paper (PRSP)'[85] or refuse to implement loans and credit conditions that conflict with its international human rights obligations assumed under the UN Charter and international human rights treaties if this is necessary to ensure that its human rights obligations are duly protected.[86] However, in practice the need for financial resources (in the least developed states) could outweigh human rights considerations, which limits the practical effectiveness of this approach.

In order to ensure that human rights issues are integrated into the policies of global NSAs there is a need for a more concerted engagement with such actors. It is essential to ensure that there is greater complementarity between the basic tenets of international economic law and international human rights law, while also combating some of the recent theorising that seeks to privilege trade law.[87] In addition, it is necessary to re-engage in a dialogue with the member states of the WTO, the IMF and the World Bank who, in the final analysis, will be vital to a determination of the extent to which the policies and decisions of these global actors are in conformity with the human rights obligations of states parties.[88]

Remedies against Violations by NSAs

When violations of human rights by NSAs occur, the state must not acquiesce to, or grant amnesty for, such violations. The state is obliged to take appropriate measures or to exercise due diligence to prevent, punish, investigate the harm caused by NSAs[89] and, where appropriate, provide access to effective judicial or other appropriate remedies at the national level to any person or group who is a victim of a violation of any ESCR by NSAs. All victims of human rights violations by NSAs should be entitled to remedies—not merely charity or philanthropy—such as adequate reparation, which may, inter alia, take the form of restitution, compensation, satisfaction or guarantee of non-repetition. In *Zimbabwe NGO Forum v Zimbabwe*,[90] the African Commission considered the offer of clemency made by the Zimbabwean government to the ZANU (PF) and other militia for 'politically motivated' offences committed between January and July 2000. The Commission held that by pardoning 'every person liable for any politically motivated crime' the Clemency Order had effectively foreclosed the complainant or any other person from bringing criminal action against persons who could have committed the acts of violence during the period in question and the complainant had been denied access to local remedies by virtue of the Clemency Order.[91] Thus, the Commission held that this act of the State 'did not only prevent victims from seeking redress, but also encouraged impunity, and thus [Zimbabwe] reneged on its obligation[s] in violation of Articles 1 and 7(1) of the African Charter'.[92] It is therefore clear that since blanket amnesties for

human rights violations encourage impunity, States should refrain from granting such amnesties to NSAs for human rights violations.

In its Concluding Observations on state reports, the CESCR has urged states to protect against human rights violations by NSAs. Some few examples are cited below for illustrative purposes. In 2001 the CESCR strongly urged Honduras to adopt and implement legislative and 'other measures' to protect workers from the occupational health hazards resulting from the use of toxic substances—such as pesticides and cyanide —in the banana-growing and gold-mining industries.[93] Similarly, in 1997 the CESCR was alarmed at reports that the economic rights of indigenous peoples in the Russian Federation were exploited with impunity by oil and gas companies which signed agreements under circumstances which were clearly illegal, and that the state party had not taken adequate steps to protect the indigenous peoples from such exploitation.[94] The Committee recommended to the Russian Federation that 'action be taken to protect the indigenous peoples from exploitation by oil and gas companies'.[95] In Bosnia and Herzegovina, following privatisation, employers arbitrarily dismissed employees or failed to pay employees' salaries or social security contributions on time.[96] The CESCR Committee recommended that 'the State party takes effective measures to ensure that [private] employers respect their contractual obligations towards their employees, namely by refraining from arbitrarily dismissing them or by paying their salaries or social security contributions on time'.[97]

However, states where human rights protection is most needed are often those least able to enforce them against NSAs, such as TNCs, who possess much desired investment capital or technology and wield unprecedented power and influence in local and global markets and domestic and international affairs.[98] The scale of NSAs power is illustrated by the fact that more than 77,000 TNCs currently span the globe, with about 770,000 subsidiaries and millions of suppliers.[99] The 2003 sales of the world's biggest company, Wal-Mart, of $256 billion made it larger than the economies of all but the world's 30 richest nations.[100] Given this current limitations of state power with respect to NSAs, what is presently required is to secure broad agreement among NSAs as to their human rights responsibility and the effective implementation of norms applicable to NSAs,[101] so that they are directly accountable to human rights standards for their actions that impact on human rights, particularly of vulnerable groups, such as women.[102] NSAs should not be complicit in human rights abuses. Such complicity could arise in several ways: (i) where a NSA has knowingly funded, supported (actively, openly, and deliberately) or benefited from human rights abuse; (ii) where a NSA complies with national laws and policies which are manifestly in violation of international human rights;[103] or (iii) where a NSA has been a silent witness of systematic human rights abuse committed by a government or others.[104] Establishing an effective framework acknowledging the human rights responsibilities of NSAs remains a challenge. One of the main problems in such arrangements is the question of who the NSAs will be responsible and accountable to in respect of ESCR, which is now addressed below.

Direct Human Rights Responsibilities of NSAs with Respect to ESCR

While there is no doubt that the UDHR, the ICCPR and the ICESCR envisage positive or negative obligations of states, and that the procedures for the implementation of the ICCPR and the ICESCR envisage actions only against states, it is obvious that

NSAs—groups or persons—can also act in violation of the human rights of other persons enumerated in the above instruments.[105] As noted above, this is particularly true in the case of ESCR given the general marginalisation of this category of rights. For example, many companies operating in South Africa during the apartheid era not only followed the discriminatory laws of that time, some of them also aided and abetted the South African government's policies—by providing technology, infrastructure, and other means to implement its policies.[106] This affected not only civil and political rights but also ESCR.

As noted above, human rights law has traditionally concentrated on the actions of states. The assumption has been that it is states that have the obligation both for protecting human rights and for ensuring that human rights are not infringed, either by the state (or its agents) or by NSAs. But in the era of globalisation, how credible is this concentration on state action? A plethora of NSAs now act on the international stage with an enhanced potential given their greater powers to promote or undermine respect for human rights, but what direct human rights responsibilities, if any, do NSAs have under human rights law?

Responsibilities of NSAs in International Human Rights Instruments

The International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts indicates that responsibility for human rights violations 'may accrue directly to any person or entity other than a State'.[107] The UDHR, arguably, establishes the basis of responsibilities for NSAs. Article 29 of the UDHR provides that everyone has 'duties to the community'. In its preamble, it states: 'every individual and every organ of society ... shall strive ... to promote respect for these rights and ... to secure their universal and effective recognition and observance'. This statement recognises that human rights obligations apply not only to states but also to NSAs, in particular to 'every individual' and 'every organ of society'. NSAs such as corporations can be seen as 'organs of society' and, therefore, responsible under the Universal Declaration to respect human rights.[108] More significantly, it implies that NSAs may shoulder more than the negative obligation engendered by human rights since they are obliged to 'secure' the observance of human rights. As Barbara Alexander noted:

> if the drafters of the [Universal Declaration] intended to limit the scope of who should promote and recognise human rights to public, state actors, they could have used the phrase 'every State' rather than 'every organ of society'.[109]

However, the UDHR provision above simply sets a common standard of achievement but does not equate to legally binding effect. Nonetheless, it is strengthened by other provisions in legally binding international human rights treaties. For example, both the ICESCR and the ICCPR expressly declare in their preambles that the individual is 'under responsibility to strive for the promotion and observance of the rights' recognised in the Covenants. With respect to the right to health, for example, the CESCR has stated unambiguously:

> While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental

> organisations, civil society organisations, as well as the private business sector—have responsibilities regarding the realisation of the right to health.[110]

The implication here is two-fold. First, states should provide an environment that facilitates the discharge of such human rights responsibilities by NSAs. It follows that there may be circumstances in which a failure to progressively realise ESCR as required by Article 2(1) ICESCR would give rise to violations by states parties of those rights, as a result of states parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*,[111] it was alleged that the military government of Nigeria had been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People. It was argued that this breached several rights guaranteed under the ACHPR.[112] The African Commission on Human and Peoples' Rights observed, inter alia, in paragraph 54:

> Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken ... and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

The Commission concluded in paragraph 58:

> despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.[113]

Consequently, states must ensure that there are accessible, transparent and effective monitoring and accountability mechanisms to regulate the conduct of NSAs like TNCs in order to ensure compliance with human rights responsibilities.[114] Secondly, NSAs—local, national, regional and transnational—should take into account the human rights dimension of their policies and activities. Soft law mechanisms such as the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[115] as well as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (revised in 2000)[116] proclaim that NSAs including multinational enterprises and firms should respect the human rights of those affected by their activities as recognised in the UDHR and

the corresponding international covenants. Although various non-legally binding codes of conduct have been adopted by several TNCs taking into account some human rights issues (e.g. not to use child labour), they are only a step in a long journey to accountability.[117] Obviously voluntary codes are only respected by those who chose to respect them and too often the codes are not respected when there is a clash against 'hard commercial interests'.[118] Each relevant NSA—such as a company—must do all in its power to ensure that there are no human rights violations within its sphere of influence and that it also does not benefit from human rights abuses by other parties.[119] In the context of the right to health, for example, drug companies have a 'soft law' obligation under the multilateral corporate codes of conduct to respect developing states' efforts to protect the right to affordable HIV/AIDS treatment for all, including socially disadvantaged groups.[120] However, there is no external body that sets standards for the voluntary codes and no independent adjudicative body to assess human rights impact assessments and compliance, or to award remedies in the event of non-compliance. It is, therefore, less surprising that Patrick Macklem has described a voluntary corporate code as 'at best a form of public relations for powerful multinationals and at worst a misleading seal of approval affixed by those with no legitimate claim to judge these matters'.[121]

It is also vital to note that both universal and regional human rights instruments prohibit both states and NSAs from engaging in any activity aimed at the destruction of human rights. For example, Article 30 of the UDHR prohibits groups or persons any right to 'engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'. Similarly, both the ICCPR and ICESCR, in common Article 5(1)—using almost identical language to that of Article 30 of the UDHR stipulate that:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

Similar provisions are in the American Declaration of the Rights and Duties of Man[122] (Articles 29–38), the ECHR (Article 10(2)), the American Convention on Human Rights[123] (ACHR) (Articles 13, 17 and 32) and the ACHPR (Articles 27–29). Although these provisions are widely considered as mere guidelines for the behaviour of both individuals and states as opposed to imposing any direct accountability for NSAs;[124] they are not without legal implications. As at the time of writing, the jurisprudence on these provisions is scarce, but the Committee on the Elimination of Racial Discrimination has commented that a person's exercise of the right to freedom of opinion and expression carries special duties and responsibilities, specified in Article 29(2) of the Universal Declaration, 'among which the obligation not to disseminate racist ideas is of particular importance'.[125]

In sum, these provisions clearly apply not only to states but also to NSAs—groups and individuals. They forbid the abuse of human rights and forbid the misuse and exploitation of human rights instruments as a pretext for violating human rights.[126] As the CESCR has observed with respect to the right to work:

> Private enterprises—national and multinational—while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory

> access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognise the labour standards elaborated by ILO and aim at increasing the awareness and responsibility of enterprises in the realisation of the right to work.[127]

Therefore, while only states are parties to the existing human rights treaties and thus ultimately accountable for compliance with them, all members of society (NSAs—individuals, local communities, trade unions, civil society and private sector organisations) have responsibilities regarding the realisation of ESCR. As a minimum, NSAs must respect states' human rights obligations. They must, therefore, refrain from acts or omissions that violate all human rights. Respecting ESCR requires NSAs not to adopt, and to repeal laws and rescind policies, administrative measures and programmes that do not conform to states' human rights obligations including those with respect to ESCR. One has to note that the shift in state sovereignty accompanying globalisation has meant that NSAs are increasingly getting more involved in activities that impact (directly and/or indirectly) on human rights, and have gained more power to violate human rights.[128] Therefore, limiting human rights obligations to only states would defeat the object and purpose of human rights since:

> Human rights are about upholding humans and protecting individuals and groups from oppressive power primarily in the context of the communities within which they live. That oppressive power can come from any source [which may be a State or a NSA]. It does not have to be political; it can be economic, social, cultural, or any other type of power.[129]

According to the UN Truth Commission on El Salvador, NSAs—in this case referring to the Farabundo Marti National Liberation Front—are subject to international human rights law. In the words of the Commission: '[w]hen insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding for the State under international human rights law'.[130] As shown below, this view should extend to all other NSAs exercising powers akin to or even greater than that of a state especially in the field of marginalised ESCR.[131]

However, the great majority of NSAs pay little more than lip service to ESCR and are based in, or funded by those living in, developed states and tend to be concerned primarily with civil and political rights. This means that most NSAs are able to violate ESCR without being questioned.[132] This is partly because of the view that 'economic and social human rights are costly to secure',[133] or that ESCR are non-binding 'principles and programmatic objectives rather than legal obligations that are justiciable'.[134] Such views reflect the marginalisation of vulnerable individuals and groups, who are meant to be the primary beneficiary of this category of rights. It is vital to note that the continuing reluctance to accord ESCR the same level of recognition and enforceability as that accorded to civil and political rights demonstrates the 'gendered' character of international human rights law.[135] This is because it is generally girls and women as a social class and as primary care givers who most acutely experience the violation and non-realisation of this category of rights.[136]

It is important to recall that treaties are made to be performed.[137] NSAs, therefore, should not (as a minimum) contribute to a state's failure to comply with a treaty obligation concerning ESCR.[138] Indeed human rights treaties are of a special character since they:

> are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.[139]

If this object and purpose is to be meaningfully achieved, NSAs must not undermine state efforts to comply with their human rights obligations. Therefore, there is a dire need for NSAs to take more seriously their human rights responsibilities with respect to ESCR on the international, regional and domestic fronts.[140] In many respects, violations of ESCR, are treated far less seriously by states and NSAs than if they occurred in relation to civil and political rights, when they would provoke 'expressions of horror and outrage'.[141] It is rare, for example, to hear of discussions of 'massive and direct denials of economic, social and cultural rights'[142] (such as systematic and large-scale violations of rights to food, housing, health and education) in relation to the subject of torture or cruel, inhuman or degrading treatment,[143] genocide, or crimes against humanity.[144] The denial of civil and political rights is considered as a 'violation', while the denial of ESCR is generally viewed as an 'injustice'.[145] As the world increasingly becomes internationalised, the decisions, policies and operations of NSAs may have significant effects on lives (and human rights) of individuals and groups in local communities. Some three examples—the IMF, the World Bank and the WTO—are briefly reviewed below:

The IMF, World Bank and Human Rights

Until recently, the IMF and the World Bank have showed very little interest in human rights when dealing with states, claiming that these are 'political' issues within a country's domestic affairs.[146] This was first clearly manifested when both the IMF and the World Bank declined the invitation from the UN Commission on Human Rights to participate in the drafting of the ICESCR.[147] Likewise, in the 1960s the UN General Assembly passed a series of resolutions successively 'inviting', 'urging' and 'requesting' the Bank to stop lending to South Africa and Portugal because of their respective apartheid and colonial policies, but the Bank insisted on its apolitical character and approved several loans in defiance of the UN resolutions.[148] Thus, the Bank provided economic support and moral sanction to oppressive governments. Both institutions—the World Bank and IMF—may affect the lives and rights of the people through their policies, and in case of the World Bank, through the projects it funds directly.[149] For example, the IMF and World Bank's policy of privatisation of hitherto public enterprises (without adequate social safety nets) has, in some respects, had a negative effect on ESCR in several states.[150]

Despite this, the World Bank and IMF have argued that they are bound by their Articles of Agreement to be 'non-political' in their approach and give due regard to 'only economic considerations'.[151] In paying limited or no attention to human rights by the two institutions, it has been stressed that there is 'need to honour the charter of each organisation and to respect the specialisation of different international organs as reflected in the

statutory requirements of their respective charters'.[152] It is claimed, for example, that drawing the Bank, which is 'an international financial institution, directly into politically charged areas, with their typical vagaries and double standards, can only politicise its work and jeopardise its credibility, both in the financial markets from which it borrows and in the member countries to which it lends'.[153] To this end, Shihata has argued:

> The role of the Bank is to promote the economic development of its member countries. Its success in this role helps to create an environment for the enjoyment by individuals in these countries of all their human rights ... But it demeans the organisation to ignore its charter and act outside its legal powers.[154]

Likewise, the IMF argued that the protection and promotion of human rights is a full responsibility of states and that 'rights cannot be realised in the absence of structural adjustment'.[155] The IMF has also argued that human rights protection was not explicitly included within its mandate[156] and that its founding Charter mandates that (as a monetary agency) it pays attention only to issues of an economic nature[157] and requires it to 'respect the domestic social and political policies of members'.[158]

The question that arises here is whether the World Bank and the IMF will be acting outside their charters or legal powers when they respect (or even promote) all human rights in the formulation of their policies and activities. In other words are human rights issues 'political' affairs and thus barred from any consideration by the two institutions? In fact, except for references to 'raising conditions of labour'[159] and 'maintenance of high levels of employment and income',[160] there are no direct human rights links from the Articles of Agreement of the two institutions. In addition, the two institutions are not parties to human rights treaties protecting ESCR,[161] and accordingly not bound, *strictu sensu*, by human rights treaties and have not accepted the implementation mechanism for the existing human rights treaties.

It is essential to note that in the agreements between the UN Economic and Social Council (ECOSOC) and the IMF[162] and the World Bank,[163] entered into in accordance with Articles 63 and 57 of the UN Charter establishing the latter's status as UN specialised agencies, greater autonomy and independence is left to the two institutions from the UN[164] and neither human rights nor even Articles 55 and 56 of the UN Charter are referred to. However, Article 103 of the UN Charter links the two institutions' Articles to the Charter.[165] As such it has a direct influence on the way in which human rights come into play in terms of policies of the IMF and the World Bank.[166] Therefore, the IMF and the World Bank Articles of Agreement should be interpreted and applied in a manner that respects all human rights. To achieve this, the IMF and the World Bank (through their credit agreements and policies) must refrain from undermining ESCR for all persons, especially disadvantaged and marginalised individuals and groups. This calls for the integration of human rights in the formulation of the policies of the two institutions.

In fact human rights issues are implicitly part of the development[167] mandate of the World Bank and central to the success of the poverty alleviation programmes of the Bank and the IMF. Respect for civil and political rights promotes participation and more accountability, which leads to better performance of government projects funded by the Bank.[168] Yet substantial violations of civil and political rights are related to lower economic growth,[169] which leads to limited available resources necessary for development and the progressive realisation of ESCR.

As a result of several criticisms of the World Bank policies, the Bank has acknowledged in its Comprehensive Development Framework (CDF) that '[w]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible'.[170] It has also noted that 'creating the conditions for the attainment of human rights is a central and irreducible goal of development'.[171] Thus, the World Bank issued a set of guidelines linking its activities to human rights[172] and acknowledged that 'ensuring sustainable development requires attention not just to economic growth but also to environmental and social issues',[173] including poverty and inequality reduction and prevention of armed conflicts and terrorism.[174] In the Bank's view 'ending global poverty is much more than a moral imperative—it is the cornerstone of a sustainable world'.[175] To this end the World Bank together with the IMF have, since 1995, been active in designing mechanisms to address the issue of debt burden, culminating into what came to be known, in 1996, as the Heavily Indebted Poor Countries (HIPC) initiative[176] that was later broadened in October 1999 to increase the number of eligible countries under the Enhanced HIPC Initiative. For a debtor country to qualify for this initiative, it must demonstrate, *inter alia*, that it will 'implement a full-fledged poverty reduction strategy, which has been prepared with broad participation of civil society, and an agreed set of measures aimed at enhancing economic growth'.[177] It is worthy noting, first, that although the alleviation of poverty and debt relief is essential for enjoyment of ESCR, the Bank, like the IMF, still lacks a coherent and a more explicit human rights policy to fully integrate human rights in the poverty reduction strategy papers (PRSPs) and its debt relief is not enough to lift the HIPC out of poverty. Secondly, the Bank has claimed that it is 'concerned by human rights' but 'its mandate does not extend to political human rights'.[178]

It has to be noted, however, that internationally recognised human rights (whether civil and political or economic, social and cultural) are of international concern that transcends 'political affairs' and autonomous jurisdiction of a state.[179] As a result, since the projects funded by the World Bank and programmes of the Bank and the IMF impact on the enjoyment of human rights, it is essential to ensure that they do not negatively impact on or violate human rights, even if they are to lead to economic development in the long run. International human rights instruments must not be subordinated to the charters of the international financial institutions or agencies in question when, as a matter of law, the reverse should be the case.[180]

In conformity with Articles 22 and 23 of the ICESCR, the IMF and the World Bank should (through their lending policies and credit agreements) cooperate effectively with states to implement ESCR at the national level, bearing in mind their own mandates. The minimum core obligation incumbent directly upon both the World Bank and the IMF as specialised agencies of the UN system and subjects of international law is a duty of vigilance to ensure that their policies and programs do not facilitate breaches of their member states' human rights treaty obligations.[181] This calls for a clear and consistent human rights impact assessment[182] (to give effect to the interdependence and universality of human rights) in project/programme identification, preparation, appraisal, loan negotiation, implementation and evaluation (post-audit) for the World Bank and similar stages in negotiations and release of funds for the IMF.[183]

This would ensure, at the very minimum, that the policies and programmes of the two institutions (such as privatisation of social security schemes, healthcare and education) in pursuit of their respective charter obligations do not violate already existing human rights standards or make such standards worse.[184] With respect to Zambia, for example, the

CESCR expressed its concern in June 2005 'about the fact that privatized social security schemes in the state party have not been financially sustainable, thereby leaving its beneficiaries without adequate social protection'.[185] It recommended:

> Zambia's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, such as the International Monetary Fund and the World Bank, so as to ensure that the rights enshrined in the Covenant are duly protected, for all Zambians, and, in particular for the most disadvantaged and marginalized groups of society. The Committee refers the State party to its statement to the Third Ministerial Conference of the World Trade Organization adopted at its twenty-first session in 1999 (E/2000/22-E/C.12/1999/11, Annex VII).[186]

Therefore, there is dire need for explicit or deliberate integration of international human rights into policies, programmes and projects of the World Bank and the IMF including the poverty reduction strategies[187] to make them 'effective, sustainable, inclusive, equitable and meaningful to those living in poverty'.[188] As the Bank has recently acknowledged in its recent communication entitled 'Human Rights: FAQ' [Frequently Asked Questions]:[189]

> The World Bank needs to undertake analytic work to examine how human rights fit within the constitutional framework and what positive contribution they could make to the development process. While the World Bank is not an enforcer of human rights, it may play a facilitative role in helping its members realise their human rights obligations.[190]

The WTO and Human Rights

Should the WTO respect (protect or even promote) human rights? In May 1998 the CESCR emphasised that the realms of trade, finance and investment are in no way exempt from human rights principles and that 'the international organisations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights'.[191] The WTO system has a potential to contribute to the development and to the realisation of broader economic, social, and cultural rights, by stimulating economic growth and thereby helping to generate the resources that are needed for the fulfilment of such rights.[192] However, the relationship between human rights and trade through the WTO is far more complex.[193] The preamble to the 1994 Agreement Establishing the WTO (WTO Agreement), which sets out the ultimate objectives of the WTO, does not explicitly refer to human rights. It refers to the following objectives: the increase of higher standards of living; steady growth of real income and effective demand; the attainment of full employment and economic growth patterns compatible with sustainable development; and the expansion of production of, and trade in, goods and services.[194] The preamble also proclaims that 'there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.[195] Thus, although the WTO Agreement does not make explicit reference to human rights, the language of the preamble 'demonstrates a recognition by the WTO

negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development'.[196]

Sustainable development is broad enough to include respect for human rights. The right to (sustainable) development implies the right to improvement and advancement of economic, social, cultural and political conditions. The essence of the right to development is the principle that the human person is the central subject of development and that the right to life includes within it existence in human dignity with the minimum necessities of life.[197] As stated in the Declaration on the Right to Development: 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.'[198] Sustainable development ensures the well-being of the human person by integrating social development, economic development, and environmental conservation and protection. One aspect of sustainable development implies that the basic needs of the human being (e.g. education, health services, food, housing, employment, and social security) are met through the implementation and realisation of human rights. Viewed in this context, the WTO has to take into account all human rights (including ESCR) in accordance with the objective of sustainable development.

The case for linking protection of human rights apart from workers' rights to the WTO rests partly on the idea that states that violate or turn a blind eye to the human rights infractions should not be allowed to participate in the international trading system.[199] This view, in turn, rests on the premise that such exclusion will cause states that violate human rights to change their actions or omissions. Thus, the case for linkage between trade and human rights depends on the power of the WTO to decree trade sanctions.[200]As Matsushita has noted there are numerous problems with the above reasoning:

> First, what human rights would the WTO seek to enforce? Arriving at an agreement on this would not be possible now. Second, there exist long established international and regional regimes for the promotion and enforcement of human rights, such as the UN Commission on Human Rights, the UN Committee on Human Rights, and the European Court of Human Rights. Adding the WTO to these regimes would accomplish little and would pose the danger of conflicting interpretations and decisions. Third, although trade sanctions have emotional appeal to punish human rights violations, empirical studies have established that trade sanctions seldom accomplish their objectives and are not effective in accomplishing their objectives. Fourth, if the WTO ever were to try to become a human rights enforcement agency, there is little chance its dispute settlement mechanism would survive; it soon would be engulfed in compliance problems, and the WTO itself would be under threat.[201]

Despite the above observations, the WTO has a role to play in the progressive realisation of human rights, including ESCR. Although the WTO cannot transform to a human rights organisation, it must take steps to acknowledge fully the human rights effects of its work in order to maintain sustainable development and its credibility. Some WTO Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights[202] (the TRIPS Agreement) and the General Agreement on Trade in Services[203] (GATS) can impact on human rights such as the rights to health and education.[204] The TRIPS Agreement is the most comprehensive multilateral agreement that sets detailed minimum

standards for the protection and enforcement of intellectual property rights.[205] The forms of intellectual property protection covered by the TRIPS Agreement most relevant to the enjoyment of the right to health include patent protection (over new medical processes and products such as pharmaceuticals), trademarks (covering signs distinguishing medical goods and services as coming from a particular trader), and the protection of undisclosed data (in particular, test data).[206] For example, patent protection of a pharmaceutical allows the intellectual property right holder to exclude competitors from certain acts, including making, using, offering for sale, selling, or importing the drug (without the owner's consent) for a minimum period of 20 years.[207] Where the subject matter of a patent is a process, a patent prevents the third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.[208] This period of exclusion theoretically allows the rights-holder to recoup some of the costs involved in medical research. This primarily protects business and corporate interests and investments. In practice, however, intellectual property protection under the TRIPS can affect medical research and this can bear upon access to medicines.

Although it has been stated that the claim that the TRIPS Agreement and the WTO are blocking access to medicines in poor countries is 'demonstrably false',[209] intellectual property protection can affect the enjoyment of the right to health, and related human rights, in a number of ways. For example, patent protection can promote medical research by helping the pharmaceutical industry shoulder the costs of testing, developing and approving drugs. However, the commercial motivation of intellectual property rights encourages research, first and foremost, towards 'profitable' diseases, while diseases that predominantly affect people in poor countries—such as river blindness—remain under-researched.[210] Further, intellectual property rights may affect the use of traditional medicines such as those of indigenous peoples. While existing intellectual property protection can promote the health innovations of indigenous and local communities, the particular nature of this knowledge and the knowledge holders might require significant amendment to be made to intellectual legislation for protection to be comprehensive. Further, some traditional medicines have been appropriated, adapted and patented with little or no compensation to the original knowledge holders and without their prior consent, which raises questions for both the right to health and cultural rights.[211]

In addition, the exclusion of competitors as a result of the grant of a patent can also be used by patent holders as a tool to increase the price of pharmaceuticals.[212] High prices can exclude some sections of the population, particularly poor people, from accessing medicines. Given that the right to health includes an obligation on states to provide affordable essential medicines according to the WHO essential drugs list, intellectual property protection can lead to negative effects on the enjoyment of the right to health. In other words, in some cases intellectual property protection can reduce the economic accessibility of essential medicines. Articles 30 and 31 of the TRIPS Agreement include some flexibility in such circumstances by permitting WTO members to authorise third parties to use the subject matter of a patent (i.e. manufacture and sell pharmaceuticals at a lower price) without the authorisation of the patent holder, subject to certain limitations including payment of a 'adequate remuneration in the circumstances of each case, taking into account the economic value of the authorisation'.[213] Nonetheless, such flexibilities are, in reality, only available to those WTO members that have a domestic pharmaceutical manufacturing capacity. Article 31(f) of the TRIPS Agreement allows unauthorised working of the

patent where sale is 'predominantly for the supply of the domestic market of the Member authorising such use'. This could limit the ability of countries that cannot make pharmaceutical products from importing cheaper generics from countries where pharmaceuticals are patented. Thus, poorer countries without adequate manufacturing capacity might not be able to benefit from these flexibilities. Accordingly an amendment to the TRIPS Agreement to allow pharmaceutical products made under compulsory licences to be exported to countries lacking production should be supported.[214] It is interesting to note that the WTO received from Canada, on 4 October 2007, the first notification from any government that it has authorised a company to make a generic version of a patented medicine for export under special WTO provisions agreed in 2003. The triple combination AIDS therapy drug, TriAvir, can now be made and exported to Rwanda, which is unable to manufacture the medicine itself.[215]

As an international organisation for states, the WTO should ensure that its policies and decisions are in conformity with the human rights obligations of its member states. As noted by the CESCR since 1998 and the UN's Sub-Commission on Promotion and Protection of Human Rights in August 1998, the WTO should consider the human rights impact of trade and investment policies by recognising human rights as the primary objective of trade, investment and financial policy.[216] This is so because human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. In contrast to human rights, intellectual property rights under the TRIPS Agreement are generally of a temporary nature, and may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person.[217] Thus, the WTO should take fully into account the existing state obligations under international human rights instruments. The Decision on Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (August 2003) allowing countries producing generic copies of patented drugs under compulsory licence to export drugs to countries with no or little drug manufacturing capacity is an example of how human rights (e.g. the right to health) could be taken into account by the WTO.[218]

As a satisfactory human rights situation also improves the objectives of the WTO, human rights and the WTO mandate are not necessarily contradictory but mutually support each other. The WTO should, therefore, play a role in promoting human rights in a systematic or deliberate manner. This could be achieved through several ways including the following:

> First, through its multilateral treaty framework that promotes principles of non-discrimination, rule of law, economic liberalism, and peaceful dispute settlement, the WTO can be said to promote and protect human freedoms. Second, Article XXI of the General Agreement on Tariffs and Trade (GATT) permits WTO Members to participate in action involving trade sanctions decreed by the United Nations in cases of threats to peace and security. Moreover, WTO Members are permitted to use investment and trade as positive incentives to promote human rights in cases where infringement of WTO norms are not at stake.[219]

While the WTO is not an enforcer of human rights, like the World Bank, it may play a facilitative role in helping its members (151 members on 27 July 2007) realise

their human rights obligations. It is therefore necessary for the WTO member states to re-engage the WTO in human rights to ensure that they are taken into account.

Conclusion

What, then, is the conclusion? (1) How should international human rights law ensure that the activities of NSAs are consistent with international human rights standards? (2) How should accountability of NSAs be promoted effectively when violations of international human rights law occur? Although there are no straightforward answers to these questions, from the foregoing, the following conclusions can be drawn.

Firstly, the international human rights law is historically, and will remain (at least in the near future), essentially state-centred. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law. This includes ensuring that NSAs respect human rights. Currently, there are limited direct human rights obligations for NSAs. Consequently, international human rights law should continue to hold the state responsible within its jurisdiction to ensure that the activities of NSAs are consistent with international human rights standards. However, as noted above, states where protection of human rights against violations by NSAs is most needed are often those least able to enforce them against NSAs such as international financial institutions and TNCs—the main driving agents of the global economy, exercising control over global trade, investment and technology transfers—who possess much desired investment capital or technology.

Secondly, given the current limitations of state power with respect to NSAs, it is necessary that NSAs (defined broadly to include international organisations) should accept/recognise some moral human rights obligations, but at present they have no clearly defined legal obligations to respect human rights apart from compliance with the legal regime of the particular state in which they are operating. Undoubtedly, however, NSAs do have a role to play in the progressive realisation of ESCR. As this article makes clear, the era of NSAs to respect ESCR has arrived. Within their respective 'spheres of activity and influence', NSAs have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ESCR.[220] They have the responsibility to use 'due diligence' in ensuring that their activities do not contribute directly or indirectly to human rights violations, and that they do not directly or indirectly benefit from human rights violations of which they are aware or ought to have been aware.[221] The question is how can this be legally realized; should NSAs be directly liable for their violations of ESC rights under international human rights law or should they continue to be indirectly liable through states and should states have a duty under international human rights law to move against NSAs that violate ESC rights within their respective jurisdictions?

Although there is no consensus on the above issue,[222] it is clear that in the era of globalisation, it is not enough to look only to the state as the primary actor to respect, protect and fulfil human rights. Various factors have contributed to this development. They include: (i) the privatisation of functions previously performed by states; (ii) the ever-increasing mobility of capital and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalisation; (iii) the expanding impact and responsibilities of multilateral organisations such as the WTO affecting broader society;[223] (iv) the enormous growth in the role played by transnational civil society

organisations, many of which now have multimillion dollar budgets, employ very large staffs, and perform public-type functions in a large number of states; (v) a rise in the impact of organised armed groups violating human rights or controlling territory and population and aspiring to gain international legitimacy; and (vi) the growth of international terrorist networks such as Al Qaeda, and international criminal networks, such as drug cartels, which are not confined to any one state and some of whose activities have become global in scope.[224] In view of these developments, it is necessary that a considerable number of other actors other than states (including multilateral institutions like the World Bank and IMF, and TNCs) should equally be obliged to respect human rights. In short, therefore, human rights should be everyone's responsibility. Thus, NSAs should support the emerging global framework for human rights responsibilities of NSAs as a means to achieve good governance, encourage participation, strengthen their own anticorruption controls, and provide assistance in ways that strengthen states human rights obligations.[225]

Consequently, making space in the legal regime to take account of the role of NSAs in the realisation of ESCR, and their accountability for the violations of ESCR, remains a critical challenge facing international human rights law today. In order to ensure more accountability for human rights violations by NSAs, it is relevant to consider the adoption of the Statute of the International Court of Human Rights, to which NSAs (including intergovernmental organizations, such as the UN; the international financial institutions such as the IMF and the World Bank; the WTO and TNCs) could also possibly become parties in addition to states.[226] In this arrangement, it should be possible to bring claims of human rights violations (including violations of ESCR) not only against the state but also directly against NSAs. As Nowak has noted: 'In principle, any non-State actor might be interested, for various reasons including upholding ethical standards, marketing, corporate identity or a genuine interest in strengthening human rights, to recognise the jurisdiction of the World Court of Human Rights.'[227] As privatisation, outsourcing, and downsizing place ever more public or governmental functions into the hands of NSAs, the human rights regime must adapt to those changes if it is to maintain its relevance.[228] It is in this context that there is increasing recognition that 'it is essential to ensure human rights obligations fall where power is exercised, whether it is in the local village or at the international meeting rooms of the WTO, the World Bank or the IMF'.[229]

It is vital for the effectiveness of international human rights law that NSAs take more account of human rights in their decision making in order to ensure that they remain relevant for all members of the international community. Indeed, it is becoming increasingly important that all decision-making by NSAs—local, national, regional and global—should take consistently and comprehensively human rights issues into account. As a minimum, policies and programs of NSAs must not facilitate breaches of their member states' human rights treaty and customary obligations. With respect to international financial institutions, they should pay greater attention to the protection of ESCR in their lending policies, structural adjustment programmes, poverty alleviation programmes and credit agreements. Whether international human rights law will develop to adequately protect against violations of human rights by NSAs, and to hold effectively all NSAs directly accountable for violations of ESCR, remains to be seen. The challenge that faces human rights activists is to reflect on the most appropriate manner in which to enhance the obligations of NSAs with respect to ESCR. As a starting point, it is necessary to integrate consistently the human rights principles of non-discrimination, monitoring, democratic participation,

and accountability at each step of the process of making and applying the policies and decisions of NSAs. In the final analysis, global rules binding on NSAs are necessary because most of these actors have outgrown the ability of many individual states to regulate them effectively.

Notes

1. M. Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court', *Journal of Conflict & Security Law*, Vol.10, No.3 (2005), pp.405–34.
2. See, e.g., W. Nelson, 'Human Rights and Human Obligation', in J. Pennock & J. Chapman (eds), *Human Rights* (New York: New York University Press 1981) at pp.275– 91. *The Restatement (Third) of Foreign Relations Law of the United States* (Philadelphia: The American Law Institute 1987), Pt.VII, introductory note, at pp.144–5 does not fully commit to any position, but states: 'how a state treats individual human beings . . . is a matter of international concern and a proper subject for regulation by international law'.
3. See R. Higgins, *Problem and Process: International Law and How We Use It* (Oxford: Clarendon Press 1994) at pp.39–55, 146–59.
4. 1 UNTS xvi.
5. N. White, 'The United Nations System: Conference, Contract or Constitutional Order?', *Singapore Journal of International and Comparative Law*, Vol.4, No.2 (2000), pp.281–99, at p.291.
6. See Preamble of the UN Charter, together with Articles 1(3), 55 and 56; Z. Stavrinides, 'Human Rights Obligations under the United Nations Charter', *The International Journal of Human Rights*, Vol.3, No.2 (1999), pp.38–48.
7. 999 UNTS 171, 160 states parties as of 20 July 2007; See Human Rights Committee (HRC), *General Comment 31*, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), Para.4, on nature of the general legal obligation on states parties to the Covenant.
8. 993 UNTS 3, 156 states parties as of 13 February 2007.
9. ICCPR, Art.2(1), 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.'. ICESCR, Art. 2(1) '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 recognised in the present Covenant.'
10. HRC General Comment 31, Para.4.
11. See, e.g., Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3, The Nature of States Parties' Obligations (Fifth session, 1990), UN Doc. E/1991/23, Annex III at 86 (1991), Para.1.
12. HRC, General Comment 31, Para.8.
13. The term 'transnational corporation' refers to 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. See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter 'UN Norms'), UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), Para.20.
14. See Kalliopi K. Koufa, *Final Report of the Special Rapporteur: on Terrorism and Human Rights*, E/CN.4/Sub.2/2004/40 (25 June 2004), Para.55.
15. See generally K. De Feyter & F. Gomez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia 2005).
16. Thus, for instance, the Commission on Human Rights, in its Resolution 1998/47, noted 'in particular the need to study further the role and responsibility of non-State actors in the sphere of human rights'.
17. See P. Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press 2005), pp.3–36, at p.5.
18. http://www.icbl.org/problem/solution/ban/nsa (accessed 14 September 2008).
19. Ibid.
20. Alston, *Non-State Actors and Human Rights* (note 17), pp.14–19.

21. D. Josselin and W. Wallace, 'Non-State Actors in World Politics: A Framework', in D. Josselin and W. Wallace, *Non-State Actors in World Politics* (Houndsmills: Palgrave 2001), pp.1–20, at pp.3–4.
22. Communication 245/2002, Annex II, 21st Annual Activity Report, at p.54. Note 52 below, at Para.136.
23. Ibid. See also Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,* Annex to the 15th Annual Activity Report of the African Commission on Human and Peoples' Rights, 8 July 2002, AHG/Dec.171 (XXXVIII); 10 IHRR 282 (2003).
24. Examples include the World Health Organisation (WHO), the International Labour Organisation (ILO), the United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF), the United Nations Population Fund (UNPF), Food and Agriculture Organisation (FAO), United Nations Environment Programme (UNEP), UN-Habitat, International Labour Organisation (ILO), International Fund for Agricultural Development (IFAD). See CESCR, General Comment 14, The Right to the Highest Attainable Standard of Health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000), Paras.63–65; CESCR, General Comment 15, The Right to Water (Twenty-ninth session, 2003), UN Doc. E/C.12/2002/11 (2002), Para.60.
25. See, e.g., CESCR, General Comment 14 (note 24), paras.63–65; CESCR, General Comment 15 (note 24), para.60; CESCR, General Comment 19, The Right to Social Security (Thirty-ninth session, 2007), UN Doc. E/C.12/GC/19 (2008), paras.82–83.
26. See J. Ruggie, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries', UN Doc. A/HRC/4/35/Add.1 (13 February 2007).
27. See, e.g., CESCR, General Comment 3, Para.3; CESCR, General Comment 14, Para.56: 'States should consider adopting a framework law to operationalise their right to health national strategy'.
28. CESCR, General Comment 3 (1990), Paras.5 & 7.
29. See, e.g., CESCR, Concluding Observations: Cyprus, E/C.12/1/Add.28 (4/12/98), Para.26.
30. Communication No.241/2001 (2003).
31. 21 ILM 58 (1982) entered into force 21 October 1986. Arts.2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4).
32. See Communication No.241/2001 (note 30), Para.54.
33. Vienna Declaration, World Conference on Human Rights, Vienna, 14–25 June 1993, UN Doc. A/CONF.157/24 (Part I) at 20 (1993), Para.5.
34. M. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press 2003), p.287.
35. See, e.g., K. Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisation', *Human Rights Quarterly*, Vol.26, No.1 (2004), p.63; L.S. Rubinstein, 'How International Human Rights Organisations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth', *Human Rights Quarterly*, Vol.26, No.4 (2004), p.845; K. Roth, 'Response to Leonard S. Rubinstein', *Human Rights Quarter*ly, Vol.26, No.4 (2004), p.873; L. S. Rubinstein, 'Response by Leonard S. Rubinstein', *Human Rights Quarterly,* Vol.26, No.4 (2004), p.879; M. Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward', *Human Rights Quarter*ly, Vol.26, No.4 (2004), p.866; K. Tomaševski, 'Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson', *Human Rights Quarterly*, Vol.27, No.2 (2005), p.709.
36. Remarks by US Delegate Richard Wall, UN ESCOR, UN Commission on Human Rights, 59th Session, Agenda Item 10 (2003).
37. Comments submitted by the United States of America, *Report of the Open-Ended Working Group on the Right to Development*, UN ESCOR, Commission on Human Rights, 57th Session, UN Doc. E/CN.4/2001/26 (2001), Para.8 (emphasis added).
38. This analysis follows Eide's taxonomy, whereby state obligations for all human rights can be seen as involving obligations to 'respect, protect and fulfil' the rights in question. See A. Eide, 'Realisation of Social-Economic Rights and the Minimum Threshold Approach', *Human Rights Law Journal*, Vol.10, Nos.1–2 (1989), p.37; A. Eide, *The Right to Adequate Food as a Human Right*, E/CN.4/Sub.2/1987/23, Para.66; A. Eide, 'Economic and Social Rights', in J. Symonides (ed.) *Human Rights: Concepts and Standards*, (Aldershot: UNESCO Publishing 2000) at pp.109–74; A. Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, C. Krause & A. Rosas (eds)*, Economic, Social and Cultural Rights: A Textbook*, 2nd ed. (The Hague: Martinus Nijhoff Publishers 2001), pp.9–28. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, *Human Rights Quarterly*, Vol.20, No.3 (1998), pp.691–705 and UN Doc. E/C.12/2000/13 (2 October 2000), Para.6; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its*

Development (Oxford: Clarendon Press 1995), pp.109–14; H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton, NJ: Princeton University Press 1996) for the view that every basic right entails duties to *avoid*, *protect*, and *aid*.

39. See, e.g., CESCR, General Comment 18 (2005), Para.25; CESCR, General Comment 17 (2005), Para.55; CESCR, General Comment 16 (2005), Para.17; General Comment 15 (2002), Paras.20–29; General Comment 14 (2000), Para.33 and General Comment 13 (1999), Para.46.
40. See, e.g., Communication 155/96 (note 23), Para.44.
41. See *X and Y v Netherlands*, Judgment of 26 March 1985, Series A, No.91 (1986) 8 EHRR 235; *Hatton and Others v UK* App 36022/97, Judgment of Grand Chamber of 8 July 2003 (2003) 37 EHRR 611, Para.98 (ECtHR); *Vela'squez Rodriguez v. Honduras* Judgment of 19 July 1988, Series C, No.4 (IACtHR) holding that a state has a positive duty to prevent human rights violations occurring in the territory subject to its effective control, even if such violations are carried out by third parties; *Union des Jeunes Av oca ts v. Chad* Communication 74/92 (ACmHPR).
42. CESCR, General Comment 15 (2002), Para.23.
43. A. Eide, 'Economic and Social Rights', in J. Symonides (ed.) *Human Rights: Concepts and Standards* (Aldershot: UNESCO Publishing, 2000), p.127.
44. CESCR, General Comment 13, Para.41 'corporal punishment is inconsistent with . . . the dignity of the individual. . . . A State Party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction'. See also CRC, Concluding Observations: Zimbabwe, CRC/C/15/Add.55 (1996) Para.18: The Committee expressed 'its concern at the acceptance in the legislation of the use of corporal punishment in school, as well as within the family. It stresses the incompatibility of corporal punishment, as well as any other form of violence, injury, neglect, abuse or degrading treatment, with the provisions of the Convention'. See also CRC, Concluding Observations: Guyana, CRC/C/15/Add.224 (30 Jan 2004), Paras.31–32; India, CRC/C/5/Add.228 (30 Jan. 2004), Paras.44–45; Indonesia, CRC/C/15/Add.223 (30 Jan. 2004), Paras.43–44; Japan, CRC/C/15/Add.231 (30 Jan 2004), Paras.35–36; Papua New Guinea, CRC/C/15/Add.229 (30 Jan 2004), Paras.37–38; *Campbell and Cosans v. UK*, Judgment of 25 February 1982, Series A, No.48 (1982) 4 EHRR 293 (ECtHR). See also CRC, Art.28(2); CRC, General Comment 8 (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment) (Forty-second session, 2006), UN Doc. CRC/C/GC/8 (21 August 2006), Paras.16–29; African Charter on the Rights and Welfare of the Child, Art.11(5).
45. See CESCR, *Draft General Comment 9: The Right to Social Security*, E/C. 12/GC/20/CRP. 1 (16 February 2006), Para.35.
46. Ibid.
47. CESCR, General Comment 18 UN Doc. E/C.12/GC/18 (adopted on 24 November 2005), Para.25. Under Article 2 of the International Labour Convention (No.29) Concerning Forced or Compulsory Labour (adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, Geneva, Switzerland, entered into force 1 May 1932), the term 'forced or compulsory labour' is defined to mean 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.
48. Ibid., Para.35.
49. Appl. No.73316/01 (Judgment of 26 July 2005), (2006) 43 EHRR 16.
50. 213 UNTS 222, Art.4 '(1) No one shall be held in slavery or servitude. (2) 2 No one shall be required to perform forced or compulsory labour'.
51. See also Holly Cullen**,** '*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights', *Human Rights Law Review*, Vol.6, No.3 (2006), pp.585–592, at p.592 stating that: '*Siliadin v France* presents Council of Europe Member States with a challenge to adopt clearer and stronger laws to criminalise trafficking for forced labour. This is despite the fact that only one Member State has yet ratified the Council of Europe's new convention on people trafficking. They will be expected, in order to fulfil their positive obligations under Article 4, to establish adequate and clear criminal offences in relation to forced labour practices, slavery and servitude, and to impose appropriate sentences, especially where children are involved'.
52. Communication 245/2002, Annex III, 21st Annual Activity Report at p.54. For a commentary see Chaloka Beyani, 'Recent Developments in the African Human Rights System 2004–2006', *Human Rights Law Review*, Vol.7, No.3 (2007), pp.582–608, at pp.604–8.
53. The rights alleged to be violated were: the duty to give effect to the rights, duties, and freedoms enshrined in the Charter (Article 1); non-discrimination (Article 2); equal guarantee of the law (Article 4); the

inviolability of human beings (Article 5); human dignity (Article 6); liberty and security of the person (Article 8); freedom of expression (Article 9); freedom of association (Article 10); freedom of assembly (Article 11) and participation (Article 13).

54. Communication 245/2002 (note 52), Para.136.
55. Ibid., Para.138.
56. IACtHR, Series C4 (1988).
57. Beyani (note 52), p.606.
58. On this issue in the context of the ECHR, see *Akkoc v Turkey* 2000-X 389; (2000) 34 EHRR 1173.
59. Beyani (note 52), p.606.
60. See Resolution on the Human Rights situation in Zimbabwe adopted by the African Commission on Human and Peoples' Rights during its 38th Ordinary Session held in Banjul, The Gambia from 21 November to 5 December 2005, Annex III, 20th Activity Report at 101.
61. CESCR, General Comment 16, Para.5.
62. Ibid.
63. ICESCR, Art.2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
64. Revised General Reporting Guidelines, E/C.12/1991/1 (17 June 1991), Para.3; CESCR, General Comment 5, Para.15; CESCR, General Comment 16, Para.11.
65. CESCR, Concluding Observations: Japan, E/C.12/1 Add.67 (30 Aug 2001), Para.39. The Committee requested 'the State party to take note of its position that the principle of non-discrimination, as laid down in article 2(2) of the Covenant, is an absolute principle and can be subject to no exception, unless the distinction is based on objective criteria'. See also CESCR, Concluding Observations: Croatia, E/C.12/1/Add. 73 (30 Nov. 2001), Para.11.
66. *Thlimmenos v. Greece*, Appl. No.34369/97, Judgment of 6 April 2000; (2001) 31 EHRR 411, Para.44.
67. *Koua Poirrez v. France*, Appl. No.40892/98 [2003] ECHR 459, Para.46; *Gaygusuz v. Austria*, Appl. No.17371/90, [1996] ECHR 36, Para.42.
68. *Thlimmenos v. Greece*, Appl. No.34369/97, Judgment of 6 April 2000; (2001) 31 EHRR 411, Para.44.
69. CESCR, General Comment 16, Para.33.
70. ICESCR, Art.3: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.'
71. GA Res. 217A (III), UN Doc A/810 at 71 (1948).
72. CESCR, General Comment 16 (2005) (emphasis added).
73. See, e.g., CESCR, General Comment 17, Para.55.
74. See the International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, Arts 5(e)(v) and s(1)(d).
75. For an introduction to the IMF see E. Riesenhuber, *The International Monetary Fund under Constraint: Legitimacy of its Crisis Management* (The Hague: Kluwer Law International 2001), pp.3–73. See also F. Gianviti, 'Economic, Social and Cultural Rights and the International Monetary Fund' in Alston, *Non-State Actors and Human Rights* (note 17), pp.113–40.
76. The 'World Bank Group' consists of the International Bank for Reconstruction and Development (IBRD) created in 1946; the International Finance Corporation (IFC) established in 1956; the International Development Association (IDA) created in 1960; the International Centre for Settlement of Investment Disputes (ICSID) operational in 1966; and the Multilateral Investment Guarantee Agency (MIGA), 1988. For an overview of these institutions, see I. Shihata, *The World Bank in a Changing World: Selected Essays*, Vol. I (Dordrecht: Martinus Nijhoff Publishers 1991), pp.7–15; I. Shihata, *The World Bank in a Changing World: Selected Essays*, Vol. III (The Hague: Martinus Nijhoff Publishers 2000); D.L. Clark, 'The World Bank and Human Rights: The Need for Greater Accountability', *Harvard Human Rights Journal*, Vol.15 (2002), pp.205–26; K. Marshall, *The World Bank: From Reconstruction to Development to Equity*, (London: Routledge 2006).
77. See C. Dommen, 'Raising Human Rights Concerns in the WTO: Actors, Processes and Possible Strategies', *Human Rights Quarterly*, Vol.24, No.1 (2002), pp.1–50; G. Loibl, 'International Economic Law' in M. Evans (ed.), *International Law* (Oxford: Oxford University Press 2003), pp.689–710; Report of the United Nations High Commissioner, 'The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights' E/CN.4/Sub.2/2001/13 (27 June 2001). For overview of the WTO,

see B. Hoekman & M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 2nd ed. (Oxford: University Press 2001); Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed. (Cambridge: Cambridge University Press 2008); J. Wouters and B. De Meester, *The World Trade Organisation: A legal and Institutional Analysis* (Antwerpen and Oxford: Intersentia 2007).

78. UNDP, *Human Development Report* (Oxford: Oxford University Press 2002), p.114.
79. Oxfam, *Africa and the Doha Round: Fighting to Keep Development Alive*, Oxfam Briefing Paper, November 2005, http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/bp80_africa_doha.pdf.
80. OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (10 September 2002), Para.244, http://www.unhchr.ch/development/povertyfinal.html (accessed 14 September 2008).
81. See the Concluding Observations of the CESCR. UK, E/C.12/1/Add.79, Para.26; Ireland, E/C.12/1/Add.77, Para.37; Italy, E/C.12/1/Add.43, Para.20; Germany, E/C.12/1/Add, Para.31; Belgium, E/C.12/1/Add.54, Para.31; Japan, E/C.12/1/Add. 67, Para.37.
82. CESCR, General Comment 16, Para.33.
83. The CESCR has affirmed this position in several of its Concluding Observations. See, e.g., Colombia, E/C.12/1/Add.74, Para.29; Ecuador, E/C.12/1/Add.100 (2004), Para.53; Egypt, E/C.12/1/Add.44 (2000), Para.28; Morocco, E/C.12/1/Add.55; (2000), Para.38; Honduras, E/C.12/1/Add.57 (2001), Paras.30, 34; Syrian Arab Republic, E/C.12/1/Add.63 (2001), Para.29.
84. This conclusion can be drawn from the recommendations of the CESCR. See CESCR, *Concluding Observations: Zambia*, E/C.12/1/add 106 (23 June 2005), Para.36; *Concluding Observations: Senegal*, E/C.12/1/add 62 (24 Sept 2001), Para.60.
85. CESCR, *Concluding Observations: Senegal*, E/C.12/1/add 62 (24 Sept. 2001), Para.50.
86. CESCR Committee, *Concluding Observations: Zambia*, E/C.12/1/Add.106 (23 June 2005), Para.36.
87. See, e.g., E. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights Law into the Law of Worldwide Organization: Lessons from European Integration', *European Journal of International Law*, Vol.13, No.3 (2002), p.621. For a response to Petersmann, see P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law*, Vol.13, No.4 (2002), p.815. See also L. Helfer, 'Human Rights and Intellectual Property: Conflict or Co-existence?', *Netherland Quarterly of Human Rights*, Vol.22, No.2 (2004), pp.167–19.
88. See, e.g., CESCR: Concluding Observations, United Kingdom, E/C.12/1/Add.79 (2002), Para.26; Germany, E/C.12/1/Add.68 (2001), Para.31; France, E/C.12/1/Add.72 (2001), Para.32; Japan, E/C.12/1/Add.67 (2001), Para.37; Belgium, E/C.12/1/Add.54 (2000), Para.31.
89. See, e.g., R. McCorquodale & R. La Forgia, 'Taking off the Blindfolds: Torture by Non-State Actors', *Human Rights Law Review*, Vol.1, No.2 (2001), p.217; CESCR, Concluding Observations: Ecuador, E/C.12/1/Add.100 (2004), Para.35. The Committee strongly urged 'the State party to implement legislative and administrative measures to avoid violations of environmental laws and rights by transnational companies'. See also 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (Maastricht, 22–26 January 1997), reproduced in *Human Rights Quarterly*, Vol.20, No.3 (1998), pp.691–705, para.18; Robert P. Barnidge, 'The Due Diligence Principle under International Law', *International Community Law Review*, Vol.8, No.1 (2006), pp.81–121.
90. Communication 245/2002, Annex III, 21 Annual Activity Report at p.54, see note 52.
91. See the Commission's previous jurisprudence on amnesties: Communications 54/91, 61/91, 98/93, 164/97 and 196/97, *Malawi African Association, Amnesty International, Diop et al, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Annex V, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights, 11 May 2000, AHG/222 (XXXVI) at 138; 8 IHRR 268 (2001).
92. *Zimbabwe NGO Forum v Zimbabwe*, *supra.*, Communication 245/2002, Annex III, 21 Annual Activity Report at p.54, see note 52, at Para.215. Art.1 ACHPR obliges states parties to adopt legislative or other measures to give effect to the rights protected in the charter, while Art.7(1) ACHPR guarantees every individual the right to a fair trial.
93. CESCR, *Concluding Observations: Honduras*, E/C.12/1/Add.57 (21/05/2001), Paras.24, 38.
94. CESCR, *Concluding Observations: Russian Federation*, E/C.12/1/Add.13 (20 May 1997), Para.14.
95. Ibid., Para.30.
96. ESCR Committee, *Concluding Observations: Bosnia and Herzegovina*, E/C.12/BHI/CO/1 (24 Jan. 2006), Para.15.
97. Ibid., Para.36.

98. P. Redmond, 'Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance', *The International Lawyer*, Vol.37, No.1 (2003), pp.9–102; P. Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal jurisdiction', *International Law Forum*, Vol.7, No.4 (2005), p.281.
99. J. Ruggie, UN Doc. A/HRC/4/35 (2007) (note 26), Para.64.
100. H.J. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: OUP 2008), p.1388.
101. Commission on Human Rights, Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2 (2003).
102. R. McCorquodale, 'Women, Development and Corporate Responsibility', in S. Rees & S. Wright (eds), *Human Rights, Corporate Responsibility: A Dialogue* (Sydney: Pluto Press 2000), at pp.174–90; J. Oloka-Onyango, 'Who's Watching "Big Brother"? Globalization and the Protection of Cultural Rights in Present Day Africa', *Human Rights Quarterly*, Vol.27, No.4 (2005), pp.1245–1273.
103. See e.g. Human Rights Watch (HRW), '"Race to the Bottom": Corporate Complicity in Chinese Internet Censorship', 10 August 2006, HRW Index No.C1808, pp.30–72, available at http://www.hrw.org/reports/2006/china0806/china0806webwcover.pdf.
104. See I. Khan, 'Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws', Business Human Rights Seminar, London, 8 December 2005, Amnesty International Index: POL 34/001/2006 (21 March 2006), available at http://www.amnesty.org/en/library/info/POL34/001/2006.
105. See, for instance, the European Court of Human Rights acknowledgement in the *Ireland v. UK*, Judgment of 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25, Para.149, that 'it is not called upon to take cognizance of every single aspect of the tragic situation prevailing in Northern Ireland. For example, it is not required to rule on the terrorist activities in the six counties of individuals or groups, *activities that are in clear disregard of human rights*' (emphasis added), quoted by C. Warbrick, 'Terrorism and Human Rights', in J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, (Dartmouth: UNESCO 1998), p.225.
106. Khan (note 104), pp.6–7.
107. ILC, Final Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Art.33(2).
108. See, e.g., J. Paust, 'Human Rights Responsibilities of Private Corporations', *Vanderbilt Journal of Transnational Law*, Vol.35, No.3 (2002), pp.810–15
109. See, e.g., B.C. Alexander, 'Lack of access to HIV/AIDS Drugs in Developing Countries: Is there a Violation of the International Human Rights to Health?', *Human Rights Brief*, Vol.8, No.3 (2001), p.14.
110. CESCR, General Comment 14, (2000), Para.42; See also CESCR, General Comment 12 (1999), Para.20.
111. Communication No.155/96 (2001).
112. Specifically, alleged violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the ACHPR.
113. Article 21(1) ACHPR provides: '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.'
114. See, e.g., R. Wai, 'Transnational Lift off and Juridical Touchdown: The Regulatory Function of Private International Law in an era of Globalisation', *Columbia Journal of Transnational Law*, Vol.40 (2002), pp.209–274.
115. Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000), available at http://www.ilo.org/public/english/employment/multi/download/english.pdf.
116. Available at http://www.oecd.org/dataoecd/56/36/1922428.pdf.
117. See Business and Human Rights Resource Centre, Company Policy Statements on Human Rights, at http://www.business-humanrights.org/Documents/Policies.
118. See N. Howen, 'Business, Human Rights and Accountability', Speech delivered at the 'Business and Human Rights' Conference, International Commission of Jurists, Copenhagen, 21 September 2005, available at http://www.icj.org/IMG/pdf/NICK_Speech_DK_2.pdf.
119. K.M. Leisinger, 'On Corporate Responsibility for Human Rights', Basel, April 2006, available at http://www.reports-and-materials.org/Leisinger-On-Corporate-Responsibility-for-Human-Rights-Apr-2006.pdf.
120. See generally, L. Ferreira, 'Access to Affordable HIV/AIDS Drugs: The Human Rights Obligations of Multinational Pharmaceutical Corporations', *Fordham Law Review*, Vol.71, No.3 (2002), pp.1133–1179.
121. See Macklem (note 98).

122. OAS Res. XXX, adopted by the Ninth International Conference of American States (1948).
123. OAS Treaty Series No.36; 1144 UNTS 123.
124. See the study prepared for the Sub-Commission by the Special Rapporteur, Ms E.-I.A. Daes, *Freedom of the Individual under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights* (Geneva & New York: United Nations 1990), Human Rights Study Series No.3, Sales No. E.89.XIV.5, Para.2.
125. General Recommendation XV on Article 4 of the Convention, UN Doc. HRI\GEN\1\Rev.1 at 68 (1994), Para.4.
126. See, e.g., P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press 1990), p.105 and T. Opsahl, 'Articles 29 and 30: The Other Side', in A. Eide, G. Alfredsson, G. Melander, L.A. Rehof and A. Rosas (eds), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press 1992), p.465.
127. CESCR, General Comment 18, Para.52.
128. See D. Shelton, 'Protecting Human Rights in a Globalised World', *Boston College International and Comparative Law Review*, Vol.25, No.2 (2002), pp.273–322.
129. See R. McCorquodale, 'Overlegalizing Silences: Human Rights and Non-State Actors', in *American Society of International Law: Proceedings of the 96th Annual Meeting* (Washington: American Society of International Law 2002), at p.387.
130. UN Doc. S/25500, Annex, p.20
131. See J. Oloka-Onyango, 'Reinforcing Marginalised Rights in the Age of Globalisation: International Mechanisms, Non-State Actors and the Struggle for Peoples Rights in Africa', *American University International Law Review*, Vol.18, No.4 (2003), pp.851–914; M. Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity 2002), p.166; S. Agbakwa, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights', *Yale Human Rights and Development. L.J.*, Vol.5 (2000), p.178.
132. C. Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights', *Human Rights Quarterly*, Vol.21, No.1 (1999), pp.56–79.
133. See, e.g., P. Harvey, 'Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously', *Columbia Human Rights Law Review*, Vol.33, No.2 (2002), p.471.
134. See, e.g., CESCR, Concluding Observation: United Kingdom E/C.12/1/Add.79, Para.11 (5 June 2002) and E/C/12/1/Add.19, Para.10 (12 December 1997). See also V. Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, Policy Research Working Paper 3006 (World Bank, Development Research Group, 20 March 2003), p.16.
135. H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press 2000) p.231–44; D. Buss & A. Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart 2005).
136. By the end of 2003, a UNESCO study disclosed that girls in 54 states still faced discrimination in access to education, with girls in sub-Saharan Africa, Pakistan, India and China especially affected. See Education for All, *Global Education Monitoring Report* 2003/4, ch.3. See also J. Spectar, 'The Hydra hath but One Head: The Socio-Cultural Dimensions of the Aids Epidemic & Women's Right to Health', *Boston College Third World Law Journal*, Vol.21, No.1 (2001), pp.1–34.
137. P. Reuter, *Introduction to Law of Treaties*, 2nd ed., (London: Kegan Press 1995), Para.44.
138. See Vienna Convention on the Law of Treaties (VCLT) 1969, UKTS (1980) No.58, Vol.II, Art.26: 'Every treaty in force is binding on the parties to it and must be performed by them in good faith'. (Although this provision of the VCLT does not apply directly to NSAs since they are not 'parties to it', the object and purpose of the VCLT would be defeated if NSAs undermine states' obligations to perform treaty obligations in good faith. Indeed, Art 26 VCLT might be seen as declaratory of customary international law.) See D. Harris, *International Law: Cases and Materials*, 6th ed. (London: Sweet & Maxwell 2004), ch.10; A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000), ch.10.
139. Inter American Court of Human Rights, *The Effect of Reservations on the Entry in Force of the American Convention*, Advisory Opinion OC-2/82 of 24 Sept 1982, Para.29. See also European Commission on Human Rights, *Austria v. Italy*, Application No.788/60, *European Yearbook of Human Rights*, Vol.4 (1961), p.116, at p.140.
140. S. Ruxton & R. Karim, *Beyond Civil Rights: Developing Economic, Social, and Cultural Rights in the UK* (Oxford: Oxfam 2001), pp.1–49; C. Puta-Chekwe and N. Flood, 'From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights' in I. Merali and V. Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights* (Philadelphia: University of Pennsylvania Press 2001), pp.39–51;

and generally T. Merish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (New Haven: Yale Law School 2002).

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143. J. McBride, 'The Violation of Economic, Social and Cultural Rights as Torture or Cruel, Inhuman or Degrading Treatment', in G. Van Bueren (ed.), *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*, (Aldershot: Ashgate 1998), pp.107–16.
144. S. Skogly, 'Crimes Against Humanity Revisited: Is There a Role for Economic and Social Rights', *International Journal of Human Rights*, Vol.5, No.1 (2001), p.58.
145. See, 'Composite Flows and the Relationship to Refugee Outflows, including Return of Persons Not in Need of International Protection, as well as Facilitation of Return in its Global Dimension', in UNHCR Standing Committee, 12th meeting (EC/48/SC/CRP.29).
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148. See S.A. Bleicher, 'UN v. IBRD: A Dilemma of Functionalism', *International Organisation*, Vol.24, No.1 (1970), pp.31–47.
149. See D.D. Bradlow and C. Grossman, 'Limited Mandate and Intertwined Problems: A New Challenge for the World Bank and IMF', *Human Rights Quarterly*, Vol.17, No.3 (1995), p.411 at p.426; B. Sadasivam, 'The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda', *Human Rights Quarterly*, Vol.19, No.3 (1997), pp.648–649.
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151. See, e.g., IBRD Articles of Agreement, Art.IV, Section 10, Art.III, Sec.5(b); IDA Articles of Agreement, Art. V, Sec.6, Art.V, Sec.1(g); IMF Articles of Agreement, Art.IV, Section 3(b). For the analysis, see I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, Vol. II (The Hague: Martinus Nijhoff Publishers 1995), pp.557–76; I. Shihata, *The World Bank in a Changing World*, Vol. III (The Hague: Martinus Nijhoff Publishers 2000), pp.155–86; J. Gold, 'Political Considerations are Prohibited by Articles of Agreement When the Fund Considers Requests for the Use of Resources', *IMF Survey* (Washington DC: IMF, 23 May 1983), pp.146–8.
152. I. Shihata, 'Democracy and Development', *International and Comparative Law Quarterly*, Vol.46, No.3 (1997), p.638.
153. Shihata (1995) (note 151), p.578; Shihata (2000) (note 151), p.152.
154. Shihata (1995) (note 151), pp.567, 574.
155. Statement submitted by the International Monetary Fund to the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the realisation of economic, social and cultural rights, UN Doc E/CN.4/Sub.2/1991/63, Para.7. It is argued that costs from SAPs are short-term and give rise to greater long-term benefits. It is also claimed that deterioration would be further in absence of SAPs.
156. E/C.12/1994/SR.20, Paras.1, 18.
157. J. van Themaat, 'Some Notes on IMF Conditionality with a Human Face', in P. De Waart, P. Peters & E. Denters, *International Law and Development* (Dordrecht: Martinus Nijhoff Publishers 1988), p.229; B. Rajagopal, 'Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights', *Boston International Law Journal*, Vol.11 (1993), p.93; G. Bird, 'The IMF and Developing Countries: A Review of the Evidence and Policy Options', *International Organisations*, Vol.50, No.3 (1996), pp.477–511.

158. Articles of Agreement of IMF, 2 UNTS 39, Art. IV, S. 3(b). The Articles were subsequently amended in 1969, 1978 and 1992; available at http://www.imf.org/external/pubs/ft/aa/index.htm (accessed 14 September 2008).
159. World Bank, Articles of Agreement, Art I (iii).
160. IMF, Articles of Agreement, Art I (ii).
161. Art.26(1) ICESCR refers only to states as being capable to become parties and it would seem that international organizations cannot directly become parties to the Covenant.
162. Agreement entered into force 15 November 1947, printed in *Selected Decisions of the IMF and Selected Documents*, 13th issue (Washington DC: IMF 1987), p.475.
163. Agreement between the UN and the IBRD. (The Agreement formalised the relationship between the UN and the IBRD. It was approved by the United Nations General Assembly on 15 November 1947.) See World Bank Group Archives, at http://web.worldbank.org/external/default/main?pagePK=64319200&piPK=64323128&theSitePK=29506 (accessed 14 September 2008).
164. For example Art.1(2) of the Agreement between UN and the IMF states, *inter alia*, that: 'The Fund is a specialized agency... By reason of the nature of its international responsibilities... the Fund is, and is required to function as, an independent international organisation.' The IBRD/UN Agreement has a similar provision.
165. Art.103 of the UN Charter provides that the obligations of the Charter prevail over other international agreements. In (1982) *Yearbook of the International Law Commission*, Vol.I, p.20, Para.12, one member of the ILC interpreted Art.103 to mean that 'the UN Charter ... (is) hierarchically superior to those of any other treaty, whether earlier or later'. For a discussion of Art.103 of the UN Charter see R. Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', *International and Comparative Law Quarterly*, Vol.57, No.3 (2008), pp.583–612.
166. S.I. Skogly, *The Human Rights Obligations of the World and the International Monetary Fund* (London: Cavendish 2001), p.27.
167. The UN Declaration on the Right to Development, adopted by GAR 41/128 of 4 Dec 1986, states in its preamble that 'all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, and social rights'. See also I, Brownlie, 'The Human Right to Development', in D. Hunter *et al.*, *International Environmental Law and Policy* (New York: Foundation Press 1998), p.331; A. Sen, *Development as Freedom* (New York: Anchor Books 1999); A.K. Sengupta, Fourth Report of the Independent Expert on the Right to Development, Submitted in Accordance with Commission Resolution 2001/9, UN Doc. E/CN.4/2001/WG.18/2 (20 December 2001), Paras.9–10.
168. J. Isham, D. Kaufmann and L.H. Pritchett, 'Civil Liberties, Democracy and the Performance of Government Projects', *World Bank Law Review*, Vol.11, No.2 (1997), p.219.
169. See e.g. R. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (Cambridge, MA: MIT Press 1997); R. Barro, 'Economic Growth in a Cross Section of Countries', *The Quarterly Journal of Economics*, Vol.106, No.2 (1991), pp.407–443.
170. See Comprehensive Development Framework, at http://go.worldbank.org/O3CN35INY0 or http://www.worldbank.org/cdf (accessed 14 September 2008).
171. World Bank, *Development and Human Rights: The Role of the World Bank* (Washington DC: World Bank, 1998), available at http://www.worldbank.org/html/extdr/rights/hrintro.htm (accessed 14 September 2008).
172. IBRD/World Bank, *Development and Human Rights: The Role of the World Bank* (Washington DC: The World Bank, 1998). For a background to status of human rights in the World Bank, see Lawyers Committee for Human Rights and Institute for Policy Research and Advocacy (ELSAM), *In the Name of Development*: *Human Rights and the World Bank in Indonesia* (Jakarta: ELSAM 1995), pp.13–33.
173. IBRD/World Bank, *World Development Report 2003*: *Sustainable Development in a Dynamic World* (Washington DC: The World Bank 2003), p.1.
174. Ibid. pp.2, 157. See also the World Bank, *World Development Report 2006: Equity and Development* (Washington DC: The World Bank 1995), available at http://go.worldbank.org/UWYLBR43C0.
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176. Shihata (2000) (note 151), pp.365–79. There are about 40 HIPC, most of which are located in sub-Saharan Africa.
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178. World Bank, 'Bank Management Response to Request for Inspiration Panel Review of the Chad–Cameroon Petroleum Development and Pipeline Project, Chad Petroleum Sector Management Capacity

Building Project, and Chad Management of the Petroleum Economy Project', p.X, Para.16, available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponse051001.pdf. I. Shihata, 'Political Activity Prohibited', in I. Shihata, *World Bank Legal Papers* (Leiden: Brill Academic Publishers 2000), ch.9, pp.219–44.

179. J.D. Ciorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement', *Cornell International Law Journal*, Vol.33, No.2 (2000), p.331; G. Brodnig, *The World Bank and Human Rights: Mission Impossible*?, Carr Centre for Human Rights Policy Working Paper, T-01-05, 18.
180. J. Oloka-Onyango and D. Udagama, 'Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice', UN Doc. E/CN.4/Sub.2/1999/11, Para.33; Skogly, *The Human Rights Obligations of the World and the International Monetary Fund* (note 166), pp.108–9.
181. M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart Publishing 2003), p.295.
182. K. Tomasevski, 'International Development Finance Agencies', in A. Eide *et al.* (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff: Dordrecht 1995), pp.403–13, 410.
183. Skogly, *The Human Rights Obligations of the World and the International Monetary Fund* (note 166), pp.163–6.
184. IMF Staff, 'Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF' (December 2000), available at http://www.imf.org/external/np/exr/ib/2000/120100.htm.
185. CESCR, Concluding Observations: Zambia, E/C.12/1/Add.106 (23 June 2005), Para.22.
186. Ibid., Para.36.
187. For guidelines see OHCHR, 'Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies', 10 June 2002. Also E. Carrasco, 'Critical issues facing the Bretton Woods System: Can the IMF, World Bank, and the GATT/WTO Promote an Enabling Environment for Social Development?', *Transnational Law &Cont. Problems*, Vol.6, No.1 (1996), pp.i–xx; OECD-commissioned study on *Integrating Human Rights in Development: A Synthesis of Donor Approaches and Experiences* (September 2005), available at http://www.odi.org.uk/rights/Publications/humanrights_into_development_execsumm.pdf.
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190. Ibid.
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193. See R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', *European Journal of International Law*, Vol.13, No.3 (2002), pp.651–659.
194. See Agreement Establishing the World Trade Organisation, at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf. For a discussion see P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge: CUP 2005), pp.86–103.
195. Ibid.
196. *US-Shrimp*, WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, Para.153, available at http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.doc. The Appellate Body stated: 'As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994.'
197. The Right to Development, CHR Res.1998/72, ESCOR Supp. (No.3) at 229, UN Doc. E/CN.4/1998/72 (1998), Para.3(a).
198. Adopted by General Assembly Resolution 41/128 of 4 December 1986, Annex, 41 UN GAOR Supp. (No.53) at 186, UN Doc. A/41/53 (1986), Art.1(1).
199. See, e.g. M. Matsushita *et al.*, *The World Trade Organisation: Law, Practice, and Policy*, 2nd ed. (Oxford: OUP 2006), pp.923–24.
200. Ibid., p.924.

201. Ibid.
202. Available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf. See also Report of the UN High Commissioner, 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights', E/CN.4/Sub.2/2001/13 (27 June 2001); CESCR, 'Human Rights and Intellectual Property: Statement of the Committee on Economic, Social and Cultural Rights', UN Doc. E/C.12/2001/15 (14 December 2001); A.R. Chapman, 'The Human Rights Implications of Intellectual Property Protection', *Journal of International Economic Law*, Vol.5, No.4 (2002), pp.861–82.
203. Available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.
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206. See Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, On His Mission to the World Trade Organization, E/CN.4/2004/49/Add.1 (1 March 2004), Para.41.
207. TRIPS Agreement, Arts.33 & 28.
208. Ibid., Art.28(2).
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210. Hunt (note 206), Para.42.
211. Ibid.
212. Ibid. Para.43.
213. TRIPS Agreement, Art.31(h).
214. See Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/641 (8 December 2005), available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.
215. See WTO, 'Canada is First to Notify Compulsory Licence to Export Generic Drug', 4 October 2007, at http://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm.
216. Sub-Commission Resolution 1998/12 (20 August 1998); Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the Word Trade Organisation (Seattle, 30 November–3 December 1999), E/C.12/1999/9 (26 November 1999), Para.2. See also J. Oloka-Onyango and Deepika Udagama, 'Globalisation and its Impact on the Full Enjoyment of Human Rights', Preliminary Report, E/CN.4/Sub.2/2000/13 (15 June 2000); Progress Report, E/CN.4/Sub.2/2001/10 (2 July 2001); and Final Report, E/CN.4/Sub.2/2003/14 (25 June 2003).
217. CESCR, General Comment 17: 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 or She is the Author (Article 15, Paragraph 1(c), of the ICESCR), E/C.12/GC/17 (12 January 2006), Para.2.
218. See *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (November 2001), http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf; Decision of the General Council of 30 August 2003, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 and Corr.1 (September 2003), http://www.worldtradelaw.net/misc/dohapara6.pdf. See also Doha Ministerial Declarations, *Doha Declaration*, WT/MIN (01)/DEC/1 (November 2001), http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.pdf. Para.6 states: 'under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.'
219. Matsushita (note 199), p.924.
220. UN Norms (note 13), Para.1.

221. See Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), Para.1.
222. See e.g. U. Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights', *Human Rights Law Review*, Vol.5, No.1 (2005), pp.1–26; and John Ruggie, Reports of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97 (2006) and A/HRC/4/35 (19 February 2007) (critical of the UN Norms). But see D. Kinley & R. Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law', *Human Rights Law Review*, Vol.6, No.3 (2006), pp.447–97 (supportive of UN Norms).
223. See, e.g. Matsushita, (note 199), pp.918–31.
224. Steiner (note 100), pp.1385–431.
225. The World Bank, *Global Monitoring Report 2006: Millennium Development Goals: Strengthening Mutual Accountability*, *Aid, Trade, and Governance* (Washington DC: The World Bank 2006), pp.177, noting that 'international financial institutions (IFIs) are essential parts of the global governance framework, especially for poor countries. Their efforts include bolstering their own anticorruption controls, improving transparency, encouraging adherence to internationally recognized standards and codes, and working with their clients to encourage domestic accountability'.
226. See M. Nowak, 'The Need for a World Court of Human Rights', *Human Rights Law Review*, Vol.7, No.1 (2007), pp.251–59, at pp.256–7.
227. Ibid., p.257.
228. See generally, K. De Feyter & F. Gomez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Oxford: Intersentia 2005); Alston, *Non-State Actors and Human Rights* (note 17).
229. M. Robinson, 'From Rhetoric to Reality: Making Human Rights Work', *European Human Rights Law Review*, Vol.1, No.1 (2003), at pp.5–6; M. Robinson, 'Shaping Globalisation: The Role of Human Rights' in *American Society of International Law*, *Proceedings of the 97th Annual Meeting* (Washington: American Society of International Law 2003), pp.1–12.