Between Justice and Law: Exploring Avenues and Obstacles to an International Obligation to Trade Fairly

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I confirm that the work presented in this thesis is my own and the work of other persons is appropriately acknowledged.

Kirsteen Shields, 1st August 2013.

Abstract

This thesis is concerned with whether international law is capable of evolving to adequately address the adverse impact of international trade practices on the billions of people living in poverty in the world today. To this end, it explores international law's capacity to integrate ethical obligations into international trade through the hypothetical construction of an 'international obligation to trade fairly'. Obligations of fairness in international law are defined as necessitating the construction of an obligation to not restrict processes of democracy and distributive justice between individuals and the state.

The application of this obligation on international trade is considered necessary in light of global economic interdependence, which has diminished the capacity of the state. An examination of the extent to which such a norm already exists is undertaken before considering the internal and external limitations to the universalization of such a norm. The central obstacles concerning the proposed obligation are identified as relating to the *subject* of the obligation and the *normative force* of the obligation. It is argued that due to the ideology and, inter-relatedly, the structure of international law, these obstacles cannot be readily overcome without radical reform.

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List of Abbreviations

ATS	US Alien Tort Statute
BIT	Bilateral Investment Treaty
BLIHR	Business Leaders Initiative on Human Rights
CAT	UN Convention Against Torture
CDF	Comprehensive Development Framework
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CERD	UN Charter of Economic Rights and Duties 1974
CESCR	UN Committee on Economic Social and Cultural Rights
CME	Coordinated Market Economy
CSR	Corporate Social Responsibility
DFID	United Kingdom Department for International Development
DPL	Development Policy Loans
DRD	Declaration on the Right to Development 1986
DSU	Dispute Settlement Understanding
EC	European Community
ECOSOC	United Nations Economic and Social Council
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
FDI	Foreign Direct Investment

FLO	Fairtrade Labelling Organisation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HRIA	Human Rights Impact Assessment
IBHR	International Bill of Human Rights
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic Social and Cultural Rights 1966
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IBLF	International Business Leaders Forum
IDA	International Development Association
IFC	International Finance Commission
IFI	International Financial Institution
IIA	International Investment Agreement
ILO	International Labour Organisation
IMF	International Monetary Fund
LME	Liberal Market Economy
LOS	Law of the Sea
MAI	Multilateral Agreement on Investment
MDG	Millennium Development Goal

MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporation
MNE	Multinational Enterprise
MoU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement 1994
NCP	OECD National Contact Point.
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NTF	Nordic Trust Fund
NYU	New York University
OECD	Organisation for Economic Coordination and Development
PCIJ	Permanent Court of International Justice
SRSG	UN Special Representative to the Secretary General
TNC	Transnational Corporation
TRIPS	Trade Related Aspects of Intellectual Property Rights
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration on Human Rights 1948
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation

UNGAOR	United Nations General Assembly Official Records
USA	United States of America
WFTU	World Federation of Trade Unions
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Table of Cases

International

Regional

National

Chapter 1: Framing the Issues

"The limits of our imagination are a product of a history

that might have gone another way."

Martti Koskenniemi[1]

1. Introduction

This thesis explores the capacity of international law to place ethical obligations on international trade through a proposed international obligation to trade fairly. A large part of this research involves defining the content and application of the obligation. In reference to international law and justice theory, 'fairness' is defined as embodied in processes of democracy and distributive justice. Consequently, an obligation to trade fairly is envisaged as an obligation to, if not positively facilitate, at least not *impede* processes of democracy or distributive justice. Democracy and distributive justice are understood for the purposes of this thesis within the traditional context of occurring between individuals and the *state*. As the state is considered to be the only legitimate agent of democratic governance at present, for the purpose of this thesis, the range of processes of fairness to be preserved is limited to those within the state's traditional competence. Yet, it is argued that due to the rise in power of multinational corporations and international financial institutions the state can no longer bear sole responsibility for the safeguarding of these processes, therefore the obligation falls to those actors with capacity to do so.

1 KOSKENNIEMI, M. (2001) *The gentle civilizer of nations : the rise and fall of international law, 1870-1960*, New York, Cambridge University Press, p 6.

The proposed obligation to trade fairly ought therefore to apply to all international actors in respect of safeguarding these processes between individuals and the state. The possibility of constructing such a norm is explored through an inter-disciplinary examination of the ethical and legal foundations for such an obligation and latterly through consideration of the obstacles to its evolution in international law. Whether the universalisation of such an obligation is possible is a question of great significance to the billions who are currently subject to an exploitative international trade regime and to the many who are actively engaged in efforts to regulate that regime.

2. Context

Economic globalisation has radically transformed the world we live in. Its successes are manifest, but so too are its failures. When I began this research I was optimistic about finding ways in which economic globalisation could be harnessed to bolster human rights. At that time, the difficulty of attaching human rights obligations to corporations was already well-established. Prior to the global financial crisis of 2008, corporations were at the height of their power. Yet within the group known as Multinational Corporations (MNCs)[2], a

2 Throughout the thesis the term 'Multinational Corporation' (MNC) is used to describe a corporation which operates across borders. The term can be used interchangeably with Multinational Enterprise (MNE) or Transnational Corporation (TNC). For a detailed history of the evolution of these terms see the introduction to MUCHLINSKI, P. (2007) *Multinational enterprises and the law*, Oxford, Oxford University Press, p.6, where the following clarification is provided: "*UN terminology originally distinguished between enterprises owned and controlled by entities and persons from one country but operating across national borders – the 'transnational' – and those owned and controlled by entities or persons from more than*

radical splinter group was gaining strength; a group known as 'social companies' which harvested that exotic fruit known as 'ethical trade'. In my naivety I hoped that this new breed of corporation might be the next big thing for civilisation and with some good fortune I joined a research team investigating the Fairtrade Movement at Queen Mary, University of London.[3]

At that stage, the burning question was; "*Can Fairtrade enter the mainstream?*" By mainstream I understood not only mainstream shopping forums, but from a legal point of view, mainstream normative behaviour, - 'widespread practice', in other words. The original premise for this research was that through organisational structures such as Fairtrade, 'globalisation bad' might turn 'good'; trade might hold the capacity to serve as a vehicle for human rights realisation. Moreover, I hypothesised that in parts of the world where the state apparatus is weak, initiatives like Fairtrade might begin to emerge as strong mechanisms for human rights realisation thus potentially resolving the 'enforcement' impasse of the human rights movement. Over time however, the realisation dawned that this 're-direction' of responsibility might not signify an under-utilised strength of trade but rather a weakness of the human rights framework and of international law more generally; that states

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one country – the 'multinational'. However in practice, this distinction appears no longer to be made in UN publications and reports."

3 Funded by the Arts and Humanities Research Council and led by Prof Janet Dine (School of Law, Queen Mary, University of London) and Prof Brigitte Granville (Centre for Globalisation Research, Queen Mary, University of London). The findings from this research project are published in DINE, J. & GRANVILLE, B. (Eds.) (2012) *The Processes and Practices of Fair Trade*, Routledge.

are given sole responsibility for human rights realisation but they do not always have the capacity to do so.

3. Research Question

This thesis explores the possibility for international law to place widespread ethical obligations on trade through the central research question; '*Can international law construct an international obligation to trade fairly*?' Although contested, for the purpose of this thesis, fairness is defined in chapter 2 by reference to the theories of John Rawls and Thomas Franck as composed of processes of democracy and distributive justice. In chapters 2 and 3 it is argued that such an obligation ought to exist for individuals rather than between states or societies in order to effectively attach to trade in an interdependent global economy. It is argued that all key actors of international trade (states, international financial institutions (IFIs), and multinational corporations (MNCs),) must be bound by these principles in order to ensure effective regulation based on the capacity and power of relevant actors.

The question then becomes; *can international law evolve to impose an obligation on international economic actors (including states, IFIs and MNCs) to not impede processes of democracy and distributive justice between individuals and the state?* In order to answer this question, several parameters are developed in the following chapters. Firstly, relating to the nature of the obligation, the meaning of 'fairness' must be defined. Secondly, the extent to which such an obligation already exists is considered. Thirdly, the subject of the obligation is identified. Fourthly, the duty-bearer of an international

obligation to trade fairly is identified. Finally, the foreseeable obstacles to the evolution of such a norm are considered.

What is proposed in an international obligation to trade fairly is not radically different from what can be constructed from existing provisions within the international human rights framework. More specifically, parallels can be drawn between the *ICCPR* and '*democracy*' and the *ICESCR* and '*distributive justice*'. What differs is the rationale based as it is on a theory of justice rather than on a theory of rights. This difference in rationale may help support the application of obligations beyond the traditional scope of state obligations.

Efforts to stretch the limits of the UN human rights framework are not new. In recent years, several notable extensions have been proposed. For example the construction of obligations on business entities to respect human rights, commonly known as Ruggie's series of 'UN norms'[4]; Skogly's construction of human rights obligation of the World Bank and IMF[5] and also her construction of a right not to be poor[6]; the construction of a global social security fund as

[4] UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' adopted 30 May 2003, Un Doc. E/CN.4/Sub.2/2003/12/Rev.1; John Ruggie, Special Representative of the Secretary General (SRSG), 2008. "Protect, Respect and Remedy: A Framework for Business and Human Rights," UN Doc. A/HRC/8/5 (7 April) (SRSG Report 2008); John Ruggie, Special Representative of the Secretary General (SRSG), 2011. "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," Advance Edited Version (21 March) UN Doc A/HRC/17/31.

[5] SKOGLY, S. I. (2001) *The Human Rights Obligations of the World Bank and the International Monetary Fund*, London, Cavendish.

[6] SKOGLY, S. I. (2002) Is there a right not to be poor? *Human Rights Law Review,* 2**,** 59-80.

advocated by De Schutter[7]; the UN's Right to Development[8] and subsequently the extraterritorial obligations in respect of economic social and cultural rights[9], developed by Salomon, Skogly and others.

Based on an egalitarian theory of justice, the extension of the human rights framework in these directions is both legitimate and necessary. Much of the groundwork for the legitimisation of an obligation to trade fairly made in chapter 2 of this thesis could be used to support these already established norms. The contribution of this thesis to the existing knowledge lies in its consideration of the obstacles to the realisation of these norms. As the norms are not yet universally accepted, the latter part of this thesis, in considering the obstacles to the international obligation to trade fairly, also highlights some of the obstacles to the extension of the UN human rights framework.

4. Structure

The first substantive chapter of the thesis, Chapter 2, seeks to build an understanding of an envisaged obligation to trade fairly from theories of justice and of global justice. The need for clearer definition of the meaning of

[7] DE SCHUTTER, O. & DE SEPULVEDA, M.:(9th October 2012) Underwriting the Poor: a Global Fund for Social Protection: The right to food as a global goal. *Briefing Note.*

[8] *United Nations Declaration on the Right to Development 1986*; See SALOMON, M. E. (2008) Legal Cosmopolitanism and the Normative Contribution of the Right to Development. IN MARKS, S. P. (Ed.) *Implementing the Right to Development: The Role of International Law.* Geneva, Friedrich-Ebert-Stiftung. Also; SALOMON, M. E. (2010) 'International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice' in Andreassen, B.A. and Marks, S.P. (eds.) *Development as a Human Right: Legal, Political and Economic Dimensions,* 2nd ed. Intersentia.

[9] *The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted 28 September 2011, final version 29 February 2012.

'fairness' in international law is underlined by Thomas Franck, who considered that there are both the necessary institutions in place to apply processes of fairness and a global society in place to instil legitimacy into those processes. Several theories are considered before John Rawls' *Justice as Fairness* is unpacked to comprise obligations of democracy and distributive justice. Subsequently, chapter 3 considers the extent to which global society has initiated processes of democracy and distributive justice and integrated these into law historically. Latterly this chapter considers the extent to which the human rights framework and the Fairtrade movement presently serve as avenues for democracy and distributive justice between individuals and corporations, thereby bypassing the state. The chapter concludes that both systems have internal limitations that reduce their capacity to operationalise the universal application of the envisaged international obligation to trade fairly.

Chapter 4 considers relevant existing obligations within international law for the promotion of fairness in international trade and considers scope for their evolution, particularly from within the international human rights framework in the specific context of extraterritorial obligations of states. The extent to which these obligations may be *internationalised* in the sense of attaching to all global actors in their relations with individuals irrespective of nationality is the subject of chapter 5. More specifically, chapter 5 explores ways through which the international human rights framework (identified as carrying positive obligations of democracy and distributive justice) may be attached to the central actors of international trade; namely International Financial Institutions (IFIs) and Multinational Corporations (MNCs). Chapter 5 acknowledges that

the attachment of obligations of fairness to IFIs and MNCs is subject to continual contestation and in some cases opposed by duly-enacted law in the shape of international economic agreements or by legal doctrines such as the non-application of international legal personality to corporations.

This sets the scene for a critique of the obstacles to the proposed obligation as internal to the nature of international law. Chapters 6 and 7 develop this critique by considering the normative and structural obstacles to the evolution of international law in line with fairness as democracy and distributive justice. In chapter 6, case studies of the suppression of ILO labour standards and of the *UN Guiding Principles on Business and Human Rights* demonstrate the normative obstacles to the integration of norms of fairness so defined into the main body of international law. Chapter 7 considers the bearing of international law's state-centric structure on procedural and substantive aspects of fairness as democracy and distributive justice. It is argued that given the economic and political restraints on state power, states do not serve as effective conduits for the global processes of democracy nor of distributive justice, which an egalitarian theory of justice necessitates.

5. Method

In order to dissect public international law as described, the thesis adopts a variety of methodological techniques. As previously stated, the construction of an international obligation to trade fairly provides the central narrative running through the thesis from which various sub-themes emerge. In the first substantive chapter, Chapter 2, I conduct a qualitative theoretical investigation

into the meaning of 'fairness' international law and justice theory. Chapter 3 develops a narrative of social movements integrating fairness into international law through analysis of the legal impact of the Abolition Movement and of labour rights movements, before considering the contribution of the Fairtrade Movement to this narrative. The following chapters, Chapters 4 and 5, rely on a positivist legal approach to examine relevant treaty provisions before moving to constructivism to expand those provisions.[10] In Chapters 6 and 7, a more critical approach is undertaken to critique 'obstacles' to the proposed obligation embedded in international law.

Besides a multi-method approach, a further layer is added through inter-disciplinarity throughout. Only by examining the issues from other disciplines (in this case philosophy, history, sociology,) is it possible to achieve the

[10] Constructivism is a multi-disciplinary approach which various definitions. Philip A Karber attributes five scholars with moving the discourse from international relations into international law, these are; Anthony Arend, Friedrich Kratochwil, Nicholas Onuf, John Ruggie and Alexander Wendt. Karber writes; "*A trail of multi-disciplinary usage can be tracked over the last fifty years – with the term 'Constructivism' coming from mathematics and entering philosophy in the late 1940s; developmental psychology in the 1950s; philosophy of science in the 1960s; sociology, semiotics and learning theory in the 1970s; post-modern philosophy, anthropology, anthro-methodology and legal studies in the 1980s; cognitive psychology, neurophysiology, and IR in the 1990s. The earliest attempt to look at the implications of applying a method of 'incomplete constructed symbols' to international law was by F.S.C. Northrop of Yale Law School in his studies of the 'The Complexity of Legal and Ethical Experience' in 1959 and 'Philosophical Anthropology and Practical Politics' in 1960…*" See KARBER, P. A. (2000) "Constructivism" as a Method in International Law. *American Society of International Law Proceedings,* 94, p.189. See also Byers' description of constructivism as 'sociological institutionalism', in BYERS, M.:(1999) Custom, power and the power of rules : international relations and customary international law. Cambridge, Cambridge University Press. For a critique of constructivism in international legal theory see; BOWRING, B. (2010) What is Realism in International Law and Human Rights? IN JOSEPH, J. & WIGHT, C. (Eds.) *Scientific Realism and International Relations.* Palgrave Macmillan.

necessary distance from the subject (law) to develop a critical understanding of it. Another reason for embracing inter-disciplinarity is the desire that this thesis should be relevant, and indeed readable in the 'real world' (or at least, by non-lawyers). This desire derives from the realisation that law is an increasingly commercialised and at times violent domain with reduced space for real consideration of the 'social', the 'public' and the 'human'. The heroic mission that Koskenniemi recalls so eloquently in *The Gentle Civiliser of Nations*[11] finds little expression in the cold light of today's city law firms.

6. Argument

At the most fundamental level this thesis seeks to cast fresh light on the relationship between international law and ideology. In particular it seeks to draw attention to the internal contradictions and limitations within international law, which are manifest within the relationship between two strands of law; international economic law and international human rights law. Several criticisms of international law emerge. The principal criticism of international law is that it supports a de facto hierarchy of international economic law over international human rights law. Through a process of routine 'trumping' of international human rights law by international economic law, corporations are increasingly capturing law-making space within international law. As the state is hollowed out by the corporation, so too is public international law hollowed out by an international trade regime which leaves little space for norms of

[11] KOSKENNIEMI, M. (2001) *The gentle civilizer of nations : the rise and fall of international law, 1870-1960*, New York, Cambridge University Press, p 1.

fairness. In turn, this has entrenched a hierarchy of trade interests over human rights.

This thesis also seeks to debunk some of the myths surrounding the relationship between international law and regulation of powerful non-state actors. In particular, it is argued that we cannot isolate the deregulation of corporations as an unintended consequence of our legal order; instead we must critically assess the construction of this legal vacuum in order to understand the root causes[12] of global poverty. Only by looking underneath the treaty law carpet of international law, may we identify the forces shaping our international legal system and fully observe the abyss between international law and 'global justice'. In order to do so, the hypothetical 'international obligation to trade fairly' acts as a vehicle for a journey through the international norm-making environment.

The risks of a complex approach such as this cannot be overstated. The pitfalls of fragmentation and superficiality abound in all research but especially so in a comparativist, inter-disciplinary project.[13] Many times during the process of this thesis I felt like calling time on the open-ended questions on which this thesis is built and returning to the safety of thinking inside the box. If it were not for recent breakthroughs in international law scholarship by contemporary

[12] This term is borrowed from Susan Marks who uses it throughout her work. See MARKS, S. (2011) Human Rights and Root Causes. *Modern Law Review,* 74**,** 57-78.

[13] See for example TRACHTMAN, J. (2002) Institutional Linkage: Transcending "Trade and…". *American Journal of International Law,* 96 (1)**,** 77-93.

critical thinkers such as Marks,[14] Salomon,[15] and Skogly,[16] I might well have done so. As it was, this strand of scholarship gave me not only essential inspiration along the way but also, by lighting the way, a certain obligation of my own, to carry on.

[14] MARKS, S. (2011) Human Rights and Root Causes. *Modern Law Review,* 74**,** 57-78, MARKS, S. (ed.) (2008) *International law on the left : re-examining Marxist legacies*, Cambridge, Cambridge University Press, MARKS, S. (2000) *The riddle of all constitutions : international law, democracy and the critique of ideology,* Oxford, Oxford University Press.

[15] SALOMON, M. E. (2008b) Legal cosmopolitanism and the normative contribution of the right to development. IN MARKS, S. P. (Ed.) *Implementing the right to development: the role of international law.* Geneva, Harvard School of Public Health/ Friedrich-Ebert-Stiftung; SALOMON, M. E., (2007) Global responsibility for human rights world poverty and the development of international law. Oxford, Oxford University Press; SALOMON, M. E., TOSTENSEN, A. & VANDENHOLE, W. (2007) *Casting the net wider : human rights, development and new duty-bearers,* Antwerp ; Oxford, Intersentia.

[16] SKOGLY, S. I. & GIBNEY, M. (2010) *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Publications; SKOGLY, S. (2006) *Beyond national borders : states' human rights obligations in international cooperation,* Antwerpen, Intersentia ; Oxford : Hart Pub. [distributor]; SKOGLY, S. I. & GIBNEY, M. (2002) Transnational Human Rights Obligations. *Human Rights Quarterly,* 24**,** 781-798; SKOGLY, S. (2001) *The human rights obligations of the World Bank and the International Monetary Fund,* London, Cavendish.

Chapter 2: Justifying an 'Obligation to Trade Fairly'?

> *"Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."*
>
> John Rawls[17]

1. Introduction

This chapter seeks to inform the content of an obligation to trade fairly by defining the meaning of 'fairness' by reference to international law and political philosophy. Thomas Franck's theory of 'Fairness in International Law and Institutions' divides fairness into its procedural and substantive parts as democracy and distributive justice. Discussion of Franck's work also highlights the problem of the contested meaning of equity in international law and the need to address this lacuna. Subsequently, support for Franck's 'double-sided' 'fairness' is found in Rawls theory of *'Justice as Fairness'.* In light of the problems posed by global economic interdependence, it is proposed that theories of justice, which were originally devised to apply within states, now hold relevance for relationships beyond the state. Essentially, it is argued that the nature of the obligations of fairness which exist under international law depend on how one rationalises the relationship between the individual and the institutions of international law.

[17] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 3.

2. Why Justice?

Under the umbrella of the UN, expectations of 'global justice' have been placed on international law. But what does 'global justice' entail? Distribution of resources? Privileging of human rights above economics? Collective obligations to respect human rights? Distribution of rights? All of these things? None of these things? And to what extent are those expectations legitimate? In searching for answers to these questions within international law, several 'black-holes' emerge. In particular, problems emerge from the absence of any clear hierarchy between laws, which enables international economic law to trump international human rights law. Similarly, the absence of clear articulation of the content of the 'general principles of international law' and the absence of effective mechanisms to regulate non-state actors, particularly multinational corporations, generates several theoretical and practical problems for the 'global justice' mandate.

Given the present day backdrop of continual suppression of human rights in international trade practices, this chapter seeks to ground the legitimacy for ethical obligations in international trade in a theory of justice. A theory of justice provides a more objective premise from which to assess the relationship between human rights and trade than a theory of rights, which clearly privileges human rights from the outset. Rights-based approaches such as that advocated by Ronald Dworkin[18] which bestow a privileged status on rights before the law, or Henry Shue's theory of basic rights upon which enjoyment

[18] DWORKIN, R. (1977) *Taking rights seriously*, London, Duckworth. See also BROWN, A. D. (2009) *Ronald Dworkin's theory of equality : domestic and global perspectives*, Basingstoke, Palgrave Macmillan.

of all other rights is predicated[19] make excellent defences of rights but they are not easily reconciled with the realities of the international law normative hierarchy. To take such a rights-based approach as a starting point in this thesis would be to skip over the many stumbling blocks facing the realisation of such rights. Instead, the benefit of grounding an international obligation to trade fairly in a theory of justice is put succinctly by Jeremy Waldron; "*a theory of justice necessarily brings together with the consideration of socio-economic rights a consideration of all the claims and principles with which such rights might be thought to compete or conflict*."[20]

Turning to political philosophy can offer some guidance as to the relationship between international law and justice. In the broadest terms, Utilitarians would most likely find that international law obligations of justice only exist to the extent that they would increase utility, whereas Contractarians might be more likely to approach the discussion by considering the common conception of international law shared by a community of persons.[21] As will be explained, I adopt the latter approach in arguing that international law must respond to the will of the people. (Indeed, Chapter 3 describes historical breakthroughs in

[19] SHUE, H. (1996) *Basic rights : subsistence, affluence and U.S. foreign policy,* Princeton ; Chichester, Princeton University Press.

[20] WALDRON, J. (2010) Socioeconomic Rights and Theories of Justice. *NYU School of Law, Public Law Research Paper*, p 5.

[21] Another important distinction is that between obligations of charity and obligations of justice. Beitz distinguishes obligations of justice as being the more demanding of the two, obligations of justice "*require greater sacrifices on the part of the relatively well-off, and perhaps sacrifices of a different kind as well*." Obligations of charity would likely necessitate aid but not efforts at large-scale institutional reform, which would derive from obligations of justice. See BEITZ, C. R. (1975) Justice and International Relations.,*Philosophy and Public Affairs,* 4**,** 360-389, p 360.

international law that have been driven by global social movements.) The question then becomes, not whether states have obligations of justice, but what does our common conception of justice infer for international law and for the regulation of international trade today.

3. The Meaning of 'Fairness' of International Law

As one of the leading proponents for the renaissance of fairness in international law, the work of the late Thomas Franck is a useful starting point for understanding fairness in international law. The following section attempts to flesh out the meaning of fairness as equity by reference to Franck's writing and jurisprudence of the International Court of Justice (the ICJ). Franck contends that *"[D]iscussion about 'fairness' is most likely to be productive when the allocation of rights and duties occurs in circumstances which make allocation both necessary and possible."*[22] Franck refers to John Rawls' condition of 'moderate scarcity'[23] as the circumstance presenting optimal opportunity for recourse to fairness. 'Moderate scarcity' and 'community' are set out as two preconditions for what Franck terms 'fairness discourse'.[24] On this basis and in light of problems of a global nature facing societies today, he makes the case that "*now is the time for international lawyers to focus on the issue of fairness in law*".[25]

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[22] Ibid. p 9.

[23] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, pp 127-130.

[24] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 9.

25 Ibid, p 9.

Fairness in international law and institutions, as defined by Franck, is composed of procedural and substantive elements.[26] Fairness in its procedural form is based on the contractarian theories of Rousseau,[27] Kant[28] and Hobbes.[29] Procedural fairness presumes that community and legitimacy of process is defined by reference to that community's standards.[30] The contractarian theory can be extended from its application to a community of persons and can be transferred to a community of states according to Franck.[31] His principle point is that it is only through procedural fairness that international law can find the legitimacy necessary for its survival. Procedural fairness therefore finds expression as 'legitimacy'. In order to achieve procedural fairness Franck suggests the emergence of *democracy* as a global normative entitlement.[32]

[26] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 7.

[27] ROUSSEAU, J.-J. & CROCKER, L. *Social Contract and Discourse on the origin and foundation of inequality among mankind,* [S.l.] : W.S.P., 1967 (1974).

[28] KANT, I. & LADD, J. (1965) *The metaphysical elements of justice : part 1 of The metaphysics of morals,* New York, London, Macmillan ;Collier Macmillan.

[29] HOBBES, T., MARTINICH, A. P. & BATTISTE, B. (2011) *Leviathan. Parts I and II,* Peterborough, Ont., Broadview ; London : Eurospan [distributor]., reprinted in The English Works of Thomas Hobbes, W. Molesworth ed., 1841.

[30] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 27.

[31] Ibid. At p.26. He adds that "*the social contract is the only associational theory relevant to the inter-state system and thus warrants our attention*".

[32] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 84.

In relation to the substantive aspect of fairness, Franck refers to *distributive justice* and later shortens this to justice.[33] The nature of this component is endorsed as moral and its legal basis is found in the principle of *equity* in international law. The indeterminacy of the principle of equity is acknowledged from the outset: "*In its international as in its domestic legal context, equity is sometimes derided as a contentless norm amounting to little more than a license for the exercise of judicial caprice*".[34] It is in his ensuing defence of the "*very real 'content'*"[35] that we catch a glimpse of the value of the principles of international law, like a rapidly setting sun in a sky increasingly polluted by the streetlight of treaty law. In order to achieve substantive fairness in international law Franck supports the evolution of obligations towards distributive justice and argues that the principle of equity could facilitate this evolution.

3.1. Equity as a Principle of Distributive Justice

Recourse to the principles of public international law enshrined in *Art 38 (c) Statute of the Permanent Court of International Justice 1920* and particularly the principle of equity inherent to public international law does not provide a clear definition of the meaning of fairness in international law. For a start, the content of the 'general principles of international law' is open to debate.[36]

[33] FRANCK, T. M. (1995) *Fairness in international law and institutions*, New York, Clarendon Press. Chapter Three, p 47 onwards.

[34] Ibid. p 47.

[35] Ibid. p 47.

[36] For further discussion see SCHACHTER, O. (1991) *International law in theory and practice*, Dordrecht ; London, M. Nijhoff Publishers, p.50. He defines five categories of general principles that have been invoked and applied in international cases: 1. Principles of

Notwithstanding this lack of definition, the International Court of Justice (ICJ) has made frequent recourse to *equity* as amongst the general principles of international law, to be applied in the pursuit of justice, when the strict application of the law is either unclear or non-justiciable.

Franck demonstrates that the concept of fairness embodied in the principle of equity can and should lead to instances where strict interpretation of treaty law and national sovereignty is overridden by international law. He cites the *Continental Shelf* (*Tunisia v. Libya*) case as an example where this has occurred.[37] He describes equity as a redeeming characteristic of international law with growing relevance and application in international law today.[38] Beyond traditional concepts of equity found within a specific legal doctrine (as mentioned; unjust enrichment, estoppel and acquiescence), Franck also describes equity as a broad mechanism through which to introduce justice into resource allocation. He identifies at least three approaches to equitable allocation. – Firstly, *'corrective equity',* which Franck describes as *''tempering the gross unfairness which sometimes results from the application of strict law''*. Secondly*, 'broadly conceived equity',* which displaces strict law to apply "*a set of principles for the accomplishment of an equitable allocation*".

municipal law (law of a state) "*recognized by civilized nations;*" 2. General principles of law "*derived from the specific nature of the international community;*" 3. Principles "*intrinsic to the idea of law and basic to all legal systems*;" 4. Principles "*valid through all kinds of societies in relationships of hierarchy and co-ordination*;" and, 5. Principles of justice founded on "*the very nature of man as a rational and social being*."

[37] *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya) (Judgement) 1982 ICJ rep 60 (para 71).

[38] Franck adds "*When [the Court] has relied on equity, the Court has taken pains to emphasize that equity is rule-based and complements, rather than conflicts with, the law*". FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 56

Thirdly, there is *"common heritage equity"* which serves to protect mankind's common patrimony.[39]

The first model, 'corrective equity', is the model of equity most commonly evoked by courts and 'norm-negotiating diplomats' in international institutions. Indeed, in the *Tunisia-Libya* case, the Court insisted that the search for an equitable result was not an operation of distributive justice.[40] This was reiterated in the *Libya-Malta*[41] case in 1985 where the Court "*continued to deny the legitimacy of any need-based resource distribution*".[42]The example of corrective equity in continental shelf allocation is presented by Franck as an instance whereby the ICJ slowly moved from a narrow conception of equity as corrective equity relying principally on 'proportionality', to a concept of corrective equity that might begin to consider socio-economic implications. Franck comments; *"It remains to be seen whether this [the Tunisia-Libya case] opens the door, if only narrowly, to economic considerations where the effect is more certain and permanent and more profoundly disturbing to the judges' sense of fairness.*"[43]

There are also developments in relation to the second and third models of equity, 'broadly conceived equity' and 'common heritage equity', which

[39] Ibid. p 57.

[40] *Continental Shelf case (Tunisia v. Libyan Arab Jamahiriya (Judgement)* 1982 ICJ Reports 60, para 71.

[41] *Continental Shelf (Libya v Malta),* 1985 ICJ 13 (June 3).

[42] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 72.

[43] Ibid. p.73. Referring to the case of *Maritime Delimitation in the Area between Greenland and Jan Mayen*, 1993, ICJ Rep. 38.

suggest a willingness to consider the distributive justice or fairness of outcome. Whilst the former is based on the broad assumption that resources belong to states, the latter assumes instead that certain resources are the patrimony of all humanity.[44] Franck points out that, as a result, a number of principles apply to the category of common heritage equity including non-ownership of the heritage, shared management, shared benefits, and use exclusively for peaceful purposes and conservation for future generations.[45] As examples, a mercantile model of common heritage equity "*in which equitable resource allocation is given higher priority than conservation*" is the basis of the *LOS Convention*[46] and the *UN Moon Agreement*.[47] This is not the case for all common heritage equity based conventions however, and the *Madrid Protocol of the Antarctica Treaty*[48] adopts an 'in trust' model of common heritage equity, in which conservation is not simply the first, it is the *sole* priority.[49]

Notwithstanding the contribution his work makes to expanding understanding of fairness in international law, Franck's efforts to articulate the legal reasoning behind equity strike at something of a contradiction. It is both a strength and a weakness that the principle of equity is defined and articulated by courts and evolving interpretations. As such it escapes the capture of positivism whilst at

[44] Ibid. p 76.

[45] Ibid. Citing BROWN WEISS, E. (1989) *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (Innovation in International Law)*, Transnational Pub, p 48.

[46] *UN Convention on the Law of the Sea*, 11th Session, Dec 10th, 1982, 21, ILM 1261.

[47] *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, Nov. 12, 1979, 18 ILM 1434, entered into force July 11, 1984.

[48] *Protocol on Environmental Protection to the Antarctica Treaty*, June 22, 1991.

[49] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 76.

the same time runs into an altogether different accountability challenge; how to rationalise fairness other than by moral judgement.[50] Franck justifies the incursion into moral judgement in equity on the basis of the necessity that "*law must create solutions and systems which take into account society's answers to these moral issues of distributive justice for we are moral as well as social beings*".[51]

Franck's theory is not without its caveats. According to Scobbie's analysis; "*Franck's endorsement of broadly conceived equity displays, perhaps, a misplaced enthusiasm and presents an over idealistic analysis which has the potential to subvert rather than realise the quest for fairness*."[52] On the contrary, arguably, it was in light of a very realist appreciation of the increasingly positivist nature of law, that Franck understood his fight to be amongst the resistance. Yet, as Higgins comments; "*it is only if one takes a positivistic approach to law that one believes that these matters cannot enter save through the door marked 'equity'*."[53]

This thesis is premised on the concern that the space which exists for concerns of distributive justice and equity appears to be shrinking. The human rights framework is often considered the avenue of protest in international law yet it

[50] HIGGINS, R. (1994) *Problems and process : international law and how we use it,* Oxford, Clarendon, p 227.

[51] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 8.

[52] SCOBBIE, I. (2002) Tom Franck's Fairness. *European Journal of International Law,* 13, p 925.

[53] HIGGINS, R. (1994) *Problems and process : international law and how we use it,* Oxford, Clarendon, p 222.

is itself subject to not inconsiderable competing pressures and can be suppressed under more powerful positivist law in the form of binding contractual obligations. In a bid to further rationalise the inclusion of norms of fairness in international law, the following section finds support for Franck's appeal to fairness in the theory of *Justice as Fairness* proposed by John Rawls. The complementarity of Franck and Rawls theories, together with the present reality of global economic interdependence, provide the ethical grounds for the construction of an international obligation to trade fairly.

4. Which 'Justice'?

'An obligation to trade fairly' is essentially an egalitarian obligation. In order to explain why I have chosen egalitarianism as the legitimate basis for re-structuring international law, in the following section I consider the wider spectrum of theories of justice. One finding to emerge from this analysis however is that a reconfiguration of the structure of international law could be justified by all of the strands of justice theory discussed. The current configuration of international law does not embody any of the predominant theories of justice.

The utilitarian theory of justice prioritises utility over equality. In general, 'utility' has been interpreted as happiness.[54] Utilitarian theory privileges the greatest capital sum of happiness rather than the fairest distribution of happiness. As Jeremy Bentham, famously wrote*; "Nature has placed mankind*

[54] See BURNS, J. H. (2005) Happiness and Utility: Jeremy Bentham's Equation. *Utilitas,* 17**,** 46-61.

under two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do as well as to determine what we shall do."[55] As a basis for society, this theory is clearly at odds with any other theory which is concerned with equitable distribution or any rights theory which places limits on society in respect of the inherent human dignity of mankind. One flaw in utilitarian theory is that despite much pseudo-science to the contrary, measuring 'happiness' remains as elusive an art as maintaining maximum levels of that emotion at all times. In order for neoliberalism to be defended on grounds of utilitarianism, it would seem that happiness must be incorrectly conflated with wealth. However, even this is quite a stretch, given the not inconsiderable happiness 'offsetting' resulting from the 1.29 billion estimated to be living in extreme poverty.[56]

A second branch of theory belongs to the Libertarians. Rather than equality or happiness, Libertarians rationalise justice as that which bestows the greatest amount of freedom on individuals. The libertarian ideology is therefore at odds with any theory of justice which advocates the placing of certain limits on trade. According to Locke[57] individuals should have maximum freedom to exploit resources subject to the proviso that "enough and as good" be left for others, and if not, compensation must be paid. This proviso has been

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[55] BENTHAM, J. (2009) (first published in 1789) *An Introduction to the Principles of Morals and Legislation*, Dover Philosophical Classics.

[56] WORLD BANK'S DEVELOPMENT RESEARCH GROUP, (February 29, 2012) Global Poverty Update. World Bank publications. Available at http://iresearch.worldbank.org/PovcalNet/index.htm Last accessed 12 March 2012.

[57] LOCKE, J. & LASLETT, P. (1988) *Two treatises of government*, Cambridge, Cambridge University Press. (Originally published 1690.).

interpreted by Nozick to require that no individual be made worse off by the use or appropriation of a natural resource compared with non-use or non-appropriation.[58] Again, relying on this concept of justice could provide some basis for a reconfiguration of a hierarchy of law within international law, or at least that legitimate limits on trade be respected. As with utilitarianism, the ideology as it manifests in its present form as market freedom, would appear to be a distortion of the original theory. Kant would have contended that consumer choice is not true freedom, and that rather what we have in global capitalism is the satisfaction of desires that have not been freely chosen in the first place.[59]

A third branch of justice theory is Egalitarianism. Egalitarianism can be most broadly described as that branch of justice theory which prioritises equality amongst individuals (rather than maximum utility or individual freedom). It has recently experienced a renaissance through Rawls' theory of '*Justice as Fairness*'[60] although Marx should arguably be considered an early proponent of the same movement. Although Marx did not advance a juridical theory, and therefore his philosophy is not easily defined as a theory of justice, his concern for a fair distribution of goods amongst individuals in society clearly resonates with egalitarianism. In the higher state of communist society envisaged by Marx, society would distribute according to the norm of "*from each according*

[58] NOZICK, R. (1974) *Anarchy, state, and utopia*, Oxford, Blackwell.

[59] KANT, I. (1964 (originallly published 1785)) *Groundwork for the Metaphysics of Morals* New York, Harper Torchbooks, chapter 2.

[60] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press and RAWLS, J., in KELLY, E. (ed.) (2001) *Justice as fairness : a restatement,* Cambridge, Mass. ; London, Belknap.

to his ability, to each according to his needs". [61] Marx considered this progress necessary on the basis that the norm of "*to each according to his labour contribution*" is defective on the basis that it does not account for the unique set of advantages and disadvantages bestowed on each individual through natural ability and circumstance.[62]

When Rawls published *A Theory of Justice* in the 1970s, it marked a watershed in political philosophy and opened the gates for renewed concerns about equality. According to Rawls original theory, the inequality that emerges as a necessary by-product of utilitarianism should be rejected as too high a moral price to pay for maximum 'utility'. In arguing that primary social goods (which include self-respect,) ought to be distributed fairly amongst individuals Rawls sets a minimum threshold of welfare for all within a just society. In so doing Rawls addresses the fact that in utilitarianism 'utility' is commonly conflated with wealth rather than welfare, with the effect that a utilitarian theory is concerned with maximising wealth amongst individuals rather than distributing welfare. However, contestation over the substance of equality has led to much splintering within the egalitarian camp. Some believe the good to be equalised should be called 'opportunity', others 'resources', others 'wealth and income', others 'capabilities' and yet others, like Rawls, advocate the fair distribution of basic primary goods within a society.

[61] MARX, K. (1875) Critique of the Gotha Program. IN TUCKER, R. C. (Ed.) *The Marx-Engels Reader 1978.* New York, W. W. Norton.

[62] Ibid.

An altogether different approach to considering justice is the comparativist approach recently proposed by Amartya Sen. In *The Idea of Justice*[63] Sen identifies two branches of the justice discourse of the Eighteenth Century Enlightenment period as a contractarian approach and a comparative approach. He then uses this distinction to reject a raft of theories he considers to fall into the former category. Amongst those he considers directly are the theories of Rawls[64] and also of Hobbes, Locke, Rousseau, Kant, and Nozick. He does so on the basis that their idealisation of the institutional arrangements for a society are so far removed from reality that, he argued, they are in fact redundant. Accordingly, we are on firmer ground with a comparative realisation-based approach relating to relative rather than absolute states of justice and injustice. Within this category Sen favours Smith, Condorcet, Wollstonecraft, Bentham, Marx, and Mill, as adopting comparative approaches to justice. Sen prefers the comparative approach on the basis that it goes "*well beyond the limited – and limiting – framework of social contract*" and "*can make a useful contribution*",[65] (that the contractarian approach cannot is implied). He adds *"practical concerns, no less than theoretical reasoning, seem to demand a fairly radical departure in the analysis of justice*".[66]

[63] SEN, A. (2009) *The idea of justice,* London, Allen Lane.

[64] See ibid. p xii. on Rawls' Justice as Fairness; "*In the approach to justice presented in this work, it is argued that there are some crucial inadequacies in this overpowering concentration on institutions (where behaviour is assumed to be appropriately compliant), rather than on the lives that people are able to lead. The focus on actual lives in the assessment of justice has many far-reaching implications for the nature and reach of the idea of justice*."

[65] Ibid. p xi.

[66] Ibid. p xii.

If a critique of Sen's theory were necessary, it would be on the grounds that he does not appear to operate the strictest of filing cabinets. In particular, I would reason that Marx clearly falls into the transcendental category, particularly in relation to his higher state of communism. The boundaries are also blurred for Rawls,[67] thus leading to the impression that what we are in fact presented with is a list of preferences. Sen's distinction becomes yet more problematic when he presents these two approaches (transcendental and comparative) as mutually exclusive for no apparent reason. The two approaches would seem to be operating compatibly within the universal human rights juggernaut. - A transcendental approach is offered in the ideal of universal human rights and a comparative approach applies to the framing of violations.

This thesis works from an egalitarian theory of justice to establish that 'just law' is law that pursues greater equality amongst individuals. There are several influences behind this starting point. Marx believed that egalitarianism would be the natural choice of society design in a higher state of communism.[68] Rawls, in his way, also believed that egalitarianism would be the natural choice of individuals were they to choose from behind a veil of ignorance.[69] Furthermore, Thomas Franck's presentation of Rawlsian 'neo-egalitarianism' almost as a 'third-way' counter-poised between two countervailing theories of fairness, (typically framed as communism and libertarianism,) is particularly

[67] For example the Difference Principle could be both comparative and transcendental.

[68] MARX, K. (1875) Critique of the Gotha Program. IN TUCKER, R. C. (Ed.) *The Marx-Engels Reader 1978.* New York, W. W. Norton.

[69] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, chapter Two.

compelling.[70] In the present day, egalitarianism would likely find its legitimisation through a contractarian theory of justice. In this respect, Rawls' *Theory of Justice* is a persuasive starting point. With this said however, it is only a starting point, and Rawls later attempted to extend his theory to the global level in *The Law of Peoples*.[71] There are, however, several shortcomings in this extension.

4.1. Rawlsian Justice as Distributive Justice

The contemporary discourse on global justice may be considered as stemming from Rawls' revival of social contract ideas favoured by the enlightenment thinkers, Rousseau,[72] Hobbes,[73] and Locke[74] in *A Theory of Justice* in 1973. Rawls established justice as a product of institutional arrangements within a state and set out principles to govern justice amongst a group of individuals. Rawls described 'justice' as the first virtue of social institutions and argued that *"laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."*[75] According to Rawls, the most reasonable principles of justice are those which would be the object of mutual

[70] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press, p 21.

[71] RAWLS, J. (1999a) *The law of peoples : with "The idea of public reason revisited"*, Cambridge, Mass. ; London, Harvard University Press.

[72] ROUSSEAU, J.-J. (1762) *Du Contrat Social; ou, principes du droit politique*, Amsterdam.

[73] HOBBES, T., MARTINICH, A. P. & BATTISTE, B. (2011) *Leviathan. Parts I and II*, Peterborough, Ont., Broadview ; London : Eurospan [distributor].

[74] LOCKE, J. & LASLETT, P. (1988) *Two treatises of government*, Cambridge, Cambridge University Press. (Originally published 1690.)

[75] RAWLS, J. (1971) *A Theory of Justice*, (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 3.

agreement by persons under fair conditions. He depicted justice as fairness, and therefore not as freedom.

Rawls proposes that it is possible to predict the principles or the terms of the social contract which individuals would choose if they were designing the principles that were to govern society from a position of ignorance. He describes the hypothetical situation whereby individuals have no knowledge of their situation or status within society as the 'Original Position'. These principles are:

> *"First: (1) Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.*
> *Second: (2) Social and economic inequalities are to be arranged so that they are both (2a) reasonably expected to be to everyone's advantage, and (2b) attached to positions and offices open to all."*[76]

These principles have been interpreted as an ideal social contract. Rawls claims that this is the configuration of social principles that individuals would choose were they behind a 'veil of ignorance', where they are ignorant as to their social advantages and disadvantages.[77] On this basis, he reasons that they represent the fairest basis for society. A common criticism levelled against Rawls' formula for justice is that it is impossible to generalise about

[76] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 60.

[77] "*They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established*." RAWLS, J. (1971) *A Theory of Justice*, (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 11.

individuals' choices and therefore these reasoned principles do not accurately represent the complexities of human nature.[78] In addition, there has been much elaboration as to the procedural application of these principles, in particular whether they would be applied in a liberal or a democratic manner.[79]

Despite its imperfections, Rawls' theory does present an ideal of justice which satisfies moral considerations of 'fairness' on several levels. It is important to point out that Rawls' principles are concerned with the substantive elements of the construction of society, under ideal conditions; he does not claim that such ideal conditions could be achieved in reality. At the substantive level, what is of direct relevance for theories of global justice is the first part of the second principle; (2) social and economic inequalities are to be arranged so that they are (2a) reasonably expected to be to everyone's advantage. In addition, it is possible to conceive the rest of Rawls' principles, ((1) each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others, and (2b), social and economic inequalities are to be arranged so that they are attached to positions and offices open to all,) as principles of distributive justice. Principle (1) addresses the distribution of basic liberties, whilst principle (2b) addresses the distribution of opportunities. Rawls' *Justice as Fairness* is therefore essentially a theory of *distributive justice.*

[78] In particular the human propensity or at least temptation to gamble has been identified as rendering Rawls' configuration as far from obvious. See for example BARRY, B. (1973) *The liberal theory of justice : a critical examination of the principal doctrines in 'A theory of justice' by John Rawls,* Oxford, Clarendon Press., at p 96 and p 230 .

[79] See MARNEFFE, P. D. (1994) Contractualism, Liberty, and Democracy. *Ethics,* 104, pp 764-783.

That said, the Rawlsian theory of justice differs from theories of strict equality and has been criticised from within the Egalitarian camp for falling short of a design for absolute equality. Rawls' approach allows for some inequality within society and differs from egalitarianism in that his first concern is about the absolute position of the least advantaged group rather than their relative position. The Difference Principle prescribes inequality up to the point where the absolute position of the least advantaged can no longer be raised. Rawls' first principle; "*each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others,"* takes priority over the second principle; "*social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."* An element of strict equality can be perceived from his reasoning that a certain level of equality in basic freedoms must be achieved before relative inequalities are addressed.

This is an important starting point for consideration of an emerging international obligation to trade fairly. Such an obligation would be bound to ensure that a certain level of equality is respected by respecting minimum human rights standards. However, Rawls' *Justice as Fairness* is confined to justice within states. If justice is considered to be, if not *the*, at least *an* objective of law, applying Rawls' *Justice as Fairness* to international law would presumably lead to 'global justice'. This would entail one of two things, either 'persons' in Rawls' maxim are replaced with 'states' and distribution of resources is distributed between states or the artificial 'veil' of states is

removed so that the same principles apply between all individuals in 'global society'. Yet the extension to the international level made by Rawls in *The Law of Peoples*[80] does not follow either of these routes. The form that Rawls' extension does take has been contested on several levels as will be discussed below.

4.2. Extension to the Global

Given the influence of his domestic theory, many were hoping that Rawls would offer a direct extension of the same principles to the global level. Rather than the commitment to pragmatic idealism which characterised the domestic theory, when Rawls published his treatise on global justice in *The Law of Peoples* some twenty-eight years after the publication of *A Theory of Justice* it was a compromise with realism. Rather than entailing the distribution of freedom amongst individual agents, justice at the international level, according to Rawls, depends on the application of the following eight principles:

- *"Peoples are free and independent, and their freedom and independence are to be respected by other peoples.*
- *Peoples are to observe treaties and undertakings.*
- *Peoples are equal and are parties to the agreements that bind them.*
- *Peoples are to observe the duty of non-intervention (except to address grave violations of human rights).*
- *Peoples have a right of self-defence, but no right to instigate war for reasons other than self-defence.*
- *Peoples are to honour human rights.*

[80] RAWLS, J. (1999a) *The law of peoples : with "The idea of public reason revisited"*, Cambridge, Mass.; London, Harvard University Press.

- *Peoples are to observe certain specified restrictions in the conduct of war.*
- *Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime."*[81]

This rule-based approach marks a significant departure from the principle-based approach to domestic justice. Rather than offering a global theory which mirrored his original construct of justice, Rawls' list approach to principles of global justice adds little of note to existing international relations between states. In fact, it could be argued, it merely reflects international law as it exists at the start of the twenty-first century. Rawls' original maxim is therefore restricted to domestic justice and does not apply globally. Rawls extension to the global has been described as complementing his domestic theory of justice with an international theory of ethics rather than an international theory of justice by Pogge. Pogge elaborates on the distinction between *justice* and ethics as relating respectively to the distinction between *institutional* and interactional moral analysis.82 This distinction applies to the distinction between Rawls' domestic theory and his international theory of justice.

Rawls' domestic theory of justice is less concerned with the legitimacy of individual choices (morality), but more so with the legitimacy of the social system within which these choices are made (justice). It analyses what Rawls calls 'the basic structure of society', rather than simply the individual decisions

[81] Ibid. p 37.

[82] FØLLESDAL, A. & POGGE, T. W. M. (2005) *Real world justice : grounds, principles, human rights, and social institutions,* Dordrecht, Springer, p 5.

made as to the use of resources. In the domestic sphere, principles of political morality govern the actions and setup of such social institutions as the government and the legal system. Rawls' international theory in *The Law of Peoples*[83] adopts an entirely different approach and skips over the question of structures of distribution. Instead Rawls offers a list of rules for conduct at the international level which appears rather to be based on how international law operates at present rather than how it might ideally be.[84]

If Rawls' extension to the global were a true extension of his theory of justice at the domestic level, replacing individuals with states and keeping all else equal, it would have provided the ethical rationale and structure for an international obligation to trade fairly. However, Rawls prefers to treat international law as several domestic constitutions interacting. He writes: "*Equal peoples, or their representatives, are equal parties at the level of the Law of Peoples*."[85] He envisages a future world society as composed of federations of 'decent hierarchical societies' interlocked with global institutions, such as the United Nations governing shared goals.[86] In this respect, Rawls' theory of global justice would seem to suffer from an over-reliance on the out-dated construct of state centricity.

[83] Ibid.

[84] Ibid. p 37.

[85] RAWLS, J. (1999a) *The law of peoples : with "The idea of public reason revisited"*, Cambridge, Mass. ; London, Harvard University Press, p 70.

[86] Ibid. p 70.

4.3. Detractors of the Global Original Position

Rawls extension to the international in the Global Original Position has received criticism from non-Egalitarians too. Rawls' Harvard colleague, Robert Nozick, grounds his criticism of Rawls theory in a theory of ownership. Nozick appears to suffer from what I would term 'colonialism denial' and an unfathomable faith in the 'voluntary' nature of contractual relationships. According to Nozick the world is initially un-owned and becomes private property by legitimate acts of initial acquisition. Yet what constitutes legitimate acts of initial acquisition to Nozick is not clear. Throughout history initial acquisition has been achieved through force, not through justice. Nozick's theory is a variant of Locke's in his *Second Treatise of Government*,[87] and typical of the Libertarian tradition discussed above.

On the grounds that 'laissez faire' institutions are natural whilst distributive institutions place great demands on the diligent and the gifted, Nozick argues that only where unanimous consent is reached should an institution adopt a Rawlsian distributive scheme. If some object, we should stick to libertarianism where each individual is free to maximise his or her personal wealth.[88] A key contention typically shared by libertarians and voiced by Nozick, is that redistribution involves appropriating the actions of persons.[89] It is possible to

[87] LOCKE, J. & LASLETT, P. (1988) *Two treatises of government*, Cambridge, Cambridge University Press. (Originally published 1690.)

[88] NOZICK, R. (1974) *Anarchy, state, and utopia*, Oxford, Blackwell. At pp. 167-74, 198–204, 280-92.

[89] Ibid. p 172. "*Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big social pot so that it's not*

counter the Libertarian objection by referring to Rawls' notion of basic liberties as a definitive list of primary goods. This list includes; the freedoms of thought, conscience, and association; the freedoms specified by the liberty and integrity of the person, including freedom of movement and the right to hold personal property; the rights and liberties covered by the rule of law, such as freedom from arbitrary arrest and seizure; and political liberty, including the right to vote and be eligible for office together with freedom of speech and assembly.[90] Rawls thereby specifies what should be subject to distribution and in doing so avoids the issue of pecuniary re-distribution that troubles Nozick.

In *The Idea of Justice*,[91] Sen reasons that the transcendental approach to justice adopted by Rawls suffers from feasibility and redundancy; even if we were to agree on the arrangements of an ideal state of justice (which, he argues, is highly unfeasible with or without Rawls' Original Position,) it would not be of much use to our present reality in the absence of a sovereign global state.[92] Sen prefers Thomas Nagel's proposition of 'minimal humanitarian morality' and long-term strategies for radical change in institutional arrangements to Rawls' idealisation of justice. Nagel's theory also bears clear implications for global institutions but shifts the focus from a traditional theory of fairness to the

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clear what's coming from where and what's going where, patterned principles of distributive justice involve appropriating the actions of other persons."

[90] See MARNEFFE, P. D. (1994) Contractualism, Liberty, and Democracy. *Ethics,* 104**,** 764-783, p 773.

[91] SEN, A. (2009) *The idea of justice,* London, Allen Lane.

[92] Ibid. pp. 9, 25.

identification and minimisation of clear atrocities.[93] Whether they are fully acknowledged or not, clearly we already have in the UN an institution which alludes to global society and the issue of global governance is far from hypothetical. Structural change is essential.

4.4. Institutions as Instruments of Justice

Rawls does not deny the existence of relations or interdependencies between individuals and peoples internationally, although he is clear in defining the parameters of 'justice'. Rawls makes the distinction between justice and morality; justice is presented as the preserve of institutions, while morality is concerned with the conduct and character of individuals. Rawls, like most Contractarians, presents justice as the first motive of social institutions and his theory of fairness is intended to provide a philosophical basis for the policies and decisions of democratic institutions.[94] According to Rawls, the primary subject of his theory should be the "*major social institutions who distribute fundamental rights and duties and determine the division of advantages from social cooperation.*"[95] He lists *"competitive markets"* along with "*the legal*

[93] See NAGEL, T. (2005) The Problem of Global Justice. *Journal of Philosophy and Public Affairs,* - where it is argued that Global Justice is not viable at this time. See also NAGEL, T. (2010) The Problem of Global Justice. IN BROWN, G. W. & HELD, D. (Eds.) *The Cosmopolitianism Reader.* Polity Press, p.394: "*If Hobbes is right, the idea of global justice without a world government is a chimera. If Rawls is right, perhaps there can be something that might be called justice or injustice in the relations between states but it bears only a distant relation to the evaluation of societies themselves as just or unjust; for the most part the ideal of a just world for Rawls would have to be the ideal of a world of internally just states*."

[94] RAWLS, J. & KELLY, E. (2001) *Justice as fairness : a restatement,* Cambridge, Mass. ; London, Belknap.

[95] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 8.

protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family" as examples of major social institutions.[96] If competitive markets are to be subject to Rawls' theory, this would indicate that an obligation to not exploit through trade and to address disadvantage through trade could be a natural outcome of Rawls theory. Yet, Rawls' international theory does not contain the principle of distributive justice present in the original theory.

Rawls addresses the fact that these institutions have the power to define men and women's 'rights' and duties as well as their life prospects. Rawls therefore claims; "*The basic structure is the primary subject of justice because its effects are so profound and present from the start."*[97] He highlights that the institutions of society favour certain starting places in life over others resulting in *"especially deep inequalities"*.[98] On this basis he advocates that his principles must apply to "*these inequalities, presumably inevitable in the basic structure of any society."*[99] In *The Law of Peoples,* Rawls alludes to the authority of organisations "*such as the UN ideally conceived,*" to condemn

[96] See RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 57. Continues on institutions: *"Now by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities and the like."*

[97] RAWLS, J. (1971) *A Theory of Justice,* (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press, p 7.

[98] Ibid.

[99] Ibid.

unjust domestic institutions in other countries and clear cases of the violation of human rights through humanitarian intervention and economic sanctions.[100]

Rawls does not prescribe certain ideological boundaries on the nature of those institutions, - unlike Hayek for example, who maintains that market freedom is incompatible with social distribution.[101] Whether what Rawls envisages is akin to liberal capitalism or socialism is left open; instead he claims; *"various basic structures would appear to satisfy its [his theory's] principles.*"[102] However, certain limitations on the basic structure do arise from its social contract basis. Rawls considers these to be the priority of justice over efficiency and the priority of liberty over social and economic advantages,[103] although they are open to interpretation, as will be considered below.

5. Global Distributive Justice

As a result of choosing the list strategy, Rawls' extension in *The Laws of Peoples* effectively misses out a principle of global distribution.[104] The difference in approach between Rawls domestic and international theories arguably stems from his treatment of justice within societies and justice

[100] RAWLS, J. (1999a) *The law of peoples : with "The idea of public reason revisited"*, Cambridge, Mass. ; London, Harvard University Press, p 36.

[101] HAYEK, F. A. V. (1973) *Law, legislation and liberty. A new statement of the liberal principles of justice and political economy*, London: Routledge & Kegan Paul.

[102] RAWLS, J. (1971) *A Theory of Justice*, (Original ed.) Cambridge, Mass., Belknap Press of Harvard University Press. At section 4.1.Justice in Political Economy.

[103] Ibid.

[104] Pogge agrees: "*Rawls law of peoples contains no egalitarian distributive principle of any sort*." In POGGE, T. W. (1994) An Egalitarian Law of Peoples. *Philosophy and Public Affairs*, 23**,** 195-224.

between societies. Rawls' definition of society does not accommodate the idea of non-geographically based societies, nor does it depict societies not represented by a state. Buchanan, for one, attributes this to Rawls' reliance on out-dated Westphalian assumptions about international law.[105] The two fundamental assumptions assume that states are (1) more or less economically self-sufficient units which are also distributionally autonomous and (2) politically homogeneous, unified actors, without internal political differentiation. Rawls does not conceptualise societies beyond being territorially-based and consequently cannot see beyond the confines of the state. Yet, as pointed out earlier, a conceptualisation of a one world society is not necessary for the application of his principles to the global level. Indeed, he could have applied the principles of *Justice as Fairness* to relations between states. Although he recognises the existence of global institutionalism in the form of the UN,[106] the idea of global society is absent from his vision. This is embodied in and compounded by his different treatment of domestic and international institutions.

Should these definitions of society and institutions evolve to consider non-geographically bound societies and institutions, the outcome would be the rationalisation of what are the implications for egalitarian justice? According to Rawls' theory it would start with a levelling of basic liberties, followed by alleviation of the most disadvantaged peoples out of absolute situations of

[105] BUCHANAN, A. (2000) Rawls's Law of Peoples: Rules for a Vanished Westphalian World. *Ethics*, 110, 697-72, p 703.

[106] RAWLS, J. (1999a) *The law of peoples : with "The idea of public reason revisited"*, Cambridge, Mass.; London, Harvard University Press, p 36.

inequality. Rawls does not seek absolute global equality but instead intends for the two principles to apply to the basic structure of a national society, and then for those parties to reconvene for a second session to deal with the relations among such societies.[107] His principles apply to states rather than individuals at the global level. Through confinement to territorially-based societies in his theory, Rawls places considerable limitations on the scope of distributive justice which he conceives as occurring within and between societies rather than between individuals. This has not prevented others, such as Thomas Pogge, Charles Beitz, David Richards, Thomas Scanlon, and Brian Barry from advocating an alternative, individual-centred strategy, which starts with a Global Original Position that transcends state borders to address relations between individuals of different nationality.

5.1. Global Society

In *Realizing Rawls*,[108] Pogge picks up the baton where Rawls dropped it at the intersection of the national and international and advocates a conception of global justice based on Rawls original theory, *Justice as Fairness*. Pogge justifies this extension by the "*realisation that the traditional conception of the world of international relations as inhabited by only states is*

[107] POGGE, T. W. (1994) An Egalitarian Law of Peoples. *Philosophy and Public Affairs*, 23**,** 195-224, p 197. Continues; "*Another main strategy is to start with a global original position that deals with the world at large, even asking, as Rawls puts it (somewhat incredulously?), "whether and in what form, there should be states or peoples at all" Variants of this second strategy have been entertained by David Richards, Thomas Scanlon, Brian Barry, Charles Beitz, and myself (Pogge)."* Citing RAWLS, J. (1999a) *The law of peoples : with "The idea of public reason revisited"*, Cambridge, Mass. ; London, Harvard University Press, p 50.

[108] POGGE, T. W. M. (1989) *Realizing Rawls*, Ithaca, N. Y. ; London, Cornell University Press.

unsatisfactory".[109] Moreover, he argues that it never has been adequate.[110] He suggests that to imbue national boundaries with any moral significance would be wrong. Setting aside the evident complexities of establishing the ideal components of states operating as unified peoples each with one interest in justice, Pogge finds that Rawls' extension to the global level is problematic in substance. He suggests that Rawls may have been "*misled by an unrecognised presumption that a laissez faire global economic order is the natural or neutral benchmark which the delegates would endorse unless they have definite reasons to depart from it*."[111] He describes Rawls' discussion of a global difference principle as peculiar in that Rawls treats the Justice as Fairness maxim as a principle of redistribution, which is too onerous an obligation to impose on hierarchical societies. Pogge, on the other hand, considers *Justice as Fairness* as a model for the design of institutions at the domestic level that could be directly applied to institutions at the global level.[112]

Pogge's critique that state-centricity has no grounding in morality is shared by Beitz. Beitz argues that state boundaries do not set the scope of social

[109] POGGE, T. W. M. (2010) *Politics as usual : what lies behind the pro-poor rhetoric*, Cambridge, Polity, p 17.

[110] POGGE, T. W. M. (2010) *Politics as usual : what lies behind the pro-poor rhetoric*, Cambridge, Polity, p 18.

[111] POGGE, T. W. (1994) An Egalitarian Law of Peoples. *Philosophy and Public Affairs*, 23**,** 195-224*,* p 212.

[112] Ibid. p 212: *"[T]here are countless ways of designing economic institutions, none initially privileged, of which one and only one will be implemented. The Difference Principle selects the scheme that ought to be chosen. The selected economic ground rules, whatever their content, do not redistribute, but rather govern how economic benefits and burdens get distributed in the first place."*

cooperation nor do they mark the limits of social obligation.[113] This, he reasons, follows from evidence of global economic and political interdependence supporting the existence of a global scheme of social cooperation. From this vantage point, an added dimension to Rawls' Original Position is ignorance as to nationality; "*The veil of ignorance must extend to all matters of national citizenship, and the principles chosen will therefore apply globally*." [114] Essentially Pogge and Beitz agree that as trade and other forms of social cooperation between individuals do not respect the confines of the state, neither should Rawls' Difference Principle. The Difference Principle should therefore be applied to the set of persons in the world as a whole. If global institutions were to be established in response to the expectations of all people in the Original Position it would lead to an obligation to assist the globally worst-off.[115]

5.2. Global Institutions

In support of the application of the Difference Principle to the global level, Pogge makes the key distinction between *interactional* and *institutional* approaches to justice, as already described.[116] According to this distinction, an

[113] BEITZ, C. R. (1979) *Political theory and international relations,* Princeton ; Guildford, Princeton University Press, p 151.

[114] Ibid. p 151.

[115] Ibid.

[116] "*We can begin with two distinctions. The first is between two different ways of looking at the events of our social world. On the one hand, we can see such events interactionally: as actions, and effects of actions performed by individual and collective agents. On the other hand, we can see them institutionally: as effects of how our social world is structured — of our laws and conventions, practices and social institutions. These two ways of viewing entail different descriptions and explanations of social phenomena, and they also lead to two different kinds of*

interactional approach understands international law (and more generally, the world,) as constituted by actions performed by individuals and nation states. An institutionalist approach, on the other hand, places greater significance on the structural arrangements from which given situations and relationships and events arise. The global distributive justice paradigm advocated by Pogge seeks to extend institutional moral analysis to the realm of international law, and therefore critically assess the constitutive rules of international law against a universal sense of justice.

Rawls makes reference to the UN at various stages in the Law of Peoples, although the global institutional arrangements are far more extensive than his depiction suggests. In terms of the components of the global institutionalism, Buchanan identifies the 'global basic structure' as being composed of: Regional and international economic agreements (including General Agreement on Tariffs and Trade, North American Free Trade Agreement, and various European Union treaties); international financial regimes (including the International Monetary Fund, the World Bank and various treaties governing currency exchange mechanisms); an increasingly global system of private property rights, including intellectual property rights which are of growing importance as technology spreads across the globe; and a set of international and regional legal institutions and agencies which play an important role in determining the character of all of the proceeding elements of the global basic

moral analysis or moral diagnostics." In lecture by POGGE, T. W. (11 September 2003) What is Global Justice? University of Oslo.

structure.[117] The concept of competitive markets, which Rawls describes as a major social institution at the domestic level, is omitted in his treatment of the international level.

Support for an extension of the Difference Principle to global institutions comes from Singer's work on the moral legitimacy of famine. According to Singer, principles of global justice arise from our capacity to deliver justice globally. Singer's argument begins with two premises. Firstly, "*suffering and death from lack of food, shelter, and medical care are bad."* Secondly, "*if it is within our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it."*[118] Singer's theory seeks to reconsider personal morality in light of globalisation. As legal structures rather than personal morality are the focus of this thesis, it does not serve my purpose to discuss Singer's theory and his detractors[119] at length. It is however important to mention that the concept of increased capacity for personal morality which Singer introduced to political philosophy in the 1970s may bear relevance in terms of the demands of

[117] BUCHANAN, A. (2000) Rawls's Law of Peoples: Rules for a Vanished Westphalian World. *Ethics,* 110**,** 697-721, p 706. Continues: "*The chief point is that, like a domestic global structure, the global basic structure in part determines the prospects not only of individuals but of groups, including peoples in Rawls's sense. It is therefore unjustifiable to ignore the global basic structure in a moral theory of international law – to proceed either as if societies are economically self-sufficient and distributionally autonomous (so long as they are well governed) or as if whatever distributional effects the global structure has are equitable and hence not in need of being addressed by a theory of international distributive justice*."

[118] SINGER, P. (1972) Famine, Affluence and Morality. *Philosophy and Public Affairs,* 1**,** 229-243.

[119] UNGER, P. (1996) *Living high and letting die: Our Illusion of Innocence,* Oxford, Oxford University Press.

individuals on their global institutions. International social cooperation and economic interdependence imply that states cannot escape the social or moral expectations placed upon them by their own citizens when operating beyond what Singer terms their 'national political community'. Arguably, states have obligations both towards and emanating from global civil society deriving from 'capacity' as well as from legitimacy in that political communities are no longer bound by state borders, indeed, if they ever were.

5.3. Global Justice Detractors

The extension of 'Justice as Fairness' from the domestic to the global has not been without its critics. In particular, the extension has been contested on the basis that there is no Global Original Position on the grounds that there is no system of world government for the principle to apply to.[120] Clearly there are grave inadequacies within our existing system of global institutionalism, although it would seem difficult to deny its existence purely because of those inadequacies. Whilst the extension of the contractarian approach to the global is typically portrayed as unachievable due to the lack of a shared understanding of justice, we may in fact be closer to its realisation than we think. The nature of nationality is changing and indeed rapidly crumbling, with a growing sense of global citizenship taking hold in its place.

Moreover, the network of international law, not to mention the plethora of global institutions working towards common ends, would seem to evidence the emergence of a social contract at the global level. As Beitz points out: "*[A]*

[120] For example, NOZICK, R. (1974) *Anarchy, state, and utopia*, Oxford, Blackwell.

strong case can be made on contractarian grounds that persons of diverse citizenship have distributive obligations to one another analogous to those of citizens of the same state."[121] As citizenship and nationality become increasingly fluid so too should our principles of social justice. The existence of a global community finds support in Thomas Franck's work on *Fairness in International Law and Institutions.*[122] Franck refers to *"an acknowledged and rapidly growing global sense of community"* and comments that, *"Rawls may simply be wrong."*[123]

For others the move to global civil society on the basis of economic interdependence is deeply flawed. Brian Barry responds to Beitz's theory on the grounds that trade is not an amenable vehicle of social cooperation and it never has been. He cites the Beaker Folk and the Spice Trade as evidence that trade, historically speaking, has not given rise to duties of 'fair play'.[124] Barry's critique risks simply expounding the prioritisation of individual freedom implicit in libertarianism. The historical division between the economic and social cannot be so easily separated as Barry suggests. Modern realities show

[121] BEITZ, C. R. (1999) *Political theory and international relations,* Princeton, NJ, Princeton University Press. See also BEITZ, C. R. & GOODIN, R. E. (2009) *Global basic rights,* Oxford, Oxford University Press. and BEITZ, C. R. (2009) *The idea of human rights,* Oxford, Oxford University Press.

[122] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press.

[123] Ibid. p 19. Continues "*there is an acknowledged and rapidly growing global sense of community. Within its precincts, legitimate processes have been established which actively facilitate, indeed require, fairness discourse among states, including considerations of distributive justice."*

[124] BARRY, B. (2006) Chapter 48: Humanity and Justice in Global Perspective. IN GOODWIN, R. E. & PETTIT, P. (Eds.) *Contemporary Political Philosophy: An Anthology*. 2nd ed., Blackwell Pubs.

that societies seek to bridge the two.[125] The growing consensus to address global inequality expressed through social movements gives renewed legitimacy to principles of distributive justice. [126]

The gap between direct application of Rawls' *Justice as Fairness* to the international level and the framework Rawls offered for international law therefore marks an important junction in global justice theory. The divide between the state-centred approach advocated by Rawls and the individual-centred approach advocated by Pogge and Beitz highlights a key contradiction within international law. Whilst international law maintains a shop-front of equal sovereign states, the real decisions are made within a plurality of political structures and institutions. This is what Kuper calls "*a plural nesting of political structures*"[127] and Scholte, "*polycentric governance*".[128] Arguably, Rawls' restricted extension to the global level does more to highlight the limitations of the existing international order than to resolve them.

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[125] See further ibid. p 727. Barry contends that "*To the extent that we are inclined to think of the world as more of a cooperative enterprise now, this is, in my judgement, not because trade is more extensive or multilateral, but because there really are rudimentary organs of international cooperation in the form of United Nations agencies and such entities as the International Monetary Fund (IMF) and the World Bank. But the resulting relationships clearly fall short of those of mutual dependence found within* societies…"

[126] For discussion of what an adequate response requires see BEITZ, C. R. (1999) *Political theory and international relations,* Princeton, NJ, Princeton University Press, p.153.

[127] Kuper also maintains that Rawls disavows democratic rights at the global level. KUPER, A. (2000) Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons. *Political Theory,* 28, 640-674.

[128] SCHOLTE, J. A. (2004) *Globalization and governance : from statism to polycentrism,* Coventry, University of Warwick Centre for the Study of Globalisation and Regionalisation, KUPER, A. (2000) Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons. *Political Theory,* 28, 640-674.

Although it is beyond the remit of this thesis, relevant further research in this area could involve recourse to the varied jurisprudence of regional courts on equity.[129] For present purposes the following chapter considers the extent to which obligations towards distributive justice find expression in international treaty law, or whether they are, as Higgins suggests, only accessed through the door marked 'equity'.

6. The Content and Nature of an International Obligation to Trade Fairly

The preceding elaboration of theories of justice helps build a legitimate basis for ethical obligations in trade. The legal basis for an obligation to trade fairly can be derived from the principle of fairness in international law, which Franck described as composed of procedural and substantive aspects that find expression in processes of democracy and distributive justice. This is supported by an ethical basis for an obligation to trade fairly as an obligation to trade in a manner which does not impede processes of democracy and distributive justice between individuals and the state, based on Rawls' contractarian theory of justice as fairness.

Rawls' theory of justice offers parameters for democracy and distributive justice. According to Rawls, the most reasonable principles of justice are those which would be the object of mutual agreement by persons under fair

[129] See SKOGLY, S. (2006) *Beyond national borders : states' human rights obligations in international cooperation*, Antwerpen, Intersentia ; Oxford : Hart Pub., pp 29-32 and Chapter Seven.

conditions (democracy) and where social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (distributive justice). The human rights framework can be considered to follow a similar framework, the *International Covenant on Civil and Political Rights (ICCPR)* is concerned with democracy and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* is concerned with distributive justice. Yet there is much more to establish in relation to the extent of the obligation and the bearers of the obligation, as chapter 4 and 5 will develop.

Proponents of procedural and substantive fairness in international law have traditionally argued that these processes ought to be the responsibility of states towards their own citizens. This premise rests on the presumption that states only operate horizontally between states, rather than diagonally between states and foreign citizens. It is argued that processes of global economic interdependence have diminished the capacity of the state to install and protect processes of democracy and distribution without creating effective alternative avenues and agents for these processes. The central obstacles concerning the proposed obligation relate to the *subject* of the obligation and the *normative force* of the obligation, as chapters 4, 5, 6 and 7 will explore.

7. Conclusion

In order to substantiate the content of an international obligation to trade 'fairly', this chapter has sought to offer a definition of fairness based on the general principles of international law and on theories of justice. The need for

greater definition of fairness at the international level is underlined by Thomas Franck, who considered that there are both the necessary institutions in place to apply processes of fairness and a global society in place to instil legitimacy into those processes. It is argued that fairness is best reconciled with an egalitarian theory of justice, and furthermore that an egalitarian theory of justice is, in terms of democracy, the most just. Rawls' *Justice as Fairness* describes how societies ought to be structured to ensure fairness, (following a democratic principle and a distributive principle). Rawls' theory is confined to relationships within societies and does not extend to those between societies. Instead, Pogge's and Beitz's extensions to the global are relied upon to depict justice as fairness at the global level. It is argued that insistence on the state-centric model of justice does not respond to the problems created by global economic interdependence. The extent to which global civil society has initiated processes of democracy and distributive justice at the global level and how these processes have been integrated into national and international law is the subject of the next chapter.

Chapter 3: Historical Integration of 'Fairness' into International Law

1. Introduction

This chapter presents examples of the integration of fairness in international law historically. Key moments of law reform driven by ethics rather than economics occurred during what Koskenniemi terms the 'heroic period' of international law.[130] It is possible to trace this humanitarian impulse, what Falk terms 'the law of humanity',[131] through legal developments prior to the human rights movement and up to the present day. This chapter presents the progressive successes of the strand of global distributive justice movements concerned with labour (- the Abolitionist movement, labour rights movement and ethical consumerism) in achieving change and codification within international law. The chapter looks at how these movements have catalyzed

[130] Koskenniemi uses this term to describe the efforts of French and German lawyers in the period between 1879 and 1939 in KOSKENNIEMI, M. (2001) *The gentle civilizer of nations : the rise and fall of international law, 1870-1960,* New York, Cambridge University Press. See for example at p. 3, Koskenniemi explains that "*The attempt to imagine international law either as a philosophy or a science of the development of societies that was pursued with energy in Germany and France during the first half of the twentieth century failed to produce or even support viable policies and collapsed with the inter-war world in 1939. The profession never really recovered from the war. It was instead both depoliticised and marginalised, as graphically illustrated by its absence from the arenas of today's globalisation struggles, or turned into a technical instrument for the advancement of the agendas of powerful interests or actors in the world scene. As a sensibility, it was compelled to fight nostalgia, cynicism, or both*."

[131] FALK, R. A. (1998) *Law in an emerging global village : a post-Westphalian perspective,* Ardsley, NY, Transnational Publishers.

the evolution of state and corporate obligations and more specifically, the extension of the obligations owed by states to their own citizens to obligations owed by states to individuals regardless of nationality. Latterly this chapter considers the extent to which the human rights framework and the Fairtrade movement serve as avenues for democracy and distributive justice between individuals and corporations, thereby, bypassing the state. The chapter concludes that as of yet neither movement potentiates the universal application of the proposed international obligation to trade fairly.

2. Distributive Justice Movements as Engines of Fairness

Social movements have naturally acted as redistributive counter movements challenging the hierarchies found both within and between states throughout history. Distributive justice movements hold the potential to restructure international relations by aligning themselves with the demands of the under-represented, - most commonly, developing states and the poor in general. Chimni argues that; "*in the face of unequal power, it is left to social movements and concerned NGOs to demand transparency, accountability and responsiveness from states and global agencies."*[132]

Like corporations, from the outset it would appear that social movements may generate a normative impact on law-making in both tangible and intangible ways, i.e. through generating a change in the letter of the law (generating rules)

[132] CHIMNI, B. S. (2005) Cooption and Resistance: Two Faces of Global Administrative Law. *International Law and Politics,* 37**,** 799-827, p 801.

or by influencing social norms (embodying principles).[133] This impact bears considerable significance in areas that appear to be beyond the reach of law or regulation, for example in the area of corporate compliance with human rights and environmental norms. This chapter identifies some of the legislative processes which, triggered by social movements, have generated global processes of distributive justice and democracy across borders and between individuals.

2.1. The Abolitionist Movement

The Abolitionist Movement stands as a landmark in the evolution of the relationship between social movements and international law. Growing social awareness has contributed to the contestations of slavery in various economic, social, political, philosophical, moral and religious contexts from the nineteenth century. This growing social protest within Europe and the US ultimately led to changes in the law that would fundamentally impact on the structure of relationships between individuals. The development of legislation outlawing slavery demonstrates the spread of the definition of the activity to be outlawed and the geographical scope of the moral consensus. The earliest recorded legal statements against slavery were concerned with the slave trade rather than the use of slaves, and were restricted to nation states, namely Britain and the USA. In the UK, court judgments preceded the enacted of an Act of Parliament outlawing the trade of slaves in 1807.[134] In the US, federal

[133] For examples see COHEN, R. & RAI, S. (2000) *Global social movements,* London; New Brunswick, NJ, Athlone Press.

[134] UK *Slave Trade Act 1807*, 47 Geo III Sess. 1 c. 36

states started to abolish slavery[135] and the Supreme Court judgments condemned slavery[136] ahead of the nation-wide outlawing through the *Thirteenth Amendment to the Constitution in 1865*.[137] Subsequently, in 1833, slavery was abolished in the British Colonies.[138] Beyond this series of localised abolitions, global consensus took longer to achieve. It was not until 1926 that international legislation appeared in the form of the *League of Nations' 1926 Slavery Convention*.[139] This was later followed by the *1953 Protocol Amending the Slavery Convention*[140] and the *1956 Supplementary Convention*.[141]

The *1926 Slavery Convention* covered 'slavery', 'the slave trade', 'forced labour' and 'the slave trade at sea'. Of these, 'forced labour' was the most

[135] For example the *Vermont Constitution of 1777* in its Declaration fo Rights of Inhabitants of Vermont.Pennsylvania and Rhode Island also enacted statutes for the 'gradual abolition of slavery' in 1780 and 1784 respectively.

[136] For a discussion of early decisions of the United States Supreme out relating to slavery, see ROPER (1969) In Quest of Juridicial Objectivity: The Marshall Court and the Legitimation of Slavery. *Stanford Law Review*, 21 (532).

[137] US *Thirteenth Amendment to the Constitution* adopted in 1865.

[138] *An Act for the Abolition of Slavery throughout the British colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the services of such Slaves.* 3 & 4 Will. 4, c. 73 (1833).

[139] *Convention to Suppress the Slave Trade and Slavery, 1926,* League of Nations treaty series.

[140] *Protocol amending the Slavery Convention*, 182 U.N.T.S. 51, entered into force December 7, 1953.

[141] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956,* 226 UNTS 3. See further: "*Both the Slavery Convention and the Supplementary Convention emerge from provisions first proposed by the United Kingdom which, during the first half of the twentieth century , maintained the lead role it had played during the totality of nineteenth century where the abolition of slavery and the slave trade were concerned"*. From MIERS, S. (2002) *Slavery and antislavery in the twentieth century*, Lanham, Md. ; Oxford, England, Rowman & Littlefield, pps 127 and 128.

contentious, with many states reportedly reluctant to comply on this point.[142] The original seventy-seven signatories were later joined by states who have become party to the *1926 Slavery Convention* by way of consenting to the *1953 Protocol Amending the 1926 Slavery Convention*. As of February 2010, ninety-nine states had signed the *1926 Slavery Convention* whilst one hundred and twenty three states had signed the *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.*[143]

The abolition of slavery has had a significant impact on distributive justice and democracy within states by virtue of the fact that it set legal limits to the extent of exploitation by human beings over other human beings. It destroyed the legal foundations of the construct whereby human beings could own other human beings. The abolition of slavery directly governed relationships between individuals. This governance was imposed by states on its citizens in relation to the treatment of individuals regardless of nationality. It placed limits on ownership and in so doing placed limits on international trade. The codification of growing moral consensus on slavery into an international covenant

[142] See LEAGUE OF NATIONS, 'Questions of Slavery: Report of the Sixth Committee', *Resolution League of Nations Official Journal,* Special Supplement 33, Records of the Sixth Assembly: Text of Debates, Nineteenth Plenary Meeting, 26 September 1925. See further: ALLAIN, J. (2008) *The Slavery Conventions: The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention,* Leiden; Boston., Martinus Nijhoff Publishers, pp 156-157: "*In the end Article 5 (Forced Labor of the 1926 Convention) – the most controversial and most discussed provision during the drafting process was limited to gradually suppressing forced labour for private ends.*"

143 See the United Nations Treaty Collections online database on these treaties. Available at http://treaties.un.org/

represented a milestone for the integration of fairness in international law and for the notion of 'universality' of certain international law provisions.

2.2. The Growth of Labour Rights Movements

Many of the advances in labour standards were born of disparate struggles for labour rights mobilised through social movements.[144] This occurred at both the international level and at the national level, for example internationally at the 1999 Battle of Seattle protests outside the WTO and nationally through the movement for a living wage in the US.[145] These developments within labour law subsequently impacted on the structural relationships both within and between states. As labour law provides an infrastructure for the distribution of wealth it bears the potential to act as an agent of distributive justice within and between states. What is more, due to the commoditisation of labour on the international market, structural adjustment in this market bears the potential to redistribute wealth from developed to developing states.

The first instance of prohibition on child labour in the UK is believed to have been instigated by an individual mill owner, Robert Owen, who advocated that all countries should protect the new working classes from "*the causes which*

[144] See for example DAVIES, ACL. (2004) *Perspectives on Labour Law*, Cambridge University Press, p 176.

[145] Stephanie Luce details how new coalitions between labor unions and community groups have advanced the circumstances of working people by winning wage increases for workers. See in LUCE, S. 'The Fight for Living Wages', in SHEPARD, B. H. & HAYDUK, R. (2002) *From ACT UP to the WTO : urban protest and community building in the era of globalization*, London, Verso.

perpetually generate misery in human society".[146] His vision was that New Lanark should act as a model for reform in labour conditions across Europe and he lobbied the Concert of Europe to this effect, presenting two Memorials at the Congress of the Concert of Europe in 1818.[147] Britain's enactment a British Bill limiting the hours of children in cotton factories in 1819 has been described as "*the real beginning of industrial legislation*".[148] Peter Waterman and Jill Timms distill the growth of international labour movements into three periods of capitalism: Period 1, Early (largely European) craft and industrial capitalism, c. 1830s–1870s; Period 2, the mature industrial–national phase, c. 1880s–1970s, including the European periphery and parts of the (semi-) colonial world; and Period 3, the beginning of a globalised capitalism c. 1980s–today.[149] Hepple identifies that several key factors were instrumental in facilitating the spread of labour standards across states notably; the stage of economic development; the extension to liberal democracy; the character of national employers' and trade union movements; and significantly, the dominant ideology in each country.[150]

Efforts by western states to standardise international labour standards led to the

[146] See OWEN, R. (1818) *Two Memorials on behalf of the Working Classes; the first presented to the Governments of Europe and America, the second to the Allied Powers assembled ... at Aix-la-Chapelle*, London. Cited in HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications, p 25.

[147] Ibid.

[148] FOLLOWS, J. W. (1951) *Antecedents of the International Labour Organization*, Oxford, Clarendon Press.

[149] WATERMAN, P. & TIMMS, J. (2005) Chapter 8: Trade Union Internationalisation and a Global Civil Society in the Making. IN ANHEIER, H., GLASIUS, M. & KALDOR, M. (Eds.) *Global Civil Society 2004/5*. London, Sage publications, pp 175-202.

[150] See HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications.

creation of the ILO in 1919. As will be discussed in Chapter 6, the ILO's labour standards embody a balance between economic and ethical objectives.[151] Reference to the ILO's constitutional documents reveal that the ILO's labour standards originated from a quest for 'social justice' a priori, and, more generally, the moral consensus set by the Abolitionist Movement cannot be overlooked as the deontological predecessor of universal labor standards.[152] Resistance to the commodification of labour became integral to the ILO's objectives in 1944 when the 16th Annual Conference in 1944, adopted the *Declaration of Philadelphia* which was appended to the ILO's revised Constitution in substitution for the general 'methods and principles' of Article 427 of the *Versailles Treaty*. The *1919 ILO Constitution* set out three objectives of international standards; social justice, international peace and their regulation of international competition. The *1944 ILO Declaration* reaffirmed the 'fundamental principles' on which the ILO is based, in particular that:

- *Labour is not a commodity;*

[151] See further DAVIES, ACL. (2004*) Perspectives on Labour Law*, Cambridge University Press; ENGERMAN, S. L. (2003) History and political economy of international labour standards. IN K BASU, K., HORNE, H., ROMAN, L. & SHAPIRO, J. (Eds.) *International Labour Standards: History, Theories and Policy Options.* Blackwell; ALSTON, P. (2005) Facing up to the Complexities of the ILO's Core Labour Standards Agenda. *European Journal of International Law,* 16**,** 467-480; ALSTON, P. (2004) Core Labour Standards and the Transformation of the International Labour Rights Regime, *European Journal of International Law*, 15.

[152] Subsequently, the *International Bill of Human Rights* has unfolded to comprise many of the ILO labour standards, and much of the ILO's labour standards regime now constitutes codified international human rights obligations. On this basis, it is arguable that labour standards should be valued as rights and awarded that status see ALSTON, P., (ED), (2005b) *Labour Rights as Human Rights*, Oxford University Press. On the special status of rights see further: DWORKIN, R. (1985) *A Matter of Principle*, Harvard University Press.

- *Freedom of expression and of association are essential to sustained progress;*

- *Poverty anywhere constitutes a danger to prosperity everywhere*.[153]

Through the promotion of core labour standards, the ILO has sought to establish a "minimum floor of labour conditions." Recently however shifts have been made which represent a suppression of wider labour standards regime as will be discussed in Chapter 6. That the integration of fairness in international law has been subsequently suppressed in this area stands to demonstrate the significance of the obstacles to evolution of fairness norms within international law.

Paradoxically, some argue that labour movements have served to prevent global distributive justice, particularly in recent movements to maintain industry within developed states. Others have expressed fear that the overregulation of labour and the standardisation of labour practices have served to prevent developing states from benefiting from international labour as they lose the comparative advantage of lower labour standards.[154] Despite studies which suggest that limitations on core labour standards in export sectors of developing countries do not result in improved price competitiveness in the export market,[155] the fear of deterring investment is an important consideration in relation to 'non-compliance' with labour standards by developing states. The

[153] HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications.

[154] BHAGWATI, J. (1995) Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues. *The World Economy,* 18.

[155] MASKUS, KE, (2000) Should Core Labor Standards be Imposed through International Trade Policy, *World Bank, International Trade Division,*. See also IRWIN, D. A. (2009) *Free trade under fire,* Princeton, N.J. ; Woodstock, Princeton University Press.

financial implications of enforcing compliance are also viewed as a relevant factor, and there can be little doubt that some states were better resourced to enforce labour standards than others. Lack of global consensus on the extent of labour standards and lack of enforcement by states has led to a paradigm shift by the ILO in recent years.

A particularly significant aspect of the erosion of labour standards is in relation to the right to freedom of association and the effective recognition of the right to collective bargaining.[156] One of the most significant features of the ILO in respect of distributive justice was that it formally recognised trade unions as stakeholders at the international level. This provided a platform from which unions could express interests and convene internationally to challenge the suppressive practices of corporations.[157] As social movements have strengthened in their pursuit of distributive justice, the threat posed by globalisation has steadily increased. Gains made within the sphere of labour rights have come under persistent and direct attack from corporations. The sustained erosion of the right to freedom of assembly by corporations (in some

[156] Established under *ILO Convention No 87: Freedom of Association and Protection of the Right to Organise Convention, 1948* and *ILO Convention No 98: Right to Organise and Collective Bargaining Convention, 1949*. Freedom of Association is also enshrined in the *ILO Constitution (1919), the ILO Declaration of Philadelphia (1944),* and the *ILO Declaration on Fundamental Principles and Rights at Work (1998)* and proclaimed in the *Universal Declaration of Human Rights (1948)).*

[157] See for example, WINDMULLER, J. P., PURSEY, S. K. & BAKER, J. (2010) The International Trade Union Movement. IN BLANPAIN, R. (Ed.) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies.* 10th ed. Alphen aan den Rijn, Kluwer Law International Publications.. See also CROUCHER, R. & COTTON, E. (2011) *Global unions, global business : global union federations and international business,* Faringdon, Libri Pub.; O'BRIEN, R. (2000) Workers and world order: the tentative transformation of the international union movement. *Review of International Studies,* 26.

instances with state support)[158] provides an insight into the pressure point where demand for distributive justice can be suppressed. The ILO also reports a decrease in allegations concerning the denial of civil liberties since 1995, yet noted that the largest single category of allegations, both globally and by region, concerns acts of anti-union discrimination.[159]

What is astonishing is that as globalisation has increased, protection of labour standards has apparently decreased. Tilly, for one, attributes this inverse relationship to the concomitant decline of the state in the process of globalisation. He remarks that: "*As states decline, so do workers' rights".* [160] Also: *"No individual state will have the power to enforce workers' rights in the fluid world that is emerging".*[161] Cohen and Rai point out that the logic of Tilly's position would infer a *"defence of strengthening of the nation state if that is seen as the only way for workers' across the globe to retain or gain*

[158] See for example HUMAN RIGHTS WATCH (2007),*"Discounting Rights: Wal-Mart's Violation of US Workers Freedom of Association",* Human Rights Watch pubs, May 2007, Vol 19, No2. See also GOPALAKRISHNAN, R., "Freedom of association and collective bargaining in export processing zones: Role of the ILO supervisory mechanisms", *ILO Working Paper No. 1*, Geneva 2007.

[159] ILO:(2008) Freedom of association in practice: Lessons learned, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, INTERNATIONAL LABOUR CONFERENCE, 97th Session 2008 Report I (B). International Labour Organisation, p 10. Supported by the findings in HAYTER, S. (2011) *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice*, ILO and Edgar Elgar co-publishers.

[160] TILLY, C. (1995) Globalization Threatens Labor's Rights. *International Labor and Working-Class History,* 47**,** 1-23, p.21. Cited in COHEN, R. & RAI, S. (2000) *Global social movements*, London ; New Brunswick, NJ, Athlone Press, p 84.

[161] Ibid.

social economic and political rights."[162] This view overlooks the strategic alliances of the state and corporation, resting as it seems to on an unshakeable faith in the accountability of the state. History, old and new, has shown us that as the state can be as susceptible to corruption and as obstructive to distributive justice and democracy as corporations, as Chapter 7 will explore.[163]

3. Ownership and the Limits of Human Rights

Despite breakthroughs carried by the Abolitionist Movement and Labour Movements the realisation of international labour standards remains elusive. The International Labour Organization's (ILO) first global estimate on forced labour, which reported a *minimum* of 12.3 million,[164] with some making even higher estimates.[165] Generally speaking, the ILO's international labour standards encounter the similar limitations as the UN's universal human rights, the principal limitation being a dependency on state governments to enforce them. In cases where state fails to provide labour standards or human rights, and where labour is either unavailable or does not provide adequately, efforts may be made to seize ownership of capital in order to survive. This may occur

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[162] COHEN, R. & RAI, S. (2000) *Global social movements*, London ; New Brunswick, NJ, Athlone Press, p 84.

[163] See for example MONBIOT, G. (2001) *Captive state : the corporate takeover of Britain*, London, Pan.; WOLIN, S. S. (2008) *Democracy incorporated : managed democracy and the specter of inverted totalitarianism*, Princeton, N.J. ; Oxford, Princeton University Press.

[164] BELSER, P., DE COCK, M. & MEHRAN, F. (2005) ILO Minimum Estimate of Forced Labour in the World. *International Labour Organisation publications.*

[165] Kevin Bales estimates that there are at least 27 million slaves in the modern world. See BALES, K. (2005) *Understanding global slavery : a reader*, Berkeley, Calif. ; London, University of California Press. For an explanation of the numerical analysis behind his figures see p. 102. See also BALES, K. (1999) *Disposable People: New Slavery in the Global Economy*, University of California Press.

on an individual basis or may become a popularised struggle in the form of a social movement (such as the land rights movement in Zimbabwe).[166]

Recent times have seen the emergence of excellent analysis and critique of human rights as a global movement. In *The Dark Side of Virtue,* David Kennedy attempts a list of "*possible downsides, open risks, bad results which have sometimes occurred, which might well occur*",[167] when "*well-meaning people attempt to express their humanitarian yearnings on the global stage*".[168] Makau Mutua takes issue with the subtext of the human rights movement which "*depicts an epochal contest pitting savages, on the one hand, against victims and savior, on the other*."[169] He asks that "*human rights advocates be more self-critical and come to terms with the troubling rhetoric and history that shape, in part, the human rights movement*."[170] Alex de Waal expresses a similar sentiment in his view of human rights as an exercise of power, in a

[166] See MOYO, S. & YEROS, P. (2005) Chapter 6: Land Occupations and Land Reform in Zimbabwe: Towards the National Democratic Revolution. IN MOYO, S. & YEROS, P. (Eds.) *Reclaiming the Land: The Resurgence of Rural Movements in Africa, Asia and Latin America.* London and New York, Zed Books. See further documentation by the African Institute for Agrarian Studies available at: http://www.aiastrust.org Last accessed 10th January 2012.

[167] KENNEDY, D. *The dark sides of virtue : reassessing international humanitarianism*, Princeton N.J. ; Oxford : Princeton University Press 2004, p.33.

[168] Ibid. p. xv.

[169] MUTUA, M. (2001) Savages, Victims, and Saviors: The Metaphor of Human Rights. *Harv. Int'l L. J.,* 42**,** 201 at 201. See also MUTUA, M. W. (1996) The Ideology of Human Rights. *Virginia Journal of International Law,* 36**,** 594-601 and; MUTUA, M. W. (1997) Hope and Despair for a New South Africa: The Limits of Rights Discourse. *Harvard Human Rights Journal,* 10.

[170] MUTUA, M. (2001) Savages, Victims, and Saviors: The Metaphor of Human Rights. *Harv. Int'l L. J.,* 42**,** 201.

world where ideals become commodities along with everything else: *"The global ethical enterprise"* he argues, "*begins in moral solipsism".*[171]

In a similar vein, Naomi Klein has made a strong case that the neutral, impartial and non-political nature of Amnesty International has encouraged the human rights movement to focus on crimes and not the causes behind human rights violations.[172] However, in her appraisal of Klein's *The Shock Doctrine*, Susan Marks identifies that consideration of the 'root causes' of human rights violations has been given greater focus within both global civil society and the United Nations.[173] Attempts to restructure the application of international human rights law to this end is discussed in the next chapter. In some instances that 'root cause' can be found in the misapplication or non-application of law. In other contexts, inequality is rooted in legal lacunae, - for example the lack of adequate enforcement mechanisms for the protection of economic, social and cultural rights, or jurisdictional gaps in the treatment of corporations. In yet more contexts, it can be found in the precise application of law.

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[171] DE WAAL, A. (2001) The Moral Solipsism of Global Ethics Inc. *London Review of Books.*. In review of BELL, D., (2000) *East meets West : human rights and democracy in East Asia,* Princeton, NJ, Princeton University Press.; POWER, J. (2001) *Like water on stone : the story of Amnesty International,* Boston, Mass., Northeastern University Press and; EDWARDS, M. (1999) *Future positive : international co-operation in the 21st century,* London, Earthscan. This critique runs throughout De Waal's work, see: DE WAAL, A., (1997) *Famine crimes : politics & the disaster relief industry in Africa,* Oxford, African Rights & the International African Institute in association with James Currey.; DE WAAL, A. (2006) *AIDS and power : why there is no political crisis - yet,* London, Zed.

[172] KLEIN, N. (2007) *The shock doctrine : the rise of disaster capitalism,* New York, Metropolitan Books/Henry Holt.

[173] MARKS, S. (2011) Human Rights and Root Causes. *Modern Law Review,* 74**,** 57-78, p. 59.

The right to property is well established as a pivotal aspect of the human rights framework, framing the ideology of the framework as firmly within the field of liberal capitalism. Indeed Marx's critique of the rights of man as rights of the bourgeoisie is based on the inclusion of the right to property therein, which he claimed led to the universal extension of market principles to all of society.[174] It is not only Marxists who express caution in relation to the right to property. David Kennedy makes the case against clear and strong property rights in his consideration of the impact of choice of property regime on development. He urges that the call for clear property rights obscures the range of alternative property regimes and obscures the many choices internal to property law.[175] Kennedy concludes that at the heart of the debate is a serious misestimation of

[174] From MARX, K. & MCLELLAN, D. (2000) On the Jewish Question. *Karl Marx : selected writings.* 2nd ed. Oxford, Oxford University Press, (first published under the German title Zur Judenfrage in the Deutsch–Französische Jahrbücher, Paris 1844,) the following passages are often cited as examples of Marx's critique of rights: *"[N]one of the so-called rights of man goes beyond egoistic man, man as a member of civil society, namely an individual withdrawn into himself, his private interest and his private desires [...] separated from the community. The practical application of the right of man to freedom is the right of man to private property.*" And: "*The perfection of the idealism of the state was at the same time the perfection of the materialism of civil society. The shaking off of the political yoke was at the same time the shaking off of the bonds which held in check the egoistic spirit of civil society. Political emancipation was at the same time the emancipation of civil society from politics, from even the appearance of a universal content*." Not all scholars agree that Marx was an ardent critic of rights however. Robert Fine, for example, presents Marx's support for the rights to freedom of religion embodied within the *Rights of Man* as qualification of his critique of rights in *On the Jewish Question*. See FINE, R., (2009) An unfinished project: Marx's critique of Hegel's philosophy of right. IN CHITTY, A. & MCIVOR, M. (Eds.) *Karl Marx and Contemporary Philosophy.* New York, Palgrave MacMillan, pp105-120.

[175] KENNEDY, D. (2011) Some Caution about Property Rights as a Recipe for Economic Development. *Accounting, Economics, and Law,* 1.

the allocative role of law. Contrary to the 'New Institutionalists'[176] who advocate clear and strong property rights as a development strategy, Kennedy urges that belief in the inherent value of a property regime is ill-founded. Instead, choices of legal regime must be made and contested on the basis of economic, social and ethical analysis.[177] Arguably the problem is not the existence of property rights but rather the distribution of them. In particular the fact that corporations hold a disproportionate amount of them. Therefore ownership, and inter-relatedly, property rights must be subject to processes of democracy and distributive justice.

3.1. Deconstructing and Reconstructing the Corporation from Within

Increasingly, it is through shareholding and other moves towards ownership that workers obtain a distribution of control necessary for the fulfillment of much of the international human rights framework. Rights are viewed in this respect as a mechanism for poverty alleviation, not as ends in themselves.[178] From this background, alternative forms of ownership are emerging as

[176] See NORTH, D. C. (1973) *The Rise of the western world : a new economic history*, Cambridge University Press; NORTH, D. C. (1981) *Structure and change in economic history*, London, Norton; NORTH, D. C. (1990) *Institutions, institutional change and economic performance*, Cambridge, Cambridge University Press. See also SOTO, H. D., (2000) *The mystery of capital : why capitalism triumphs in the West and fails everywhere else*, London, Bantam.

[177] KENNEDY, D., (2011) Some Caution about Property Rights as a Recipe for Economic Development. *Accounting, Economics, and Law*, 1, p.55.

[178] See OFFICE OF THE HIGH COMMISSION OF HUMAN RIGHTS, *Draft Guidelines: A Human Rights Approach to Poverty Reduction, 2002*, prepared by Paul Hunt, Siddiq Osmani, Manfred Nowak, available at; http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies_draft%20guidelines.pdf Last accessed 10th January 2013.

mechanisms through which to place stronger obligations on trade practices. Evolution in labour standards towards co-ownership bears the potential to introduce greater democracy within those organisations. This would democratise the organisations within the state from the ground up, rather than asking the state to regulate these organisations on behalf of its citizens.[179] This process bypasses the need for state regulation of the corporation and could relieve pressure from 'the race to the bottom' wherein states compete to offer the lowest regulatory environment, which drains weak states of their limited power. With a renewed interest in ownership over recent years, social movements are reaching out to the background rules which structure exploitation, principally property law. Progressive enterprises are elevating workers to a new status beyond stakeholdership to that of co-ownership, thus leading to a deconstruction of the hierarchies within the corporation.[180]

In his insightful analysis of labour law at century's end, D'Antona describes new and unforeseen demands advanced by workers as "*a vision of the worker not subaltern*"; "*a new organisation of time to overcome rigid synchrony between production time and the time for life*"; and "*the new interest in worker participation as owners of the enterprise (really of anything on which one*

[179] See generally, KOVEN LEVIT, J. (2005) A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments. *Yale Journal of International Law*, 30.

[180] Paradoxically, this element of ownership is what is fundamentally missing from the social business model advocated by Nobel Peace prize winning "Banker to the Poor", Mohammad Yunus. See YUNUS, M. & WEBER, K. (2007) *Creating a world without poverty : social business and the future of capitalism*, New York, PublicAffairs ; London : Perseus Running [distributor]. Yunis proposes an investor-owned no-profit-no-loss model. The ownership structure does not differ from the classic liberal capitalist model; even once investors have been paid back, the investors still own the business.

depends)".[181] This new interest in workers as owners of the enterprise materialises in shareholding by employees. Increasingly employees are opting to trade the security of wage subordination for the control and risk involved in shareholding. As D'Antona identifies: *"Worker ownership of shares is a factor in the spread of economic power through the socialisation of property in favour of non-capitalist components of the firm. In this sense, it inserts into labour relations a previously unknown element."*[182]

Recent trends towards distribution of ownership within the forestry movement further substantiate the notion that social movements are driving regulatory methods based on worker-ownership and consumer-producer networks. Forestry movements provide an example of where social and economic rights are secured by tenure rights rather than by human rights mechanisms such as monitoring. Over recent decades, distribution of ownership of forests has begun to diversify. Large-scale state ownership has been eroded by new methods of ownership. In their report for the Washington DC-based Rights and Resources Initiative entitled '*Who Owns the World's Forests? Forest Tenure and Public Forests in Transition',*[183] Alejandro Martin and Andy White chart three new trends in forest tenure transition: firstly, state recognition of community ownership, including territories owned by indigenous populations;

[181] D'ANTONA, M. (2002) Labour Law at the Century's End: An Identity Crisis? IN JOANNE CONAGHAN, R. M. F., KARL KLARE (Ed.) *Labour Law in an Era of Globalization.* Oxford Oxford University Press, p 44.

[182] Ibid.

[183] MARTIN, A. & WHITE, A. (2002) Who Owns the World's Forests? Forest Tenure and Public Forests in Transitio. *Rights and Resources Publications.* Available at http://www.rightsandresources.org/publication_details.php?publicationID=98 Accessed 22 February 2013.

secondly, state designation of management responsibility to communities; thirdly, reform of public forest concessions by states in order to support greater community access.[184]

That some business models may be more conducive to fairer outcomes has been recognised by UN Special Rapporteur on the Right to Food, Oliver de Schutter, in his interim report to the UN Security Council.[185] The report places emphasis on improved market access and suggests that cooperatives represent a method through which to improve the bargaining position of marginalised farmers and producers. To this end, the report sets out recommendations for governments to support the organisation of farmers into cooperatives and other types of producers' organisations. Yet, for individuals eking out an existence as wage labourers, discussion of improving access to markets holds little relevance. Instead of going to the market wage labourers *are* the market. De Schutter's report only indirectly addresses this issue. Firstly in the recommendation to governments that they encourage cooperatives in order to enhance farmers bargaining position.[186] Secondly, in the recommendation that governments "*monitor labour conditions in contract farming and ensure that the expansion of such farming does not lead to the overexploitation of cheap*

[184] Ibid.

[185] UNGA, *Interim Report of the Special Rapporteur on the Right to Food,* 4 August 2011, UN Doc A /66/262 Available at; http://www.srfood.org/images/stories/pdf/officialreports/srrtf_contractfarming_a-66-262.pdf Last accessed 12 June 2012.

[186] Ibid.

family labour or to indirect downward pressure on the labour rights of agricultural workers".[187]

In recognising that contract farming does not facilitate progress up the value chain and is in many ways discriminative, the report states that other "*other business models, therefore, should be explored".*[188] Farmer-controlled enterprises, joint ventures and community-supported agriculture schemes are mentioned.[189] The report suggests the best way of controlling corporations for human rights is at the root, by encouraging human rights friendly business models. As one of the most significant consumer movements aimed at integrating greater fairness in international trade operating at present, the following section will consider to what extent the Fairtrade labeling system supports the integration of fairness into international law. It is acknowledged from the outset however that the lack of universality of the system and the barriers to participation within the system negate the system's potential to carry the international obligation to trade fairly. The extent to which this system's universal application may be desirable and possible is subsequently explored.

3.2. The Fairtrade Movement

Fairtrade presents an opportunity to consider how distributive justice movements may be formalized and made more widespread, and moreover what may be lost when they become so. The Fairtrade Movement is considered to be an effective mechanism for attaching higher labour standards by the ILO. With

[187] Ibid para 52 (a).

[188] Ibid para 33.

[189] Ibid paras 38-42.

this said however, the aim of this case study is not to prove that Fairtrade labeling is a foolproof mechanism for compliance with labour standards. By all means the Fairtrade Labeling Organisation is susceptible to corruption and fraud like any other industry. Furthermore, it is important to note that not everyone would agree that the Fairtrade movement is a successful tool for development at the macro level.[190] This section focuses on those instances where it has been found to deliver improved labour standards and asks *why* it has been successful in this area when international labour standards have not achieved the same level of compliance in the same context. The ILO's endorsement of and partnership with the Fairtrade system is viewed as an indicator of Fairtrade's compliance levels.[191] This indicator is supported by the findings of a meta-review of 33 case studies of Fairtrade carried out by the Natural Resources Institute UK[192] and also by the author's own findings from interviews conducted with Fairtrade farmers in Bolivia and South Africa, undertaken as part of a research project on the Fairtrade Movement sponsored by the Arts and Humanities Research Council Queen Mary, University of London from 2006-2012.

[190] For a critique of Fairtrade that received considerable publicity in the UK whilst researching this thesis, see SIDWELL, A. (2008) Unfair Trade. *Adam Smith Institute.*

[191] See for example, ILO Publication (2009)*:* Coop AFRICA Working Paper No. 6, *Fair trade – fair futures : the Kilimanjaro Native Cooperative Union scholarship programme for orphan and vulnerable children*, Series on HIV/AIDS impact mitigation in the world of work – responses from the social economy. Available at: http://www.ilo.org/empent/Publications/WCMS_117874/lang--en/index.html. Last accessed 24th March 2012.

[192] NELSON, V. & POUND, B. (2009) The Last Ten Years: A Comprehensive Review of the Literature on the Impact of Fairtrade. *Natural Resources Institute, University of Greenwich.*

Fairtrade operates two-models of direct trade; one for cooperatives and the other for organisations of farm workers. The nature of the industry generally depends on the nature of the crop; for example, coffee growers are generally organised as independent producers attached to cooperatives and banana growers are generally employed as hired labourers on banana plantations. Despite undertaking very similar employment, the variation in labour and living standards between small producers and hired labourers is striking. The self-employed nature of coffee-growers in Bolivia for example, limits, to an extent, the scope for labour exploitation. - Through organisation as cooperatives, primary producers have captured power within the value chain. In contrast, hired labourers in South Africa receive the minimum hourly wage, sometimes less and have fewer opportunities to collectively bargain.[193] National employment laws and international labour standards are therefore necessary means by which to install some baseline as to acceptable conditions on South Africa's plantations. These means are necessary but not sufficient, as Fairtrade's presence there would imply. Fairtrade operates on several sets of standards; *Generic Fairtrade Standards for Hired Labourers*; *Generic Fairtrade Standards for Small Farmers' Organisations*; and *Product Specific*

[193] Examples are based on author's own observations on Fairtrade cooperatives in Bolivia and South Africa between 2008 and 2009 as part of an AHRC research team. The data analysis of the quantitative research interviews undertaken there will be published separately in DINE, J. & GRANVILLE, B. (Eds.) (2012) *The Processes and Practices of Fair Trade*, Routledge.

Standards.[194] It is the *Generic Fairtrade Standards for Hired Labourers* that are particularly relevant to this discussion.[195]

Fairtrade provides additional monitoring mechanisms through the incentive of certification and through 'peer monitoring' whereby farms are willing to report on certified farms in the same region if they suspect non-compliance. This may be motivated by the desire of certified parties to ensure fair competition and to maintain the integrity of the label. It is thought that peer monitoring may contribute to Fairtrade's high attainment of labour standards and is an important factor in understanding Fairtrade's attainment of compliance with labour standards. Yet, gaps in the governance of certification, for example through the rarity of application of penalties, would suggest that compliance cannot be due to enhanced monitoring alone. Looking beyond monitoring and enforcement to consider the structural arrangements surrounding the norms may contribute to better understanding of why compliance with labour standards occurs on Fairtrade farms.

There are several aspects of Fairtrade governance that might be amenable to better scale and scope economies which may have a direct bearing on labour conditions. The argument is frequently made that through the Fairtrade Labeling Organisation (FLO) farmers have access to scale and scope economies at the cooperative level that are not available at the individual

[194] A comprehensive list of all Fairtrade Labelling Organisation Standards is available; http://www.fairtrade.net/944.html Last accessed 25 June 2013.

[195] *Fairtrade Labelling Organisation Generic Fairtrade Standards for Hired Labour* (updated May 2011). Available here: http://www.fairtrade.net/fileadmin/user_upload/content/2011-12-29-HL_EN.pdf Last accessed 25 June 2013.

small-holder farmer level.[196] In particular, risk management and investment are easier to achieve through a cooperative structure. Martha Prevezer identifies at least four ways in which a cooperative governance structure may influence conditions on Fairtrade farms as; ownership and control; agency issues; value chain management; and capacity building.[197] This study focuses solely on ownership and control.

One of the most fundamental structural factors surrounding corporate norm-setting is the distance between the owners and the workers within any enterprise. The evolution towards redistribution of ownership within the corporation finds a halfway house in social enterprises. Although definitions vary, Maria Granado defines social enterprises as occupying a unique space within the economy where, as businesses, they are driven by the need to be financially sustainable but, compared with a normal for-profit organisation, they use economic surpluses to drive social and environmental growth. Additionally, social enterprises are distinguishable from other non-profit or charity organisations because they trade in the competitive marketplace.[198]

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[196] PREVEZER, M., (2012) Fairtrade Governance – A framework. In Dine J and Granville B (eds) *The Processes and Practices of Fairtrade, Trust, Ethics and Governance*. Routledge, London, pp 19-42.

[197] Ibid. p 23.

[198] GRANADOS, M. L., HLUPIC, V., COAKES, E., MOHAMED, S., (2011) Social Enterprise and Social Entrepreneurship Research and Theory: A Bibliometric Analysis from 1991 to 2010. *Social Enterprise Journal* 7, 198-218; HORST, D. V. D., (2008), Social Enterprise and Renewable Energy: Emerging Initiatives and Communities of Practice. *Social Enterprise Journal* 4:171-185; KOGUT, B., ZANDER, U., (1992) Knowledge of the Firm, Combinative Capabilities, and the Replication of Technology. *Organization Science* 3:383-397; DRUCKER, P. F., (1991) The New Productivity Challenge. *Harvard Business Review* 6, 69-79

By operating through a network of social enterprises with smaller hierarchies, Fairtrade can be seen to be deconstructing the corporation from within. Fairtrade has successfully fostered and linked several social enterprises together under the umbrella of Fairtrade certification. Collective decision–making processes replicating ownership in Fairtrade and collective ownership in forestry movements demonstrate the value of co-ownership as a mechanism for human rights in areas where the state does not provide. Although Fairtrade operates two-models of direct trade, one for cooperatives (producers) and the other for organisations of farm workers (hired labourers) both groups may benefit from the scale and scope economies of access to a cooperative governance structure. The success of these movements in delivering labour standards whilst investing in communities serves to highlight the limits of the traditional human rights framework, constrained as it is by the state as enforcer.

3.3. Fairtrade and Distributive Justice

Steps in the direction of collective ownership in Fairtrade farms are found in requirements under the Fairtrade codes of conducts. For instance, two fundamental components which apply to Fairtrade hired labour farms are; (i) a Fairtrade minimum price designed to cover the costs of sustainable production (including ensuring fair wages and decent working conditions for farm workers) and; (ii) a social 'Premium' to be spent on development projects.[199] The 'Premium' is paid directly from the importer to a worker controlled group

[199] *Fairtrade Labelling Organisation Generic Fairtrade Standards for Hired Labour* (updated May 2011). Section 2. Available here: http://www.fairtrade.net/fileadmin/user_upload/content/2011-12-29-HL_EN.pdf Last accessed 25 June 2013.

called the 'Joint Body', rather than to the plantation owner. The Joint Body is elected by the labourers and the labourers have a leading role in the decision-making of the Joint Body. According to the FLO, plantation management personnel are on the board of the Joint Body but the farm workers must have the majority of the votes. The Joint Body controls the distribution of the social premium which must be spent on 'community development'.[200]

Reports of the Kuapap Kokoo, Ghana case study show further evidence of producer ownership.[201] This regulatory structure goes beyond improvements in wage labour to offer tangible worker empowerment. Distribution of power is also integral to the element of cooperation between key economic actors. Cooperation between consumers and producers is integral in the Fairtrade supply chain. The drawbridge between the two sets of economic actors is lowered and each is able to communicate with each other, lending to greater concern for and responsibility towards the other. This is exemplified by Fairtrade's practice of inviting representative farmers to come to the UK to

[200] Ibid. For further discussion see NICHOLLS, A, OPAL, C., (2005) *Fair Trade: Market-Driven Ethical Consumptio*n. Sage, London

[201] JONES, S., BAYLEY, B., ROBINS, N. & ROBERTS, S. (2000) Overview, Impact, Challenges, Fairtrade: Study to Inform DFID's Support to Fairtrade. . *International Institute for Environment & Development Publications.* Available at http://portals.wi.wur.nl/files/docs/ppme/ACF3C8C.pdf Accessed 21 May 2013. RONCHI, L. (2002) Monitoring Impact of Fairtrade Initiatives: A Case Study of Kuapa Kokoo and the Day Chocolate Company. . *International Institute for Environment & Development Publications.* Available at http://portals.wi.wur.nl/files/docs/ppme/TwinMEKuapaandDayA_5version.pdf Accessed 21 May 2013. BARRIENTOS, S. & SMITH, S. (2007) Mainstreaming Fair Trade in Global Production Networks: Own Brand Fruit and Chocolate in UK Supermarkets. IN RAYNOLDS, T., MURRAY, D. & WILKINSON, J. (Eds.) *Fair Trade: The Challenges of Transforming Globalisation.* London, Routledge.

meet consumers as a culture and knowledge sharing activity.[202] This cooperation is also manifest when Fairtrade farmers communicate to consumers information relating to social premium spending on community projects – often on crèches and housing and IT, which is often published on product packaging and is also available on the Fairtrade Labeling Organisation website.[203]

3.4. Fairtrade and Democracy

At the international level, regional and international economic agreements have weakened state power[204] to the extent that should states even be capable of 'democracy' at the domestic level, 'democracy' within international forums is obstructed. Competition for foreign direct investment encourages states to agree to international economic agreements which may demand those states to strip down their regulatory environment. Therefore, any policy and law-making undertaken via democratically elected governments at the national level may be trumped economic interests at the international level. What is more, these agreements often include provisions imposing higher costs on one party than

[202] See for example FAIR TRADE FOUNDATION PRESS RELEASE:(2002) Share the Passion for Fairtrade: http://www.fairtrade.org.uk/press_office/press_releases_and_statements/archive_2002/feb_2002/share_the_passion_for_fairtrade.aspx. Accessed 21 May 2013 where it is stated that "*the Fairtrade Foundation is enabling farmers to meet with shoppers in UK supermarkets setting up internet links and running a competition so winners can visit coffee growers in Costa Rica."*

[203] FAIR TRADE FOUNDATION PRESS RELEASE:(2012.) Tea Growers Build School in Vietnam. http://www.fairtrade.net/967.html?&cHash=161b9e464989697b5493a6776ce47a5b&tx_ttnews[tt_news]=279. Accessed 21 May 2013. Many other examples are available at http://www.fairtrade.net/meet_the_producers.html. Accessed 21 May 2013.

[204] See BERNARD, N., (2002), *Multilevel Governance in the European Union*. Kluwer Law International, The Hague.

on another for breaking the relationship. The most vulnerable parties in trade negotiations are usually those with a heavy concentration of exports in a few countries. The emergence of avenues of global democracy becomes a necessary expression of civil society unrest as a result. Modern democracy needs to be global in nature and that requires mediation between civil society and corporations.

The Fairtrade movement and other ethical trade initiatives have offered some structure to these democratic processes by generating trust networks between consumers and producers, thus enabling mediation between individuals and corporations. These networks impact on democracy for consumers, producers and the world's population at large in positive and negative ways. For consumers to whom money is no object, there may be a positive democratic impact in that they have greater choice of product and therefore more control in their relationship with corporations. For producers, those producers attached to the Fairtrade system have better opportunities for participation in decision-making concerning their production is also fairly well-established. Yet what of those consumers who cannot afford Fairtrade products and those producers who are left out of the Fairtrade system, either because they cannot afford the set-up costs or Fairtrade does not need more of their produce? This group constitutes the vast majority of the population. Surely, democracy at a price is a discriminatory democracy? The risk that these networks bear a negative impact on democracy, by creating greater exclusion as many slip the net in the

transition, is not one we can afford to overlook.[205] It is partly for this very reason, due to the lack of universality of the Fairtrade system that this thesis focuses on constructing a universal international obligation to trade fairly; an international obligation to democratise and distribute fairly through trade.

4. Conclusion

This chapter presents the progressive successes of global distributive justice movements concerned with labour in achieving change and codification within international law. What we learn from these movements is that, in the absence of empowered states and in the presence of unaccountable corporations, it falls to civil society and to the ethically minded to self-organise and deliver the nuts and bolts of fairness in international law. These movements have historically challenged property rights, initially through rejecting the commoditization of labour and more recently by encouraging a shift from stakeholdership to common ownership. Through so doing they bear the potential to re-define the role of the corporation in society. Yet, social movements such as Fairtrade that do not instigate universal change bring democratic deficits of their own. As has been established from the outset, fairness is composed of procedural and substantive elements and one cannot be compromised for the other. The following chapter identifies provisions in international law that support the *universalisation* of an obligation to trade fairly.

[205] See for example HAIGHT, C., (2011) The Problem with Fair Trade Coffee. *Stanford Social Innovation Review* 9, 11.

Chapter 4: Existing International Law Provisions Supporting an International Obligation to Trade Fairly

1. Introduction

This chapter seeks to identify existing international law provisions supporting the emergence of an international obligation to trade fairly. The chapter begins by identifying obligations of distributive justice and democracy embodied in the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and argues that obligations of an extraterritorial nature emerge *indirectly and necessarily* from obligations on states under international human rights law. Secondly, the chapter substantiates obligations of a transnational nature emanating *directly* from UN treaty law provisions relating to duties of 'international cooperation'. Thirdly, the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (hereinafter the *Maastricht Principles*)[206] are unpacked as the most recent and direct statement of states' obligations in the area of economic, social and cultural rights.

Specifically, this chapter seeks to establish the extent to which international law creates obligations towards democracy and distributive justice (procedural and substantive fairness) and the extent to which those obligations are

[206] *The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, adopted 28 September 2011, final version 29 February 2012.

international in the sense of being 'external' in nature. *'External'* obligations are those obligations typically of states to citizens of other states as opposed to *'internal'* obligations that typically entail obligations on states towards their own citizens.[207] 'External' obligations in this sense have been termed 'transnational human rights obligations'[208] or 'extraterritorial human rights obligations'.[209] It is acknowledged that the existing provisions suffer from two central weaknesses. These are, firstly, that under the prevailing structure of international law, only states are subject to international human rights law, and secondly, that international human rights law does not have adequate enforcement mechanisms to imbue these provisions with sufficient normative force. In light of these shortcomings, the following chapter considers avenues through which international human rights law obligations may be directly attached to non-state actors, focusing on corporations and international financial institutions.

2. Indirect Obligations through State Obligations of Distributive Justice and Democracy

The following section seeks to consider the extent to which obligations on

[207] The distinction between internal and external dimensions of human rights is presented in SALOMON, M. E. (2008c) Legal Cosmopolitanism and the Normative Contribution of the Right to Development. IN MARKS, S. P. (Ed.) *Implementing the right to development: the role of international law.*, Harvard School of Public Health/ Friedrich-Ebert-Stiftung.

[208] SKOGLY, S. I. & GIBNEY, M. (2002) Transnational Human Rights Obligations. *Human Rights Quarterly*, 24**,** 781-798, ibid. See also; SKOGLY, S. I. & GIBNEY, M. (2010) *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Publications, ibid. WOUTER, V. (2012) Emerging Normative Frameworks on Transnational Human Rights Obligations.

[209] GIBNEY, M. & SKOGLY, S. (2010) *Universal human rights and extraterritorial obligations*, Philadelphia, University of Pennsylvania Press.

states under the international human rights framework necessarily implicate obligations of international assistance in order for states to fulfil these obligations. These obligations are broadly defined as state obligations of democracy and distributive justice embodied in the *ICCPR* and the *ICESCR*.

2.1. Locating Obligations of Democracy in the *International Covenant on Civil and Political Rights (ICCPR) 1966.*

The word democracy does not appear in any of the constituent documents of the *International Bill of Human Rights*.[210] Its absence is explained as a symptom of philosophical conflicts which persisted until the end of the Cold War. Instead, the *International Bill of Human Rights* evokes democratic principles such as "self-determination",[211] "equal rights",[212] and "non-discrimination*"*.[213] Furthermore, of these principles, the principle of self-determination established in the *ICCPR* is widely regarded as the basis or as close as we get to a basis for 'a right to democracy'. In pursuit of the principle of self-determination, the UN human rights bodies have sought to import values such as a right to freedom of thought, conscience, religion, belief, peaceful assembly and association, freedom of expression, freedom of opinion,

[210] For a critique of the description of democracy as a human right, see COHEN, J. (2005) Is There a Human Right to Democracy. IN SYPNOWICH, C. (Ed.) *The Egalitarian Conscience* New York, Oxford University Press. Cohen makes the case that democracy is a higher ideal than human rights.

[211] For example: "*The will of the people shall be the basis of the authority of government*", *Universal Declaration of Human Rights 1948,* Article 21 (3).

[212] For example "*All human beings are born free and equal in dignity and rights*." *Universal Declaration of Human Rights 1948, Article 1.*

[213] For example; *"All are equal before the law and are entitled without any discrimination to equal protection of the law.*" *Universal Declaration of Human Rights 1948, Article 7.*

a free, independent and pluralistic media, and procedural guarantees under the human rights regime.

The *ICCPR* is considered to lay the framework for democratic societies. The *ICCPR* makes reference to 'democratic society' in articles 14 (1)[214], 21[215] and 22 (2).[216] In addition, the *ICCPR*'s principles on the right to freedom of thought, conscience, and religion, the right to peaceful assembly, the right to periodic elections and the right to equality before the courts, are considered key principles of democracy.

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[214] Article 14 (1), *International Covenant on Civil and Political Rights (ICCPR) 1966*. "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*."

[215] Article 21, *International Covenant on Civil and Political Rights (ICCPR) 1966*: "*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others*."

[216] Article 22 (2) *International Covenant on Civil and Political Rights (ICCPR) 1966*: "*No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*"

In recent years, amidst growing evidence of the link between democracy and economic development, the UN Commission on Human Rights has elaborated economic rights into its democratic agenda. For example, in its working paper on the *Promotion and Consolidation of Democracy* in 2002, the Commission stresses the links between democracy and economic, social and cultural rights and democracy and third generation rights. It states that: *"Democracy does not stop with the formal structure of the rule of law or the indispensable periodic replacement of rulers following free and fair elections."*[217] The working paper explicitly identifies that democracy requires the transfer of powers *"so as to confer on the poor and marginalized members of society a form of citizenship that integrates them fully in the political and economic system and makes them directly responsible actors at the national, regional and local levels in economic and social development strategies and policies."* [218] In pursuit of this objective, the working paper ties the fight against poverty and extreme poverty, extreme social inequality and unfair income distribution to the legitimacy of a democratic system.[219]

However, the *ICCPR* relies on the state to ensure these rights and offers no means of mediation between individuals and corporations, that is to say, between individuals and the centres of global economic governance. Furthermore, *Human Rights Committee General Comment No. 31* expressly states that the general legal obligation imposed on states parties to the covenant

[217] UN Commission on Human Rights, Expanded Working Paper on the Promotion and Consolidation of Democracy, UN doc. E/CN.4/Sub.2/2002/36 (2002). Para 95.

[218] Ibid.

[219] Ibid.

does not have horizontal effect and therefore may not be applied between two private parties within a state party.[220] The General Comment does however stipulate that the state party has an obligation to control a private party which may impair the enjoyment or the fair distribution of Covenant rights.[221] However, the problem remains that despite the existence of an obligation to this effect, unless the corporation is owned by the same state the state will have limited means through which it may induce a foreign corporation to remedy any human rights violations caused.

2.2. Limitations on a State's Capacity to Fulfil Obligations

Whilst the UN supports a fluid interpretation of democracy[222] it may nonetheless be constrained by its adherence to the state as gatekeeper to democracy. By virtue of its state-centric foundation, the UN human rights framework offers little in the way of mediation between individuals and corporations. Instead, the UN's aspirations towards democracy have focused on institution building and the implementation of electoral politics. The *ICCPR* relies on the state to ensure these rights, and it offers no means of mediation between individuals and corporations, that is to say, between individuals and

[220] *UN Human Rights Committee General Comment No 31* Adopted on 29 March 2004 (2187th meeting), Para 8: "*The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law*."

[221] *UN Human Rights Committee General Comment No 31* Adopted on 29 March 2004 (2187th meeting) Para 8.

[222] A fluid interpretation of democracy such as that advocated by Tilly portrays societies as always in a state of dynamic movement with constant pressures towards democratisation and de-democratisation. See TILLY, C. (2007) *Democracy*, New York, Cambridge University Press. For counterviews see: See ELKINS, Z. (2000) Gradations of Democracy. *American Journal of Political Science,* 44**,** 293-300. Discussed further herein at Chapter 7.

the centres of global economic governance.

Franck advocates a 'global normative entitlement to democracy'.[223]- Yet this is confined to *a participatory electoral process."*[224] Electoral politics alone are not sufficient to constitute democracy. State obligations of democracy receive some international cooperation such as in the form election observation missions and the right to individual petition through the *Optional Protocol to the ICCPR*.[225] Democracy increasingly demands that interests are represented within international decision-making. This is not supported by integration of processes of democratic participation at the international level. The extent to which the meaning of democracy has been reduced to fit the framework of state-centricity will be discussed in Chapter 7.

2.3. Locating Obligations of Distributive Justice in the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Perhaps the most striking provision which bears implications for cooperation within the *ICESCR* is to be found in *Article 11 ICESCR* on the right to an adequate standard of living.[226] This provision has been elaborated to include

[223] FRANCK, T. M. (1995) *Fairness in international law and institutions,* New York, Clarendon Press. pp. 137-139.

[224] Ibid. p. 138.

[225] *Optional Protocol to the International Covenant on Civil and Political Rights* 1966, adopted 15 Dec. 1989, entered into force 23 March 1976, 999 UNTS 171, reprinted in ILM 383 (1967).

[226] *International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR),* Article 11(1): "*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential*

the right to adequate food,[227] the right to adequate housing,[228] and the right to clean water.[229] The right to clean water is derived from *Article 12 ICESCR* on the right to health. These rights are described by Shue as 'subsistence rights', and each demand a minimum level of available resources. *Article 11 (2) ICESCR* stipulates an obligation on state parties to cooperate (on the basis of free consent) in recognising the fundamental right of everyone to be free from hunger and *Article 11(2)(b) ICESCR* expresses the need to cooperate to ensure an equitable distribution of world food supplies in relation to need.

Further implications for distributive justice and international cooperation can be found in the economic rights contained within the *ICESCR*, for example

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importance of international co-operation based on free consent." Article 11(2): "*The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need*."

[227] *UN General Assembly Resolution 59 /202, The Right to Food*, 31 March 2005 A/RES/59/202 Elaborated upon in ICESCR Committee's general comment No 12 (1999) The right to adequate food (art. 11) 12 May 1999 E/C.12/1999/5.

[228] *UN Commission on Human Rights Resolution 1986/36: 'The Realization of the Right to Adequate Housing'*, adopted 12 March 1986; Economic and Social Council resolution 1986/41 of 23 May 1986; *UN General Assembly Resolution, Realization of the right to adequate housing*, 4 December 1986, A/RES/41/146. Elaborated upon in *CESCR General Comment No. 4* (1991) on the right to adequate housing, 13 December 1991, E/1992/23. and *CESCR General Comment* No. 7 (1997) on forced evictions. *20 May 1997* E/1998/22, annex IV.

[229] *United Nations, General Assembly Resolution 'The Right to Water* and *Sanitation'*, 3 August 2010, A/RES/64/292. Elaborated upon in *CESCR General Comment No. 15*, (2002) 20 January 2003 E/C.12/2002/11.

Article 6 ICESCR sets out the right to work.[230] The extent to which this right can be described as universal is questionable however. So too is the idea that the state should be the sole actor responsible for the fulfilment of the right to work. In *General Comment No 18,*[231] the Committee on Economic, Social and Cultural rights recognises the existence of structural and other obstacles arising from international factors beyond the control of states which hinder the full enjoyment of Article 6 in many states' parties. Nonetheless, despite recognition of these structural obstacles, *General Comment No 18* maintains that states' obligations are threefold; to respect, protect and fulfil.[232] Furthermore, this requires that states' parties *"take measures that prevent third parties from*

[230] *International Covenant on Economic, Social and Cultural Rights 1976 (ICESCR),* Article 6 (1): "*The States Parties to the present Covenant recognize 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.*" Article 6 (2): "*The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*" These objectives reflect the fundamental purposes and principles of the United Nations as defined in Article 1, paragraph 3, of the *Charter of the United Nations.* The essence of these objectives is also reflected in Article 23, paragraph 1, of the *Universal Declaration of Human Rights 1948.* At the universal level, the right to work is contained in Article 8, paragraph 3 (a), of the *International Covenant on Civil and Political Civil Rights (ICCPR)*; in Article 5, paragraph (e) (i), of the *International Convention on the Elimination of All Forms of Racial Discrimination*; in Article 11, paragraph 1 (a), of the *Convention on the Elimination of All Forms of Discrimination Against Women*; in Article 32 of the *Convention on the Rights of the Child*; and in articles 11, 25, 26, 40, 52 and 54 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.* Similarly, the right to work has been proclaimed by the United Nations General Assembly in the *Declaration on Social Progress and Development*, in its *Resolution 2542 (XXIV)* of 11 December 1969, Article 6.

[231] *CESCR General Comment No 18*. Adopted on 24 November 2005 UN doc E/C.12/GC/18.

[232] Ibid.

interfering with the enjoyment of the right to work."[233] By third parties, we may infer corporations, multinational corporations and international institutions.

In order to understand the extent to which these obligations have been interpreted as applying 'extraterritorially' it is useful to examine the General Comments of the UN Committee on Economic, Social and Cultural Rights (CESCR). *CESCR General Comment No 18* extends responsibility beyond the state. It does so by stressing the essential role of international cooperation in ensuring states comply with their *"commitment to take joint and separate action to achieve the full realization of the right to work."*[234] Secondly, in *CESCR General Comment No 18*, the committee interprets *Article 6 ICESCR* on the right to work, as creating obligations for states' parties to ensure the right to work is respected in bilateral and multilateral negotiations.[235] The Committee goes as far as saying 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.[236] Problems arise from the fact that states do not hold equal bargaining power in international economic agreements and therefore may be compelled to compromise on their human rights commitments in order to secure foreign direct investment. In such

[233] Ibid.

[234] Ibid at para 29.

[235] Ibid at para 30.

[236] Ibid at para 33.

instances, insistence on state responsibility does not address the root of the problem.

Nonetheless, *CESCR General Comment No 18* does extend obligations towards states in their capacity as members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks. *CESCR General Comment No 18* stipulates that states should pay greater attention to the right to work in their capacity to influence the lending policies, credit agreements, structural adjustment programmes and international measures of the international financial institutions.[237]

CESCR General Comment No 18 also sets out obligations for actors other than states. *Section VI of General Comment No 18* states that whilst states have primary accountability for human rights, all members of society – individuals, local communities, trade unions, civil society and private sector organisations – have responsibilities regarding the realisation of the right to work. *CESCR General Comment No 18* states explicitly that 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 and that the labour standards elaborated on by the ILO should be recognised in measure to promote and realise the right to work.[238]

In addition, *CESCR General Comment No 2* stresses a duty on states to refrain from action that might impede the realisation of economic, social and cultural

[237] Ibid at para 30.

[238] *CESCR General Comment No. 18* : 06/02/2006. At para 52.

rights in other countries in the context of the work of international lending institutions.[239] This obligation is given expression again in General Comment No 15[240] on the right to water when the Committee on Economic Social and Cultural Rights held that economically developed states have a "special responsibility" when it comes to assisting poorer developing states in realising the right to water. Therein it was held that states should facilitate the realisation of the right to water "*in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required".*[241]

To this end, *CESCR General Comment No 15* stipulates that states have a positive duty to ensure that the right to water is given due attention in international agreements and, further, should consider the development of further legal instruments. States also have a negative obligation to ensure that the conclusion and implementation of other international and regional agreements do not adversely impact upon the right to water. Of particular significance is the obligation placed on states to not make agreements which may curtail or inhibit a country's capacity to ensure the full realisation of the right to water: "*Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water."*[242] It can therefore be seen that international human rights treaty law

[239] *CESCR, General Comment No. 2: International Technical Assistance Measures* (Art. 22 of the Covenant), 2 February 1990, E/1990/23.

[240] *CESCR General Comment No 15* (E/C.12/2002/11 20 January 2003).

[241] *CESCR General Comment No 15* (E/C.12/2002/11 20 January 2003) para 34.

[242] Ibid para 35.

places extraterritorial obligations on states to assist other states in their human rights mandates, in the context of the right to water.

2.4. Limitations on a State's Capacity to Fulfil Their Obligations

One of the key factors inhibiting fuller protection of the rights within the *ICESCR* is contention over its core content and specifically the lack of universally recognised standards of economic, social and cultural rights. This lacuna is embodied in the Human Rights Council's *Report of the Independent Expert on the Effects of Economic Reform Policies and Foreign Debt on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights, 2008*.[243] In Paragraph 12 the report acknowledges a need for international norms to be "*further strengthened*" but admits that *"national conditions are so different that the minimum standards or core content of human rights to be safeguarded against the economic reforms and foreign debt burdens cannot be easily expressed as a universal international standard."* [244] The following paragraph refers to *"context-specific standards, benchmarks and indicators".*[245] It is herein argued that this approach has conveniently led the human rights movement to tolerate inequality in rights provision.

[243] UN HUMAN RIGHTS COUNCIL, BERNARDS, A., NYAMWAYA, M., *Report of the Independent Expert on the Effects of Economic Reform Policies and Foreign Debt on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights*, UN Doc A/HRC/7/9, issued on 1st February 2008.

[244] Ibid paras 12 and 13.

[245] Ibid.

This ideological position became entrenched when civil and political rights were quickly established as priority rights within the rights framework. Economic, social and cultural rights became 'second generation' rights subject to 'progressive realisation'.[246] As a result, not only extraterritorial obligations but even strict territorial obligations which are economic, social or cultural in nature are not always justiciable. It has been proposed that this approach was adopted in order to ensure the integrity of the agreements on the basis that developing states would not sign up to promises they could not keep in order to prevent those promises from being rendered meaningless.[247] In a similar vein, it is sometimes proposed that providing free education might demand resources that a state does not have, whereas running free and fair elections would not.[248] Such rhetoric has served to delay the realisation of economic, social and cultural rights and has created a global inequality of rights to accompany a

[246] This was subject to contention from the outset. The Shah of Iran speaking at the United Nations International Conference on Human Rights, Tehran 1968, he urged that the stratification into 'generations' of rights created *"one set of rights for the "South" and another for the "North.""* Speaking at the same conference, Rene Cassin also objected to the creation of two categories of human rights applicable to developed and to developing countries and sought to preserve the "*ideal of universality*". 3rd Plenary Meeting, 23 April 1968, A/CONF. 32/SR. 3, France. Recounted in BURKE, R. (2008) From Individual Rights to National Development: The First UN International Conference on Human Rights, Tehran, 1968. *Journal of World History,* 19**,** 275-296.

[247] See EIDE, A., KRAUSE, C. & ROSAS, A. (1994) *Economic, social and cultural rights : a textook,* Dordrecht ; London, M. Nijhoff, p. 248.

[248] See generally; WALDRON, J. (2010) Socioeconomic Rights and Theories of Justice. *NYU School of Law, Public Law Research Paper,* ; NOLAN, A., PORTER, B. & LANGFORD, M. (2007) The Justiciability of Social and Economic Rights: An Updated Appraisal. *CHRGJ Working Paper No. 15,* See also: ROBERTSON, R. E. (*1994*) Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights. *Human Rights Quarterly,* 16; YOUNG, K. G. (2008) The Minimum Core of Economic and Social Rights: A Concept in Search of Content. *Yale Journal of International Law 113,* 33.

global inequality of wealth. It has essentially severed the link between the universal human rights agenda and theories of distributive justice.

As a result, the majority of the economic, social and cultural rights provisions have remained the privilege of citizens in developed states and of the elite of developing states.[249] The second class treatment of economic, social and cultural rights has been compounded, in a symbolic sense at least, by the fact that in contrast to the *ICCPR*, the *ICESCR* did not benefit from an Optional Protocol granting the right to individual petition for citizens of signatory states until 2013.[250]

Lack of positive action to prevent violations of economic, social and cultural rights is occasionally rationalised by a distinction between positive and negative obligations. According to the theory of "positive" and "negative" rights, some rights (typically civil and political rights, for example the right to be free from torture,) require only non-interference by the state, whereas others (for example the right to an adequate standard of living,) require positive action by the state. Somewhat illogically, this distinction has traditionally been transposed onto the distinction between civil and political rights and economic,

[249] This approach has been contested by the 'structural approach' to human rights, mainly advocated by developing states and behind the *Declaration for the Establishment of a New International Economic Order* adopted by the UN General Assembly in 1974 1 May 1974, A/RES/S-6/3201.

[250] The General Assembly adopted *Resolution A/RES/63/117*, on 10 December 2008. The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* entered into force on 5 May 2013 after receiving the requisite tenth state ratification, (ratified by Uruguay). The right to individual petition will only apply to citizens of the states who have ratified the treaty however, see further summary from Amnesty International, 5 February 2013: http://www.amnesty.org/en/news/new-route-justice-poorest-being-denied-millions-2013-02-05

social and cultural rights. The subsequent conceptualisation of economic, social and cultural rights as "positive rights" and therefore rights of a more demanding nature than civil and political rights has led to widespread de-prioritisation of these rights.

The opacity of this understanding of rights has been exposed by Shue who effectively renders the distinction inaccurate and meaningless.[251] In its place, Shue offers a distinction between duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived. [252] Pogge's construction of obligations owed towards the global poor as negative obligations supports this analysis. In Beitz's edited volume, *Global Basic Rights*,[253] Pogge reiterates that there is a "*general duty, insofar as we reasonably can, to avoid making uncompensated contributions to the deprivation of others and also to avoid receiving uncompensated benefits from such deprivation*".[254] Such a reading may not satisfy a positivist theory of international law but it would make a

[251] SHUE, H. (1996) *Basic rights : subsistence, affluence and U.S. foreign policy*, Princeton ; Chichester, Princeton University Press.

[252] Ibid.pp. 52-60.

[253] BEITZ, C. R. & GOODIN, R. E. (2009) *Global basic rights*, Oxford, Oxford University Press.

[254] Originally in POGGE, T. W. (2002) *World poverty and human rights : cosmopolitan responsibilities and reforms*, Cambridge, Polity Press. Reiterated in Thomas W. Pogge, 'Shue on Rights and Duties' in BEITZ, C. R. & GOODIN, R. E. (2009) *Global basic rights*, Oxford, Oxford University Press. At p. 189. This is countered by Lichtenberg who finds that Pogge's negative duties towards the global poor are so demanding that they erase the appeal of a distinction between negative and positive obligations altogether. She also argues that these duties are also problematic in relation to the appropriate baseline for comparison. See Lichtenberg, J. 'Are There Any Basic Rights?' in ibid. pages 85-88. See also CANEY, S. (2007.) Global Poverty and Human Rights: the Case for Positive Duties. IN POGGE, T. (Ed.) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* , Oxford University Press.

timely and relevant contribution to the evolution of international law norms. If international law is to maintain legitimacy it should reflect the demands of global civil society to this effect. In particular, movements such as the Fairtrade movement are presented as expressions of global civil society's demand for greater equality. As outlined in chapter 2 the absence and impossibility of a 'one world community' is acknowledged as a shortfall and challenge to the legitimacy of the proposed obligation to trade fairly.

It is proposed that states' capacity to fulfil their obligations under these treaties is limited by external influences and international relationships. It is further argued that, rather than responding to the needs of states in this regard, the international community have circumvented these obligations through economic, social and cultural rights rhetoric of 'second generation rights' and 'progressive realisation' that diffuse the strength of the norms. In Chapter 6, it is argued that the structure of state sovereignty and relatedly the traditional territorially-based construction of jurisdiction create barriers to the realisation of international human rights norms. This model fails to take into account the imperfect nature of our global world order, in particular the realities of 'unequal sovereignty' whereby many states are restricted in their capacity to implement rights due to lack of resources and the influence or authority states often have in other territories. Insistence on territorially-based understandings of jurisdiction and sovereignty has created a barrier to responsibility for human rights and has led to a global inequality of rights to accompany a global inequality of wealth.

3. Direct Obligations of International Cooperation and Assistance

In examining scope for an obligation to trade fairly, the obligation towards international cooperation in international law marks the obvious starting point. Before examining this obligation within international human rights treaty law, the most general statement of this obligation is to be found in the Charter of the United Nations (hereinafter the *UN Charter).*[255] The following sections detail this obligation before sourcing its existence in international human rights treaty law.

3.1. International Cooperation in the UN Charter

The *UN Charter* lays the constitutional foundations for the UN human rights framework. It is therefore both a constituent part of treaty law and a statement of the principles behind the UN machinery. Obligations towards international cooperation can be inferred, to an extent, from the *Preamble to the UN Charter*[256] and from *Article 1(3).*[257] However, the most explicit statement of this obligation is to be found in *Chapter IX of the UN Charter*, establishing principles of international economic and social cooperation within international law. In particular, *Articles 55* and *56* set out that international cooperation for

[255] *Charter of the United Nations 1945.*

[256] Ibid. Preamble declares commitment to "*to employ international machinery for the promotion of the economic and social advancement of all peoples*".

[257] *Charter of the United Nations 1945,* Article 1: "*The Purposes of the United Nations are: (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.*"

'development' is an obligation of all states' parties.[258] The references to '*joint and separate action in co-operation*' within the *UN Charter* impose obligations owed towards all people on all states but are limited to the *"purposes set forth in Article 55"*.[259] *Article 55* directly stipulates *"universal respect for and observance of human rights"* amongst those purposes.

What is more, obligations embodied in the *UN Charter* are recognised as customary international law and, on some readings, as *jus cogens* norms.[260] It is established under general international law that states have territorial and extraterritorial obligations under customary international law to end violations of peremptory norms of international law (*jus cogens*). This includes an obligation to cooperate to bring to an end any serious breaches; an obligation to refrain from recognising as lawful any situation resulting from such breaches;

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[258] *Charter of the United Nations 1945,* Chapter IX International Economic and Social Co-operation, Article 55: "*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*." Article 56, "*All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55*."

[259] Article 56, *Charter of the United Nations 1945.*

[260] This may be inferred from *Vienna Convention on the Law of* Treaties 1969, Article 53. Although objection may be made on the grounds that Article 53 applies only relative to treaties between states, and furthermore only relative to such treaties that are concluded by states after the entry into force of the Vienna Convention "with regard to such States." (Vienna Convention, Art. 4). See LINDERFALK, U. (2007) The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences? *European Journal of International Law,* 18**,** 853−871, p 854.

and an obligation to refrain from providing aid or assistance in maintaining such a situation.[261] The *Maastricht Principles* stipulate that "*Such peremptory norms are relevant to civil, cultural, economic, political, and social rights, and include, inter alia, the right to self-determination and the prohibitions against genocide, crimes against humanity, war crimes, slavery, racial discrimination, extra-judicial executions, enforced disappearances, and torture, and other cruel, inhumane, or degrading treatment or punishment*."[262]

With this said however, state practice in pursuit of the duty of international cooperation for the observance of human rights is difficult to document.[263] A degree of extraterritoriality can be found in the customary international law principle prohibiting a state from allowing its territory to be used to cause damage on the territory of another state. The principle was invoked in the *Trail Smelter* case, in relation to a dispute between the US and Canada over pollution caused by mining in Canada which constituted trans-boundary harm in the US.[264] The principles were reiterated as 'deeply entrenched' in the dissenting

[261] See report of the International Law Commission, Report of the Fifty-Third Session, *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, Int'l Law Comm'n, 53d Sess., art. 41, U.N. Doc. A/56/10 (2001).

[262] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4), p 1096.

[263] See SALOMON, M. E. (2008a) Legal cosmopolitanism and the normative contribution of the right to development. IN MARKS, S. P. (Ed.) *Implementing the right to development: the role of international law.* Geneva, Harvard School of Public Health/ Friedrich-Ebert-Stiftung. At p 6.

[264] *Trail Smelter Case (US v. Can.)*, 3 R.I.A.A. 1905 (1941); *see also* the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the legality of threat or use of nuclear weapons, in which, referring to the principle that "*damage*

opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the 'Legality of Threat or Use of Nuclear Weapons'.[265] More often, when international cooperation under the *UN Charter* does occur it is made under *Chapter VII, UN Charter* on the grounds of restoring '*international peace and security*'[266] and not for the protection of human rights.

It is nonetheless revealing to acknowledge the lack of enforcement mechanisms for the duty of international cooperation, typical of human rights enforcement in general. As will be discussed further, one of the contributing factors to the subordination of human rights treaties to trade and investment treaties is that penalties for breaking a trade relationship are, in general, higher than those for violating a human rights convention. Outside of the regional court mechanisms, the international human rights conventions have only weak mechanisms of enforcement and delegate responsibility of enforcement to states.

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must not be caused to other nations," Judge Weeramantry considered the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country's population, should be decided "*in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law*."

[265] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226 (8 July) (Weeramantry, J., dissenting).

[266] *Charter of the United Nations*, 1945, Chapter VII.

3.2. International Cooperation in the Universal Declaration of Human Rights 1948 (UDHR)

Whilst the UN Charter laid the framework for a new international order in 1945, the catalogue of rights today commonly referred to as the international human rights framework finds its constitutional origins in the *Universal Declaration of Human Rights* (hereinafter the *UDHR*) in 1948.[267] Although integrating civil, political, economic, and social human rights, the *UDHR* does not protect economic freedoms (such as non-discriminatory conditions of labour, division of labour, efficient supply of goods, services and job opportunities).[268] Yet norms of international cooperation can be inferred, to an

[267] *Universal Declaration of Human Rights (UDHR)* adopted 10 December 1948, preceded by the *UN Charter* adopted 26 June 1945. Subsequently in 1966, the *UDHR* was attached to the *United Nations International Covenant on Civil and Political Rights and the United Nations International Covenant on Economic Social and Cultural Rights* to create the *International Bill of Human Rights*. The universality of the norms contained within these provisions was upheld in the *Vienna Declaration and Programme of Action*, UN GAOR, World Conference on Human Rights 48th Session., 22nd plen. mtg., UN Doc. A/CONF. 157/24 (1993) which refers to the "*universal, indivisible and interdependent and interrelated*" nature of human rights and the obligations of the international community towards all human rights. *The Vienna Declaration and Programme of Action* recognized that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.

[268] 'Economic freedoms' are mentioned only in Article 6 of the *ICESCR* on the right to work. However more recent UN human rights treaties such as the *Convention on the Elimination of all Forms of Discrimination Against Women 1979,* as well as the *Convention on the Rights of the Child 1989* have begun to be granted equal importance to economic, social and cultural rights as to civil and political rights in their realm of protection. See MERALI, I. & OOSTERVELD, V. (2001) *Giving meaning to economic, social, and cultural rights,* Philadelphia ; [Great Britain], University of Pennsylvania Press.

extent, from *Article 22*[269] and have been elaborated from *Article 28*, which states that everyone is entitled to a social and international order in which the rights and freedoms set forth in the *UDHR* can be fully realised.[270] Recently described as the seed of the globalisation of human rights,[271] Article 28 is the most aspirational and the least concise of the provisions contained in the *UDHR*. *Article 28* is largely considered to be a party to the same wave of aspiration towards development as was contained in the treaty law of that time.[272] Yet whilst other rights in the *UDHR* were later embodied in the *ICESCR* and *ICCPR*, the content of *Article 28 UDHR* was not included in these covenants.

It was not until new developing states emerged as a counter-hegemonic challenge to the dominance of developed states within international law that the right to development emerged in human rights debates. It was at the request

[269] Article 22, *Universal Declaration of Human Rights 1948*: "*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."*

[270] Article 28, *Universal Declaration of Human Rights 1948.* Also of note is Article 22, *Universal Declaration of Human Rights 1948*: "*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."*

[271] FEYTER, K. D. & GÓMEZ ISA, F. (2005) *Privatisation and human rights in the age of globalisation,* Antwerp ; Oxford, Intersentia, ibid.

[272] For example the ILO *Declaration of Philadelphia* adopted by the General Conference of the International Labour Organisation (ILO) in May 1944 made reference to a right to development, as did documents submitted in connection with the drafting to the *Declaration of Rights and Duties of States*' in the late 1940s, the *Draft Declaration on Rights and Duties of States*, adopted by the International Law Commission in 1949.

of developing states during the decolonisation phase in the 1960s that the right to development featured in the context of a 'New International Economic Order'.[273] In response to the growing demand from developing nations, in 1969, the UN General Assembly passed *Resolution 2542 (XXIV)* proclaiming the *Declaration on Social Progress and Development (1969).*[274] In 1979, the Commission on Human Rights affirmed that a right to development exists and that the equality of opportunity for development is as much a prerogative of nations as individuals.[275] In 1981, work began on a declaration in a special

[273] MARKS, S. P., (2004) The Human Right to Development: Between Rhetoric and Reality. *Harvard Human Rights Journal,* 17**,** 137-169 See also LINDROOS, A. (1999) *The right to development,* Helsinki, Forum Iuris. At p. 22: *"The human rights debate provided a convenient vehicle for the political interests of the South. These interests were then vested in the shape of a human 'right to development' in order to gain more weight. "* See also BEDJAOUI, M. (1991) *International law : achievements and prospects,* Paris ; London, UNESCO and Martinus Nijhoff.; AGUIRRE, D. (2008) *The human right to development in a globalized world,* Aldershot, Ashgate.

[274] UNGA *Resolution 2542 (XXIV)* proclaiming the *Declaration on Social Progress and Development (1969)*, UN Doc A/RES/2542 (XXIV)

[275] Commission on Human Rights Resolution 5 (XXXV) of 2 March 1979 and in General Assembly resolution 34/46 of 23 November 1979. Subsequently in General Assembly Resolutions G.A.Res 174, 35 U.N. GAOR (1980); G.A. Res 133, 36 U.N. GAOR (1981); G.A. Res. 199, 37 U.N. GAOR (1982); G.A. Res. 124, 38 U.N. GAOR (1983); and the draft resolution adopted by the Third Committee on Nov 30, 1984 U.N. Doc A/C3/39/L36. Follow-up studies on the regional and national dimensions of the right in U.N. Doc E/CN.4/1421 and U.N. Doc. E/CN.4/1488. See also reaffirmation in Res 6 (XXXVI) and Res. 1983/15. The right to development has figured prominently in international seminars sponsored by UNESCO (UNESCO, Colloquium on the New Human Rights: The "Rights of Solidarity," Mexico City (Aug. 12-15, 1980); see also Final Report, UNESCO Doc. SS-80/CONF.806/4.), the Division of Human Rights, Seminar on the Effects of the Existing Unjust International Economic Order on the Economies of the Developing Countries and the Obstacle that this represents for the Implementation of Human Rights and Fundamental Freedoms, Geneva, Switzerland (June 30-July 11, 1980), reprinted in U.N. Doc. ST/HR/SER.A/8 (1980); Seminar on the Relations that Exist between Human Rights, Peace and Development, United Nations Headquarters, New York, N.Y. (Aug. 3-14, 1987), reprinted in U.N. Doc. ST/HR/SER.A/10 (1981).

Working Group of Governmental Experts on the Right to Development.[276] Subsequently the *Declaration on Social Progress and Development (1969)* and the *Declaration on the Right to Development (1986)* have been taken together to constitute the normative framework for the transformation of the right contained in *Article 28 UDHR* to a realisable right to development.[277] Whilst brokering the views of North and South, the Declaration offers little guidance as to the normative content of the right. It opened the door to the possibility of such obligations beyond the nation state but did not clarify the content of that obligation.

In 1993 the World Conference on Human Rights adopted the *Vienna Declaration and Programme of Action*[278], which recognises that "*democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing*".[279] The World Conference reaffirmed by consensus the right to development as a universal and inalienable right and an integral part of fundamental human rights.[280] It further states that, while development facilitates the enjoyment of all human rights, lack of development may not be invoked to justify the abridgement of internationally recognised

[276] The Reports of the Working Group are available at UN Doc E/CN.4/1489, UN Doc E/CN.4/1983/11, and UN.Doc E/CN.4/1984/14.

[277] ALFREDSSON, G. & EIDE, A. (1999) *The Universal Declaration of Human Rights : a common standard of achievement*, The Hague ; London ; Kluwer. At p. 602. Eide also lists the *UN Charter, the ILO Constitution, the ICCESR* and *ICCPR*, as building blocks serving as pillars for the realisation or Article 28.

[278] *Vienna Declaration and Programme of Action*, UN GAOR, World Conference on Human Rights 48th Session., 22nd plen. mtg., UN Doc. A/CONF. 157/24 (1993).

[279] *Vienna Declaration and Programme of Action* as adopted by the World Conference on Human Rights on 25 June 1993, para 8.

[280] Ibid, para 10.

human rights.[281] This statement in particular would seem to challenge the concept of 'progressive realisation' attached to economic, social and cultural rights. The UN Commission on Human Rights has since built a body of soft law supporting a right to development[282] and established a high-level task force on the implementation of the right to development within the framework of the Working Group.[283]

Despite codification in the form of the *Declaration on the Right to Development (1986), (DRD)* the content and even the existence of the right to development remain contested. The lack of clarity on the content of the right has fuelled denial of its very existence.[284] Amongst varied definitions,[285] one of the strongest to emerge in recent years is that of Margot Salomon. Salomon

[281] Ibid.

[282] Including the *General Assembly Resolution 48/141* of 20 December 1993, UN resolution 1998/72 of 22 April 1998, the conclusions and recommendations of the Working Group of the right to development UN Docs: E/CN.4/2002/28/Rev.1, E/CN.4/2004/23, paras. 41-51, and E/CN.4/2005/25.

[283] Established by the *Vienna Declaration and Programme of Action as adopted by the World Conference on Human Rights* on 25 June 1993. At para 72.

[284] See for example DONNELLY, J. (1985) In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development. *California Western International Law Journal,* 15 At p. 481. *"[T]he"variety of views" (on the content of the right to development) arises not from any special difficulties in specifying the human right to development, but from the fact that no such right exists. As with any other non-existent object, the reports of those who claim to have seen it cannot but be expected to show great diversity."*

[285] SCHRIJVER, N.:(2011) The Legal Formulation of the Right to Development, ABI-SAAB, G. (1980) The Legal Formulation of the Right to Development. IN DUPUY, R. J. (Ed.) *The Right to Development at the International Level.* The Hague Academy of International Law, BARSH, R. L. (1991) The Right to Development as a Human Right: Results of the Global Consultation. *Human Rights Quarterly,* 13**,** 322 - 338, ALSTON, P.:(1980) The right to development at the international level. *The right to development at the international level.* Martinus Nijhoff Publishers, AGUIRRE, D. (2008) *The human right to development in a globalized world,* Aldershot, Ashgate.

takes the view that rather than establishing a new substantive right, the *DRD* is more concerned with advancing a "*system of duties that might give better effect to existing socio-economic rights*."[286] Salomon is right to place emphasis on the nature of the duties surrounding the right as the content of the right to development is already well-defined. The more contentious issues concern responsibility for the right to development.

Under the *DRD* the primary responsibility for creating conditions favourable to the development of peoples and individuals lies with the state acting domestically.[287] Although it does stipulate collective and differentiated responsibilities under *Article 4: "States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development"*.[288] Differentiated obligations informed by the contribution that a state has made to the emergence of the problem have since been supported by statements of the UN High-Level Task Force on the Implementation of the Right to Development. [289] That the *DRD* advocates positive duties on developed states

[286] SALOMON, M. E. (2008a) Legal cosmopolitanism and the normative contribution of the right to development. IN MARKS, S. P. (Ed.) *Implementing the right to development: the role of international law*. Geneva, Harvard School of Public Health/ Friedrich-Ebert-Stiftung, p 18.

[287] Article 3, *Declaration on the Right to Development (1986)*.

[288] Article 4, *Declaration on the Right to Development (1986)*.

[289] SALOMON, M. E. (2005) Addressing Structural Obstacles and Advancing Accountability for Human Rights: A Contribution of the Right to Development to MDG 8. *Briefing note to the 2nd Session of the UN High-Level Task Force on the Implementation of the Right to Development.* Continues: "*While all countries, including poor and middle-income countries have human rights obligations both domestically and internationally, certain responsibilities in the alleviation of world poverty - the cornerstone of the right to development - attach themselves to a particular set of developed countries and are essential complements to the*

to assist developing states is underlined by the fact that the *DRD* serves as the normative basis of the *Millennium Declaration's* call to eradicate extreme poverty.[290]

3.3. International Cooperation in the International Human Rights Conventions

The International Covenant on Economic, Social and Cultural Rights (ICESCR) makes direct reference to 'international cooperation', along with 'resource allocation', and 'subsistence'. *Article 1 (2) ICESCR* opens with an obligation to preserve a people's means of subsistence in all cases.[291] Article 2 (1) provides that state parties have an obligation to pursue the fulfilment of human rights *"to the maximum of its available resources", "individually and through international assistance and cooperation, especially economic and technical"*.[292] *Article 2(1) ICESCR* also implies an obligation on the part of

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domestic fulfilment of rights elsewhere." Available at http://www2.ohchr.org/english/issues/development/docs/salomon.pdf Last accessed on 20th February 2012.

[290] The *UN Millennium Declaration* is a United Nations General Assembly Resolution adopted at the 8th plenary of the Millennium Summit meeting on 8 September 2000. See further SALOMON, M.E., (2005) '*Addressing Structural Obstacles and Advancing Accountability for Human Rights: A Contribution of the Right to Development to MDG 8'*, Briefing note to the 2nd Session of the UN High-Level Task Force on the Implementation of the Right to Development.

[291] Article 1 (2) *International Covenant on Economic Social and Cultural Rights 1967*. Article 1 (3) continues: "*The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations*."

[292] Article 2, *International Covenant on Economic Social and Cultural Rights 1967*. Article 2 (2) continues: "*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*

developed states to help ensure worldwide minimum economic, social and cultural rights by taking necessary steps in development cooperation.

Besides these obligations, the *ICESCR* contains several provisions which place obligations of distributive justice on states which are simply not realisable without international cooperation. These obligations will be discussed in the preceding section before a similar analysis of state obligations of democracy from the *International Covenant on Civil and Political Rights (ICCPR)* is undertaken. When negotiating what came to be *Article 2(1) ICESCR* the drafters agreed that international cooperation and assistance was necessary to realise economic, social, and cultural rights, although they disagreed whether it could be claimed as a right.[293] Disagreement continued in the negotiations on the Optional Protocol to the ICESCR. - Some industrialised countries accepted the moral responsibility of international cooperation, but argued that the Covenant does not impose legally binding obligations in regard to economic, social, and cultural rights internationally.[294]

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as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3: "*Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals*."

[293] ALSTON, P. & QUINN, G. (1987) The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*, 9, 156, pp 188-190.

[294] See UN COMMISSION ON HUMAN RIGHTS, *Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Third Session*, U.N. ESCOR, Comm'n on Hum. Rts., 62d Sess., 78, 82, U.N. Doc. E/CN.4/2006/47 (2006).

Lack of consensus on the binding status of the norm is reflected in international declarations adopted without a vote, such as the resolutions of the UN General Assembly on the right to food. Despite a lack of consensus, the UN Special Rapporteur on the Right to Food, Oliver de Schutter has recently described *ICESCR* norms as *jus cogens* norms.[295] On this reading, they are accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted.[296] This infers that treaties or provisions within these treaties inconsistent with human rights should be considered void and terminated.

It should also be noted that direct obligations of international cooperation have also been derived from specialised human rights treaties, for example the *UN Convention on the Rights of Persons with Disabilities*,[297] the *UN Convention Against Torture*,[298] the *UN International Convention for the Protection of all*

[295] UN HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the right to food, Olivier De Schutter, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements,* Human Rights Council, Nineteenth session, 19 December 2011, UN Doc A/HRC/19/59/Add.5. Para 1.3. p.6.

[296] *Vienna Convention on the Law of Treaties,* Articles 53 and 64. See also the conclusions of the Study Group of the International Law Commission on fragmentation of international law: difficulties arising from the diversification and expansion of international law, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. 12, para. 251 (41).

[297] *International Convention on the Elimination of All Forms of Racial Discrimination*, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., art 32, 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969).

[298] Article 5 *UDHR,* Article 7 *ICCPR* and Article 7 *CAT.* See NOWAK, M., (2010) 'Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective' in SKOGLY, S. I. & GIBNEY, M. (2010) *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Publications, Chapter 1.

Persons from Enforced Disappearance[299] and the *UN Convention on the Rights of the Child*.[300] An obligation on state parties to cooperate in order to prevent and punish the sale of children, child prostitution, child pornography, and the involvement of children in armed conflict is included in the first two *Optional Protocols to the Convention on the Rights of the Child.*[301] The two protocols require states to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes. In addition, the *Millennium Declaration* refers to a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.[302] Yet regardless of whether classified as binding international agreements or non-binding declarations, these obligations are not attached to means of enforcement, thus rendering their legal force questionable.

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[299] *International Convention for the Protection of All Person from Enforced Disappearance*, adopted 20 Dec. 2006, U.N. GAOR, 61st Sess., Annex Art. 15, U.N. Doc. A/ RES/61/177 (*entered into force* 26 Dec. 2010): "*States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains*."

[300] Article 4: "*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation"*.

[301] *Optional Protocol to the Convention on the Rights of the Child in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography*, *adopted* 25 May 2000, G.A. Res. 54/263, U.N. GAOR, 44th Sess., annex II art. 10, U.N. Doc. A/54/49 (2000); *Id.* Annex I, art. 10.

[302] *United Nations Millennium Declaration, adopted* 8 Sept. 2000, G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/2 (2000). Article 2.

3.4. Summary

From the foregoing analysis it is clear that within the scope of traditionally 'internal' human rights treaty obligations there are degrees of *externality*. However, reference to the limited history of international intervention on human rights grounds would suggest that in practice due to lack of consensus or collective will, these obligations may be better described as *rights* than as obligations. Due to globalisation and a high degree of economic interdependence between states, a state may be responsible for human rights situations in another state. For example, through international economic agreements, foreign states may restrict another state's human rights policies directly or indirectly. Gibney and Skogly point out that; "*In fact the paradox becomes that if the state itself is responsible for massive human rights abuses, it is of concern to the international community. But if human rights problems or neglect is a result of the involvement of foreign states, all of a sudden, the sovereignty argument carries far more weight.*"[303] Efforts to tackle this lacuna have come from progressive interpretation of existing instruments. Indeed, in order to consolidate and strengthen efforts in this direction a new set of Principles, *the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* has recently been adopted by a group of experts in international human rights law.[304]

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[303] SKOGLY, S. I. & GIBNEY, M. (2002) Transnational Human Rights Obligations. *Human Rights Quarterly*, 24**,** 781-798. 8, p 798.

[304] The following experts are listed as signatories to the Maastricht Principles: Meghna Abraham; Catarina de Albuquerque; Theo van Boven; Maria Virginia Bras Gomes; Lilian Chenwi; Danwood Chirwa; Fons Coomans Virginia Dandan; Olivier De Schutter; Julia Duchrow; Asbjørn Eide; Cees Flinterman; Mark Gibney; Thorsten Göbel; Paul Hunt; Ashfaq Khalfan; Miloon Kothari; Rolf Künnemann; Malcolm Langford; Nicholas Lusiani; Claire Mahon; Christopher Mbazira; Maija

4. The Maastricht Principles

The *Maastricht Principles* were adopted on 28 September 2011 by a group of leading experts in international law and human rights convened by Maastricht University and the International Commission of Jurists. The *Maastricht Principles* and the accompanying commentary issued by some of the drafters of the *Maastricht Principles*[305] (hereinafter the Commentary) enunciate the parameters of extraterritorial human rights obligations.[306] The *Maastricht Principles* develop and give renewed significance to existing obligations and commitments embodied in international human rights law[307] and build on existing principles in this area.[308] The *Maastricht Principles* and the Commentary employ innovative interpretation and analysis, particularly in relation to jurisdiction, in order to establish extraterritorial state obligations as legal *obligations* rather than moral duties or rights.

Mustaniemi-Laakso; Gorik Ooms; Marcos Orellana; Sandra Ratjen; Aisling Reidy; Margot Salomon; Fabián Salvioli; Martin Scheinin; Ian Seiderman; Magdalena Sepúlveda; Heisoo Shin; Sigrun Skogly; Ana María Suárez Franco; Philippe Texier; Wouter Vandenhole; Duncan Wilson; Michael Windfuhr; Sisay Yeshanew.

[305] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4).

[306] Preamble, t*he Maastricht Principles.*

[307] *The Vienna Declaration and Programme of Action, Millennium Declaration, Charter of the United Nations, the Universal Declaration on Human Rights,* and numerous of the core UN international human rights treaties.

[308] *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).*

4.1. Content of the *Maastricht Principles*

In light of ambiguity surrounding the scope of existing obligations the *Maastricht Principles* enunciate, clarify and expand existing obligations through innovative analysis and drafting. In particular, the *Maastricht Principles* respond to the realities of globalisation and relationships beyond borders, by breathing fresh life into the concepts of jurisdiction, capacity and resources. The concept of 'effective control'[309] is employed to cover diverse situations where states may have positive obligations to influence the exercise of rights or to take steps to ensure avoidance of negative effects on economic, social and cultural rights in other territories. This may occur in cases of belligerent occupation, where the occupying power assumes the obligations to respect, protect and fulfil the right to work, to health, to education and to an adequate standard of living.[310] The *Maastricht Principles* are particularly innovative in extending responsibility where there is 'de facto' occupation, for example, where through its conduct the state has influence on the exercise of rights outside of its territory. Margot Salomon describes the adoption by a state or states of agricultural subsidies that undercut farmers elsewhere and make earning a basic living impossible as such a situation. Indeed, she offers this as

[309] Principle 9a, the Maastricht Principles.

[310] Ibid. For example, in respect of Israel and Occupied Palestinian Territory, the UN Committee on Economic, Social and Cultural Rights has affirmed that, in line with the International Court of Justice Advisory Opinion on the Wall, Israel's Covenant obligations are fully applicable, although in fields where competences have been transferred to the Palestinian authorities, the obligation is that Israel 'not raise any obstacle to the exercise of …rights'. UN Doc. E/C.12/ISR/CO/3 (2011), at para 8. Cited in SALOMON, M. & SEIDERMAN, I. (2012) Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights *Global Policy,* 4 (3). At p 461.

an example of where responsibility is extended through the *Maastricht Principles*.[311]

The *Maastricht Principles* address the jurisdiction gap in protection for economic, social and cultural rights by developing two conceptually distinct extraterritorial obligations. Firstly, a specific obligation on states to respect and, in some circumstances, fulfil rights when involved in conduct that has foreseeable effects beyond borders, and secondly a more general obligation on states to act jointly and separately to realise economic, social and cultural rights extraterritorially thought international assistance and cooperation. The former obligation builds on the established duty to not cause harm by establishing a wide sphere of influence for state actors and moreover by giving definition to the obligation to *fulfil*. The latter obligation reaffirms the wide-ranging duty of international cooperation found in the *UN Charter* and those explicitly concerning economic, social and cultural rights found in *ICESCR* (both of which are discussed earlier in this chapter). It also substantiates the content of those duties. Furthermore, states are to develop a suitable international division of responsibility to give effect to the obligation to cooperate.[312]

[311] SALOMON, M. E.:(16 November 2012.) The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive "Obligations to Fulfil". *EJIL:Talk!*

[312] SALOMON, M. & SEIDERMAN, I. (2012) Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights *Global Policy*, 4 (3), p 460.

4.2. Subject of the Maastricht Principles

Principles 1 and 2 assert the universal nature of human rights. Principle 1 states: "*All human beings everywhere are born free and equal in dignity and are entitled without discrimination to human rights and freedoms."*[313] As the Commentary points out, the principle that rights are subject to enjoyment without discrimination or distinction is contained in *Article 7 UDHR* and in a number of the core human rights treaties.[314] The Commentary draws an important distinction between the principle of non–discrimination in relation to the enjoyment of rights, as expressed in Principle 1 and as a self-standing principle and confirms that international human rights law relates to both. Principle 2 develops the principle of non-discrimination and equality further. It stipulates that "*States must at all times observe the principles of non-discrimination, equality, including gender equality, transparency and accountability".*[315] In the Commentary it is recalled that national or social

[313] Principle 1, *Maastricht Principles.*

[314] *International Convention on the Elimination of All Forms of Racial Discrimination,* adopted 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., art. 2(1), 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352 (1966) [hereinafter CERD]; *International Covenant on Economic, Social and Cultural Rights, adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 2(2), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR]; *Convention on the Rights of the Child, adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 2(1), U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted 18 Dec. 1990, G.A. Res. 45/158, *U.N. Convention on the Rights of Persons with Disabilities, adopted* 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., art. 5, U.N. Doc. A/RES/61/106 Cited DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly,* 34 (4).

[315] Principle 2, the *Maastricht Principles.*

origin is explicitly included as an example of grounds on which discrimination may not occur under human rights law.[316]

4.3. The Applicability of the *Maastricht Principles*

Situations where extraterritorial obligations apply are detailed in Principle 9 to include:

> *a) Situations over which it [the state] exercises authority or effective control, whether or not such control is exercised in accordance with international law;*
>
> *b) Situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;*
>
> *c) Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realise economic, social, and cultural rights extraterritorially, in accordance with international law.*[317]

These provisions are subject to the principles and purposes of the United Nations as set out in Principle 10. The Commentary draws attention to *Article 2 (4) UN Charter* which imposes an obligation on UN member states to *"refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other*

[316] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4), p 1088.

[317] Principle 9, the *Maastricht Principles.*

manner inconsistent with the Purposes of the United Nations."[318] Principles 24 and 25 further describe that the scope of the duty on states to act extraterritorially may be limited by the sovereignty of the state on the national territory of where a situation occurs, as well as by the principle of equality of all states.[319]

Principles 12 – 17 extend the scope of state-responsibility to non-state actors. Principle 12 sets out that states are responsible for both acts and omission of non-state actors. (Principle 13 sets out that states must desist from acts and omissions which create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. This implies that states must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights.[320] The results of the assessment must be made public (Principle 14). A state that transfers competences to, or participates in, an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that state (from Principle 15). States must elaborate, interpret and apply relevant international agreements and

[318] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly,* 34 (4). p 1109.

[319] Ibid.

[320] Principle 14, the *Maastricht Principles*. See also DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly,* 34 (4). p 1117.

standards in a manner consistent with their human rights obligations, whilst international trade investment, finance, and taxation are explicitly included in this obligation (from Principle 17).

4.4. The Scope of the *Maastricht Principles*

Principle 3 asserts that the obligations are to respect, protect and *fulfil*. Principles 19-22 address the obligation to respect. In the Commentary it is recognised that this obligation applies to direct and indirect interference as well as sanctions and equivalent measures.[321] Principles 23–27 address the obligation to protect. The obligation to protect is unpacked to include an obligation to regulate private groups or individuals,[322] recalling the classic bases for allowing a state to exercise extraterritorial jurisdiction in compliance with international law.[323] In this regard, the active personality principle as a basis for extraterritorial jurisdiction is invoked. Principle 25(c) qualifies the active personality principle to the degree that a state may regulate an enterprise which has its centre of activity in the national territory, which is registered or domiciled on the territory, or which has its main place of business or substantial business activities in the territory.[324]

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[321] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4), p 1126.

[322] Principle 24, the *Maastricht Principles.*

[323] Principle 25, ibid.

[324] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4), p 1139.

Principles 28-35 address the obligation to *fulfil*. The Commentary to the Principles clarify the obligation to fulfil human rights to include *"any action or omission that, whether intended or not, disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting de facto discrimination"*.[325] It is stipulated that states may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. The positive obligations inferred in the obligation to fulfil are subject to the limitations of reasonability, objectivity and proportionality and ought to be discontinued when substantive equality has been sustainably achieved.[326]

4.5. Key Provisions of the *Maastricht Principles*

(i.) Jurisdiction

The Maastricht Principles are most progressive in their innovation interpretations of jurisdiction and capacity. Principle 9 is ground-breaking in asserting the extension of jurisdiction to cover situations where control is exercised. The Commentary to Principle 9 points out that the *Vienna Convention on the Law of Treaties* establishes a presumption that treaties are

[325] Ibid. p 1088

[326] Ibid. The Commentary cites the following as authority; *General Comment No. 18, Non-discrimination*, U.N. GAOR, Hum. Rts. Comm., at 146, U.N. Doc. HRI/GEN/1/Rev.7 (2004); and *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, U.N. ESCOR, Committee On Economic, Social & Cultural Rights. 42d Sess., U.N. Doc. E/C.12/GC/20 (2009).

binding on states in respect of their national territory[327] but that international human rights law has developed exceptions to the general rule based on the object and purpose of the core human rights instruments.[328] This extension of territoriality moves beyond the customary law prohibition on a state to allow its territory to be used to cause damage on the territory of another state,[329] and the obligation on states to end violations of peremptory norms of international law,[330] to enunciate a positive obligation to fulfill human rights obligations.

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[327] See *Vienna Convention on the Law of Treaties*, art. 21 U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980), reprinted in 8 I.L.M. 679 (1969) art. 29: "*Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*." The SS Lotus case is commonly cited as an example of the traditional approach *SS Lotus (France v Turkey)*, Permanent Court of International Justice, PCIJ Reports, Series A, No. 10 (1927).

[328] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I. C. J. 136, ¶ 109 (9 July). Also *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 26 (19Dec.). Also see *Human Rights Committee cases;* (case No. 52/79, *Lopez Burgos* v. *Uruguay:* case No. 56/79, *Lilian Celiherti de Cusariego* v. *Uruguay).* It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No.106181, *Montero* v. *Uruguay).*

[329] *Trail Smelter Case (US v. Can.),* 3 R.I.A.A. 1905 (1941). See also the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the legality of threat or use of nuclear weapons, in which, referring to the principle that "*damage must not be caused to other nations,*" Judge Weeramantry considered the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country's population, should be decided *"in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law*." *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* 1996 I.C.J. 226 (8 July) (Weeramantry, J., dissenting).

[330] *See International Law Commission, Report of the Fifty-Third Session, Responsibility of States for Internationally Wrongful Acts,* U.N. GAOR, International Law Commission, 53d Sess., Art. 41, U.N. Doc. A/56/10 (2001). Cited in DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly,* 34 (4) p.1096.

The extension of jurisdiction finds ground in the dynamic interpretation of the principles of *nexus* and the *nature of the protected good* within jurisdiction. These principles have been used to establish universal jurisdiction with respect to some international crimes (*nature*) at least if the offender is present on the territory (*nexus*).[331]

Similar statements emerge from the regional bodies. In the case of *Victor Saldano v. Argentina*, the Inter-American Commission on Human Rights holds that in relation to the American Convention, *"jurisdiction [. . .] [is] a notion linked to authority and effective control, and not merely to territorial boundaries*."[332] Similarly, in the case of *Al-Skeini and Others v. The United Kingdom*, the European Court of Human Rights indicated that; "*as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory*."[333] Under the *European Convention on Human*

[331] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34.

[332] *Victor Saldano v. Argentina*, Petition, Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/ II.95 Doc. 7 rev. at 289 (1998), ¶ 19. Cited in the DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4), p 1107. See also Communication No. 1539/2006 *(Munaf v. Rom.), adopted* 30 July 2009, U.N. GAOR, Hum. Rts. Comm., 96th Sess., Annex ¶ 14.2, U.N. Doc. CCPR/C/96/D/1539/2006 (2009).

[333] Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 18 (2011),138-139, *available at* http://www.unhcr.org/refworld/pdfid/4e2545502.pdf Cited in ibid. At p 1107. See also *Ilascu and Others v. Moldova and Russia, Appl. No. 48787/99,* 40 Eur. Ct. H.R. 46 (2004), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886 last accessed 29 May 2013.

Rights,[334] the extent of the state's obligation will depend on the degree of control of the territory. Furthermore, it is important to recall that statements of regional bodies relate only to where the obligations of the relevant treaties are engaged and does not purport to express the scope of obligations under general international law.[335]

This shift is not confined to international human rights law and is perceptible in other spheres. For example, in the context of aviation law, the European Court of Justice stretched extraterritorial jurisdiction on the basis of nexus and nature.[336] Regarding the nature of the violation at issue, the ECJ ruled that it was not an international crime that was committed but a positive obligation to protect a global public good which was violated.[337]

Jurisprudence in this area is supported by statements of UN institutions. For example, in *General Comment No 3,* the Human Rights Committee stated that each state party to the *ICCPR "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State*

[334] *European Convention for the Protection of Human Rights and Fundamental Freedoms,* signed 4 Nov. 1950, entered into force 3 Sept. 1953, 213 UNTS 221, ETS 5, available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[335] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4), p 1107.

[336] See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC, OJ (2009) L8/3, recital 25 in particular; ECJ, Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change ('ATA')*, Judgment of 21 December 2011.

[337] ECJ, Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change ('ATA')*, Judgment of 21 December 2011.

Party, even if not situated within the territory of the State Party."[338] The Commentary elaborates that; "*For the purpose of defining the conditions of applicability of the Covenant, the notion of jurisdiction refers to the relationship between the individual and the state in connection with a violation of human rights, wherever it occurred, so that acts of states that take place or produce effects outside the national territory may be deemed to fall under the jurisdiction of the state concerned*."[339] This is supported by the Committee Against Torture's interpretation of any "*territory*" to include all areas where the state exercises, directly or indirectly, in whole or in part, de jure or de facto, effective control in accordance with international law.[340] Further rebuttals against the presumption of territorially-based jurisdiction have been made in relation to the *CERD.*[341]

(ii) Capacity and resources

In relation to the general obligation to international cooperation for the pursuance of human rights, the *Maastricht Principles* work from the premise that it should be "*uncontroversial*"[342] that there is an obligation of international

[338] Human Rights Committee *General Comment No. 31,* 10.

[339] Ibid.

[340] *General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. GAOR, Comm. Against Torture, 16, U.N. Doc. CAT/C/GC/2 (2008).

[341] Provisional Measures in the case of *Georgia v. Russian Federation,* 2008, No. 35/2008, I.C.J. 109 (15 Oct.).

[342] SALOMON, M. E.:(16 November 2012.) The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights: An Overview of Positive "Obligations to Fulfil". *EJIL:Talk!* Available here: http://www.ejiltalk.org/the-maastricht-principles-on-extraterritorial-obligations-of-states-in-the-area-of-economic-social-and-cultural-rights-and-its-commentary-an-overview-of-positive-obligations-to-fulfil/ Last accessed 1 June 2013.

cooperation for the exercise of basic human rights within traditional sources of international law and seek to substantiate the nature and content of that obligation. The extraterritorial application of human rights obligations is asserted in Principle 3: "*All states have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially."*[343] The Commentary points out that this is not to be read as implying that each state is responsible for ensuring the human rights of every person in the world. Instead this provision is to be read together with the rest of the *Maastricht Principles* to identify the circumstances and conditions to which the *Maastricht Principles* apply.[344]

This is an important addition and reflects the theme of burden-sharing which is central to the *Maastricht Principles*. To this end, the *Maastricht Principles* also develop and revise 'capacity' beyond the problematic phrasing of the original *ICESCR* (discussed in Section 2 above) in Principles 28 – 35 on the obligation to fulfill. The Principles stipulate that capacity cannot be limited by lack of resources and reject a narrow interpretation of the international cooperation norm as a demand for transfer of financial resource.[345] The Principles instead establish that all states have a duty to cooperate to avoid causing injury to the interests of other states and to the rights of their peoples and moreover states

[343] Principle 3, the *Maastricht Principles.*

[344] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly*, 34 (4). At p. 1090.

[345] Ibid. At p.1096, recalling ICESCR *General Comment No3*: The Nature of state Parties Obligations, UN ESCOR, Comm. on Econ., Soc. & Cult. Rts, 5th sess., para 11, U.N. Doc E/1991/23/(1991). And p 1097 para 4 (3).

should actively seek to address existing deprivations.[346] It is established that this may take the form of cooperation in policy agreement and design by states as members of international organisations.[347]

Furthermore, the Commentary recalls that international law recognises a principle of common but differentiated responsibilities among states[348] and there are several examples of negotiated systems of burden-sharing established to address challenges or duties of a global character.[349] Principle 30 expresses the expectation that states act in good faith in order to establish a system of burden-sharing in this area and affirms a procedural obligation on relevant states are to devise a suitable international division of responsibilities necessary to give effect to the obligation.[350] The absence of a system of coordination for the allocation of responsibilities does not relieve an individual state of its duty to act separately in order to comply with its obligations.[351]

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[346] Principle 13, the *Maastricht Principles.*

[347] Ibid. Principles 15, 16 and17.

[348] DE SCHUTTER, O., EIDE, A., KHALFAN, A., ORELLANA, M., SALOMON, M. & SEIDERMAN, I. (2012) Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. *Human Rights Quarterly,* 34 (4).At p.1149. Recalling the United Nations Framework Convention on Climate Change 1994, Art. 3.

[349] Ibid. At p.1150. Recalling the shared commitment to 0.7 percent Gross National Income in Official Development Assistance from industrialised countries, which is perhaps the oldest negotiated burden-sharing scheme in *IDA's Long-Term Financing Capacity*, International Development Association Resource Mobilization (Feb. 2007) (*available at* http://siteresources.worldbank.org/IDA/ Resources/IDAFinancialCapacity.pdf; *Resource Scenarios 2011–2013,)* and the Kyoto Protocol for burden-sharing in the reduction of greenhouse gas emissions, *Kyoto Protocol to the United Nations Framework on Climate Change 1998*, Art. 11.

[350] Ibid. At p. 1150.

[351] Ibid.

In substantiating the norm of international cooperation the *Maastricht Principles* straddle both positive and negative obligations to address deprivation and to avoid causing injury. While international assistance and cooperation for the realisation of economic, social and cultural rights is particularly incumbent on those states in a position to assist, there is no formal system of international coordination and allocation that would facilitate the discharging of obligations of a global character among states with the capacity to assist. There is also an obligation to provide reparation but no mention of reparation for historic injustices.

4.6. Outstanding Issues

The *Maastricht Principles* are an exceptional contribution to the development of extraterritorial obligations and are carefully researched and drafted to address a number of lacunae in international human rights law. Given the authority and expertise of the drafters, the *Maastricht Principles* ought to be readily incorporated and applied as a source of international law. Yet the normative force of the *Maastricht Principles* is as yet unknown. As Salomon points out,[352] similar expert human rights instruments have proven to hold great normative force, including the *Limburg Principles* and the *Maastricht*

[352] SALOMON, M. & SEIDERMAN, I. (2012) Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, *Global Policy*, 4 (3). At p.460.

Guidelines, as well as international principles on sexual orientation and gender identity, to name but a few.[353]

In addressing the barriers to responsibility rooted in the concepts of jurisdiction and personality, the *Maastricht Principles* may be effective in addressing some of the causes of violations of economic social and cultural human rights which are rooted in law. The next step will be for the courts to apply the *Maastricht Principles*, helping to evolve the *Maastricht Principles* into a source of customary international law. Yet, as has been mentioned above, jurisprudence in this has been relatively slow to evolve. There may be a number of reasons for this, including the nature and wording of the *ICESRC* as mentioned above. The *Maastricht Principles* may not be enough to overturn these obstacles. The extent to which obstacles to the development of jurisprudence in this area are normative and structural in nature is considered subsequently in Chapters 6 and 7.

5. Conclusion

This chapter establishes that obligations towards procedural and substantive fairness as democracy and distributive justice are embodied in foundational treaties of the UN and in the most recent statements of international human rights law. Simultaneously however, by prioritising home state responsibility for democracy and distributive justice the internationalisation of these obligations has been diffused. In this respect, the *Maastricht Principles* are

[353] The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986)* and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).*

significant in their effort to bridge the gap between ‘international obligations on states’ and ‘state responsibility for human rights standards internationally’. The extent to which these evolving international obligations can bridge the gap between implementation and enforcement remains to be seen. The following chapter considers further avenues through which obligations of democracy and distributive justice may be attached to non-state actors, namely IFIs and MNCs.

Chapter 5: International Economic Actors as Duty-Bearers

1. Introduction

This chapter considers the extent to which the obligations discussed in the previous chapter may be *internationalised* in the sense of attaching to global actors in their relations with individuals irrespective of nationality. To this end, this chapter explores ways through which the international human rights framework (identified as carrying positive obligations of democracy and distributive justice) may be attached to the central actors of global trade; namely International Financial Institutions (IFIs) and Multinational Corporations (MNCs). Through so doing, we may arrive at an obligation that ensures processes of democracy and distributive justice are preserved.

This chapter considers firstly the *grounds* and subsequently the *mechanisms* for human rights obligations of IFIs before undertaking a similar examination in relation to MNCs. Firstly, mandates, otherwise known as the 'constitutional frameworks' of IFIs[354] and MNCs are assessed. It is acknowledged that the promulgation of codes of conduct advanced under the business and human rights agenda does not adequately attribute responsibility for the generation of global inequality through international trade. This is principally due to the non-binding nature of these codes and as the following chapter will develop due to their continual contestation and suppression by powerful interests. This reasoning leads to support for Human Rights Impact Assessments (HRIAs) of agreements to be

[354] The analysis of IFIs is herein limited to the World Bank, the International Monetary Fund, and the World Trade Organisation (WTO).

undertaken prior to the commencement of corporate activity in order to prevent violations before they occur. Ultimately however, the lack of international legal personality for corporations is identified as a key gap in the construction of an international obligation to trade fairly.

2. The World Bank and the IMF's Responsibility for Human Rights

Some of the World Bank's projects involving the infrastructure, management and privatisation of water and oil have been particularly controversial in respect of human rights.[355] David Kinley has undertaken a useful empirical analysis of the most common critiques against the World Bank in a report commissioned by the World Bank.[356] The findings categorise criticisms into the following areas; economic and social impacts; environment; labor; politics and government; project design and implementation; resettlement /land ownership; and water access.[357] The economic and social impacts covered include problems such as enclave development, socially disruptive industry growth and failure to protect previously sustainable economic practices. Concern over lack of protection for existing eco-systems, failure to protect workers rights and lack

[355] For example on Chad-Cameroon Pipeline see ROSENBLUM, P. (2000) Pipeline Politics in Chad. *Current History,* 99. On the controversial Narmada Dam project see; BRADFORD, MORSE & ET AL.:(1992) Sardar Sarovar: The Report of the Independent Review. Ottawa, Resource Futures International;and FISHER W. (1995) *Towards Sustainable Development: Struggling over India's Narmada River,* London, M.E. Sharpe.

[356] KINLEY, D. & DAVIS, T. (2008) Human Rights Criticism of the World Bank's Private Sector Development and Privatisation Projects. *Sydney Law School Research Paper*, p.28.

[357] Ibid, p.28.

of appropriate consultation and application of World Bank safeguards also feature in the report.[358]

The World Bank, and the IFIs[359] in general, are criticised on grounds relating to both procedural and substantive fairness. In Mac Darrow's assessment, issues of procedural fairness relate to the historical foundations of the World Bank whereby primary ownership and control was reserved to a small number of economically dominant states, which led to a disproportionate influence in the affairs of less powerful states.[360] On substantive fairness, a common criticism relates the tendency at the World Bank to employ overly prescriptive approaches to development, which have generally emphasised 'economic' development at the expense of 'social' development.[361] It is this latter form of development - development that bears positive social impact - that is embodied in the 'human rights based approach' to poverty alleviation.

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[358] Ibid.

[359] The international financial institutions include IFAD, (the International Fund for Agricultural Development,) the IMF, (the International Monetary Fund,) and the World Bank group consisting of the IBRD, (International Bank for Reconstruction and Development,) the IFC, (the International Finance Corporation,) which assists developing countries through investing in private sector projects, the IDA, (International Development Association,) which provides loans on concessional terms to poorer developing countries that may not be eligible for loans from the IBRD, ICSID, (the International Centre for the Settlement of Investment Disputes,) and MIGA, (the Multilateral Investment Guarantee Agency).

[360] DARROW, M. (2006) *Between light and shadow : the World Bank, the International Monetary Fund and international human rights law*, Oxford, Hart. At p.1.

[361] For a good synopsis see *'What are the main concerns and criticisms about the World Bank and the IMF?'* webpage by the Bretton Woods Project, available at http://www.brettonwoodsproject.org/item.shtml?x=320869 (Last updated 18th March 2011, last accessed April 13 2012.)

The following sections examine grounds and mechanisms for human rights obligations of the World Bank and the IMF. In order to do so, Skogly's construction of obligations through constitutional foundations, relationship agreements and composition of member states is adopted before considering emerging practice to this effect. [362]

2.1 Constitutional Foundations

In the aftermath of World War II, the World Bank emerged with a mandate which primarily entailed assisting in the reconstruction of Europe and the development of less developed countries. Human rights were not explicitly referred to in the World Bank's constituent document, *The International Bank for Reconstruction and Development Articles of Agreement.*[363] Instead, it was argued, that as human rights were considered to be political in nature they came under the general prohibition on political activities within the Articles of Agreement.[364] Throughout the 1990s, the only official policy statements which could be construed as expressing human rights obligations came from the

[362] SKOGLY, S. (2001) *The human rights obligations of the World Bank and the International Monetary Fund,* London, Cavendish.

[363] *International Bank for Reconstruction and Development Articles of Agreement* as amended in 1989. Contains provisions such as Art 1 (i); "*the encouragement of the development of productive facilities and resources in less developed countries*" and Art 1 (iii); "*by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories.*"

[364] Id at Article IV, Section 10. For discussion see SHIHATA, I. (2000) Political Activities Prohibited. *World Bank Legal Papers.* Martinus Nijhoff and DE FEYTER, K. (2004) The international financial institutions and human rights: Law and practice. *Human Rights Review,*

World Bank's Operational Directives on 'Involuntary Resettlement', 'Indigenous Peoples' and 'Poverty Reduction'.[365]

Scope for human rights considerations within the World Bank framework have entered through the gate of 'development' however. The Articles of Agreement make specific reference to 'reconstruction and development'. According to Article III, s.1 (a) of the Articles of Agreement: *"The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects for development and projects for reconstruction alike."*[366] The World Bank also subscribes to the wider mandate of 'poverty alleviation'. For example, in 2012, the World Bank's logo appears as '*World Bank: Working for a World Free of Poverty*'. Similarly, the introductory information on the Bank's website states*: "We are not a bank in the ordinary sense but a unique partnership to reduce poverty and support development."*[367]

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[365] *World Bank Operational Directive on Involuntary Resettlement,* OD 4.30, June 1990. *World Bank Operational Directive on Indigenous Peoples*, OD 4.20, September 17, 1991. *World Bank Operational Directive on Poverty Reduction,* OD 4.15, December 1991.

[366] *International Bank for Reconstruction and Development Articles of Agreement* as amended 1989, Art III, s.1 (a).

[367] World Bank Website, *'What we do',* available at: http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20103838~menuPK:1696997~pagePK:51123644~piPK:329829~theSitePK:29708,00.html See also ELLIOTT, L. & WHYSALL, M.:(12 April 2012) "It's not a bank, it's a development institution." Interview of Jeffrey Sachs on the World Bank, *Guardian newspaper.* Available at: http://www.guardian.co.uk/business/video/2012/apr/12/jeffrey-sachs-world-bank-video Last accessed 13 April 2012.

As the links between human rights and development have grown and reached greater consensus, so too has the World Bank's understanding of 'development' evolved to appreciate the relationship between human rights and development. Bolstered perhaps by the United Nations Secretary-General Kofi Annan's human rights mainstreaming processes since 1997[368] and by the growing strength of the 'Anti-Globalisation Movement',[369] the World Bank has begun to acknowledge human rights in Legal Opinions and Statements. Clarification of the constitutional grounds for the World Bank's human rights obligations is found in *Legal Opinion on Human Rights and the Work of the World Bank*[370] issued in 2006, wherein it is stated:

> *"The Articles of Agreement permit, and in some cases require, the [World] Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank's mission."* [371]

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[368] Report of UN Secretary-General, (1997) *Renewing the United Nations: A Proposal for Reform* (A/51/950); Report of UN Secretary-General, (2000) *We, the Peoples: The Role of the United Nations in the 21st Century* (A/54/2000); Report of UN General Assembly, (2000) *United Nations Millennium Declaration* (UNGA Res. 55/2); for details on the Millennium Summit see http://www.un.org/ millennium/ (last accessed on 8 February 2007).

[369] See further HELD, D. & MCGREW, A. G. (2007) *Globalization/anti-globalization : beyond the great divide,* Cambridge, Polity; SKLAIR, L. (2002) *Globalization : capitalism and its alternatives,* Oxford, Oxford University Press.; COHEN, R. & RAI, S. (2000) *Global social movements,* London ; New Brunswick, NJ, Athlone Press.

[370] For example former Senior Vice President and General Counsel, ROBERTO DANINO (2006) *'Legal Opinion on Human Rights and the World Bank',* January 27 2006. See also DANINO, R. (2005) Legal Aspects of the World Bank's Work on Human Rights. IN ALSTON, P. & ROBINSON, M. (Eds.) *Human Rights and Development: Towards Mutual Enforcement.* Oxford University Press.

[371] Ibid. At para 25. This is supported by related statements made around the same time, for example; PALACIO, A., (2006) *The Way Forward: Human Rights and the World Bank*, World Bank Institute, October 2006. Available at; http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMD

As evidence of its growing commitment to human rights, the World Bank has made explicit reference to human rights in recent years. In 2010, a report entitled *Human Rights Indicators in Development*,[372] specifically considered the reach of World Bank projects and program areas in relation to human rights.[373] The report elaborates on ways in which consideration of human rights in World Bank activities is justified on grounds of the linkages between human rights and development. In 2012, in a statement issued to the Human Rights Council's Panel on Human Rights Mainstreaming, Siobhan McInerney-Lankford, Senior Policy Officer at the World Bank described human rights principles as an inherent "*part of good development practice"*.[374] Such statements render it more difficult for the relevant institutions to refute their human rights obligations and may serve to induce a growing human rights culture within institutions. The extent to which this will bear an impact on all

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K:21106614~menuPK:445673~pagePK:64020865~piPK:149114~theSitePK:445634,00.html Last accessed 12 June 2012.

[372] MCINERNEY-LANKFORD, S. & SANO, H.-O. (2010) Human Rights Indicators in Development An Introduction. *World Bank Study*. At p.459. Available at http://siteresources.worldbank.org/EXTLAWJUSTICE/Resources/HumanRightsWP10_Final.pdf Last accessed 12 June 2012. See also MCINERNEY-LANKFORD, S. (2007) Human Rights and Development: Some Institutional Perspectives. *Netherlands Quarterly of Human Rights*, 25 (3).

[373] Ibid. At p.6.

[374] *"Whilst the Bank does not have an explicit human rights policy, it does recognise the links between development and human rights and that creating the conditions for the attainment of human rights is a central and irreducible goal of development. Human rights principles are considered to be part of good development practice."* MCINERNEY-LANKFORD, S. (28 February 2012.) Panel on Human Rights Mainstreaming, . *19th Session Human Rights Council.* Videolink available at http://www.unmultimedia.org/tv/webcast/2012/02/world-bank-panel-on-human-rights-mainstreaming-19th-session-human-rights-council.html Last Accessed 12 June 2012.

activities of the IFIs and their bodies remains unknown however. Sarfaty, for one, finds that the Bank's rhetoric in reports and in public speeches may be a long way from the reality of everyday decision-making in the Bank.[375]

The IMF's Articles of Agreement, on the other hand, omit reference not only to human rights but also to development. The IMF traditionally portrays itself as a monetary agency rather than a development agency.[376] The Articles of Agreement do however refer to the "*development of the productive resources of the members, and the notion that the correction of maladjustment in the members' balance of payments should not include "measures destructive of national and international prosperity"* ".[377] Indeed, the IMF's activities inevitably began to entail 'development' particularly in the 1980s as a consequence of its role in debt rescheduling.[378] Through its partnership with the World Bank in the Comprehensive Development Framework (CDF), the

[375] SARFATY, G. A. (2009) Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank. *American Journal of International Law,* 103

[376] See DE FEYTER, K. (2004) The international financial institutions and human rights: Law and practice. *Human Rights Review,* 6 (1), 56 -90.

[377] Art. I, para ii and v respectively. The IMF General Counsel, Francois Gianviti, states that under the latter provision, the IMF "*has taken the view that its conditionality could include the removal of exchange and trade restrictions, but also the avoidance of measures that may be damaging to the environment or to the welfare of the population*." See GIANVITI, F., (2001) *Economic, Social, and Cultural Rights and the International Monetary Fund,* UN doc. E/C. 12/2001/WP.5 (7 May 2001), para 50.

[378] For country examples see STIGLITZ, J. E. (2002) *Globalization and its discontents,* New York, W. W. Norton & Co. and SACHS, J. (2005) *The end of poverty : how we can make it happen in our lifetime,* London, Penguin.

IMF has been linked to statements on aims related to development and human rights.[379]

Yet the official line by the IMF has been that it is up to the borrower, not to the Fund, to raise considerations related to the implementation of human rights.[380] This position is maintained in recent correspondence from the IMF. A recent example concerns a scheduled $130 million loan disbursement to the government of Angola by the IMF. In a letter addressed to Christine Lagarde, Managing Director at the IMF, Human Rights Watch and Revenue Watch Institute requested the IMF to delay disbursement of any further funds to Angola on the basis that it had not fully accounted for how it spent billions of dollars in public funds. The response from the IMF was that it will continue to attach *"great importance to transparency and good governance in the management of public finances"*.[381] Despite failing to ensure the withholding of the loan, the willingness to interact and justify actions to the human rights

[379] For example in a Joint Statement by the Heads of the IMF, the World Bank, and the WTO it is stated: *"Trade, and trade policy reform, must be made more effective tools for poverty reduction, particularly in the poorest countries, and we intend to increase our support for countries to use the opportunities offered by the global economy as key elements of their strategies for poverty reduction and development*." JOINT STATEMENT BY THE HEADS OF THE IMF, THE WORLD BANK, AND THE WTO, *IMF News Brief No.99/78*, November 30, 1999. Available here: http://www.imf.org/external/np/sec/nb/1999/nb9978.htm

[380] For more on this see DARROW, M. (2006) *Between light and shadow : the World Bank, the International Monetary Fund and international human rights law*, Oxford, Hart.

[381] Letter from Antoinette M. Sayeh, Director, African Department, IMF to Mr. Arvind Ganesan, Human Rights Watch and Ms. Karin Lissakers, Revenue Watch Institute on 9 April 2012. Available here: http://www.hrw.org/sites/default/files/related_material/IMF%20Angola%20Response%20Letter.pdf Last accessed 12 June 2012.

organisation would suggest an emerging sense of human rights accountability at the IMF.[382]

2.2. The World Bank and the IMF Relationship Agreements

In addition to the Articles of Agreement, the IFI's 'Relationship Agreements' with the UN also constitute part of their constitutional framework.[383] The World Bank was established as a specialised agency of the UN under this agreement which was entered into with the Economic and Social Council of the United Nations in accordance with Articles 63 and 57 of the Charter of the United Nations.[384] The IMF is subject to a similar relationship agreement under the *Agreement between the United Nations and the International Monetary Fund*.[385] The World Bank and the IMF remain independent institutions under these agreements, although their constitutional principles cannot be so easily detached from those of the UN as a consequence of these agreements.

[382] Another example of correspondence between the IMF and Human Rights Watch is in 2009 concerning economic support for Sri Lanka in a letter from Dominique Strauss-Kahn, Managing Director IMF, Nov 5 2009, it is stated: "*Like you, I share the distress of the refugees.[…] The aim of our support, therefore, is to provide the resources necessary to prevent a full-blown economic crisis, contribute to reconstruction efforts, and sustain social spending aimed at protecting the poor*." Available here http://www.imf.org/external/np/vc/2009/110509.htm Last accessed 12 June 2012.

[383] *Agreement between United Nations and the International Bank for Reconstruction and Development*, 15 November 1948.

[384] As described in SKOGLY, S. (2001) *The human rights obligations of the World Bank and the International Monetary Fund*, London, Cavendish, p. 27.

[385] UNGA Resolution *Agreement Between the United Nations and the International Monetary Fund*, 15 November 1947. Available here: http://unsceb.org/content/ga-resolution-124ii-15-november-1947 Last accessed 1 June 2013.

The extent to which the World Bank and the IMF as independent, specialised UN agencies are bound by the principles of the UN and specifically the principles and provisions of the UN Charter which were discussed in Chapter 4 is subject to debate. According to the UN Charter, the Economic and Social Council may co-ordinate the activities of the specialised agencies through consultation with and recommendations to those agencies and through recommendations to the General Assembly and the Members of the UN. Skogly, for one argues that despite their independent status the World Bank and IMF may not disregard the *UN Charter* as the foundation for all proceeding international human rights law.[386]

2.3. Institutional Composition of State Members

Beyond their constitutional documents and legal relationships with international law, a third avenue through which the World Bank and the IMF's responsibility for human rights law could flow is by virtue of their composition of states. It is argued that states cannot leave their human rights obligations at the door when they enter international institutions.[387] This construction of obligations gained widespread recognition following Skogly's analysis of the human rights obligations of the World Bank and the IMF in 2001[388] and was

[386] SKOGLY, S. (2001) *The human rights obligations of the World Bank and the International Monetary Fund,* London, Cavendish. At p.106.

[387] See also NARULA, S. (2006) The R*ight to Food:* H*olding Global Actors Accountable Under International Law*. *Columbia Journal of Transnational Law,* 44**,** 691-800.

[388] SKOGLY, S. (2001) *The human rights obligations of the World Bank and the International Monetary Fund,* London, Cavendish.

codified in the *Tilburg Guiding Principles on World Bank, IMF and Human Rights (the Tilburg Principles).*[389]

The *Tilburg Principles* offer guidance and contribute to evolving soft norms, although they do not constitute legal obligations. Paragraph 5 of the *Tilburg Principles* asserts that: *"The responsibility for implementing human rights is universal and concerns all – state and non-state – actors whose activities may affect people's lives."* It is maintained however that; *"the primary responsibilities and obligations in the field of domestic human rights enjoyment, however, remain with the state,"* and that; *"states cannot 'delegate' human rights obligations to, for instance, international institutions and relieve themselves of these obligations."*[390] Under the *Tilburg Principles*, the extension of states' human rights obligations through their roles in international institutions is considered to imply manifold duties. Firstly, it implies is a duty on poor states to use their human rights obligations as a defence against the more extreme demands of liberalisation and conditionality. Secondly, it implies a duty on rich states not to impose such extreme conditions through pressure in WTO negotiations or bilateral negotiations. Thirdly, it implies a duty to control

[389] *Tilburg Guiding Principles on World Bank, IMF and Human Rights 2002*. The Tilburg Guiding Principles were drafted by a group of experts, meeting at Tilburg University, The Netherlands, in October 2001 and April 2002. See HUNT, P., GENUGTEN, W. V. & (EDS), M. S. (2003) *World Bank, IMF and Human Rights : Including The Tilburg Guiding Principles on World Bank, IMF and Human Rights,* Nijmegen, Wolf Legal Publishers.

[390] *Tilburg Guiding Principles on World Bank, IMF and Human Rights 2002*, para 5.

the activities of MNCs whose economies of scale and sophistication create extreme contractual imbalances.[391]

Moreover, there is an emerging duty on states to undertake Human Rights Impact Assessments (HRIAs) of their laws, policies and practices, including activity within multilateral institutions when engaged in decision-making with potential extraterritorial impact. Principle 14 of the *Maastricht Principles* requires states to conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights.[392] Various models such as these have been devised by organisations including the International Finance Corporation (IFC), International Business Leaders Forum (IBLF), Global Compact, the Danish Institute for Human Rights 'Human Rights Compliance Assessment', and the Business Leaders Initiative on Human Rights (BLIHR) 'Human Rights Matrix'.

The practice of HRIAs has found some standardisation in the *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (*the *Guiding Principles on HRIAs*) recently issued by Oliver de

[391] See HUNT, P., GENUGTEN, W. V. & (EDS), M. S. (2003) *World Bank, IMF and Human Rights : Including The Tilburg Guiding Principles on World Bank, IMF and Human Rights,* Nijmegen, Wolf Legal Publishers.

[392] *Maastricht Principles*, Principle 14: "*States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.*"

Schutter, UN Special Rapporteur on the Right to Food.[393] The *Guiding Principles on HRIAs* seek to specifically address the problem of conflict with or disregard for human rights within trade and investment agreements and propose a duty to make HRIA integral to trade and investment agreements.[394] The *Guiding Principles on HRIAs* also seek to standardise methodology techniques in recognition of the fact that the term 'Human Rights Impact Assessment' has been misappropriated by a variety of actors.[395]

The *Guiding Principles on HRIAs* offer a number of valuable contributions beyond a clear procedure for HRIAs. In particular, they clarify and strengthen the duty on states to undertake such assessments. They stipulate that all states should prepare HRIAs prior to the conclusion of trade and investment agreements.[396] Any inconsistency with pre-existing human rights obligations imposed on the state are to be identified beforehand, to the fullest extent since non-compliance with the obligations imposed under trade and investment agreements is typically ensured by the threat of economic sanctions or reparations authorised or awarded by an agreement-specific dispute settlement mechanism or international arbitral tribunals.[397] What is more, it asserts that states cannot ignore their human rights obligations in the conclusion of trade or

[393] Report of the Special Rapporteur on the right to food, Olivier De Schutter, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, Human Rights Council, Nineteenth session, 19 December 2011, UN Doc A/HRC/19/59/Add.5.

[394] Ibid, para 2.

[395] Ibid, para 4.

[396] Ibid, para 1.

[397] Ibid, para 1.

investment agreements, whether at the multilateral or bilateral level.[398] The *Guiding Principles on HRIAs* stipulate that states should use HRIAs as an aid in identifying both the positive and negative impacts on human rights of the trade or investment agreement, to ensure that the agreement contributes to the overall protection of human rights.[399] The *Guiding Principles on HRIAs* stipulate that they place a duty on all states to prepare HRIAs prior to the conclusion of trade and investment agreements.[400] Demand for HRIAs has been reinforced by Principle 14 of the Maastricht Principles subsequently. Although neither Principle 14 nor the *Guiding Principles on HRIAs* bear enforcement measures they may develop normative force through jurisprudence as discussed in Chapter 4 in relation to the *Maastricht Principles.*

There are already steps towards binding legal obligations to conduct HRIAs. In May 2013, the US government brought into force the *Burma Responsible Investment Reporting Requirements* which place a requirement on US persons undertaking new investment activity in Burma to carry-out HRIAs.[401] All US businesses investing more than US$500,000 in Burma are required to report annually on their policies and procedures to address human rights, labour, corruption, and environmental risks associated with their projects or supply

[398] Ibid at para 2.1. On the basis of *CESCR General Comment No. 12* (1999) on the Right to Adequate Food, paras. 19 and 36*; CESCR General Comment No. 14* (2000) on the Right to the Highest Attainable Standard of Health, para. 39; *CESCR General Comment No. 15* (2002) on the Right to Water, paras. 31 and 35-36.

[399] Ibid, para 6.

[400] Ibid.

[401] *Burma Responsible Investment Reporting Requirements* 2013. Available here: http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf Last accessed 10 June 2013.

chains. In addition, they must also disclose their payments to the Burmese government and any arrangements they make for security or to acquire land. Risk assessments and communications with the military must be disclosed to the US government, but not the public. The first reports are due on 1 July 2013. The process is intended to foster negotiation, awareness, and compliance. On receiving the reports businesses will be advised on how to avoid human rights risks rather than being prevented from investing.[402]

2.4. Human Rights Mechanisms at the World Bank and the IMF

The World Bank Group[403] is attached to numerous accountability mechanisms.[404] The problem is that those accountability mechanisms are not always concerned with human rights or attached to enforcement mechanisms. As a result the Bank fails to provide concrete redress for human rights violations through these mechanisms. Controversy stems partly from the fact that whilst human rights standards provide the most widely accepted principles

[402] See further; US Department of State, *Media note on Burma Responsible Investment Reporting Requirements*, 23 May 2013. http://www.state.gov/r/pa/prs/ps/2013/05/209869.htm Last accessed 10 June 2013 and Human Rights Watch Press Release, 24 May, 2013, *Burma: Investors Need Robust Rights Safeguards US Reporting Requirements Take Effect, More Needed* http://www.hrw.org/node/115861 Last accessed 10 June 2013

[403]The World Bank Group consists of the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the International Centre for Settlement of Investment Disputes (ICSID), and the Multilateral Investment Guarantee Agency (MIGA).

[404] For example the IBRD/ IDA has the Inspection Panel; the IFC /MIGA has the Compliance Advisor Ombudsman; the IDB has the Independent Investigation Mechanism; the ADB has the Inspection Function; EBRD the Independent Recourse Mechanism; and the AfDB Independent Review Mechanism. See http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:22226194~menuPK:6256339~pagePK:148956~piPK:216618~theSitePK:445634,00.html Last Accessed 12 June 2012.

on ‘human flourishing’ the bodies of the World Bank Group have been subject to other, sometimes less demanding, principles, occasionally called ‘policies’.

A submission to the Office of the United Nations High Commissioner for Human Rights, on behalf of Amnesty International and other international human rights organisations highlights that there is no ‘robust’ due diligence process through which to identify or address potential human rights impacts attached to the World Bank Group Bodies.[405] Although many of the policies implicate human rights, the Indigenous Peoples policy[406] is the only one which explicitly mentions human rights, and at a somewhat limited representation of the full extent of the rights of indigenous peoples embodied in the UN human rights framework.[407] Objection is rooted in the grounds that it is in the World Bank’s capacity to impose human rights obligations or at least impose the obligation of a HRIA, although no such obligation exists.

What is more, many of the World Bank activities are not covered by these policies. The UK-based NGO, Bretton Woods Project, reports that new lending

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405. *Submission for Report on Business and Human Rights and the UN System to Office of the United Nations High Commissioner for Human Rights*, 28 March 2012, on behalf of Amnesty International at al. Available at http://www.hrw.org/news/2012/03/28/submission-report-business-and-human-rights-and-un-system Last accessed 1 June 2012.

406 *World Bank Draft Operational Policy 4.0,* July 2005. Available here; http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html Last accessed 10 June 2012.

407For discussion see HALL, G. H. & PATRINOS, H. A. (2012) *Indigenous peoples, poverty, and development,* Cambridge, Cambridge University Press. and; MACKAY, F. (2002) Universal Rights or a Universe unto Itself ? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples. *American University International Law Review,* 3

approaches in Development Policy Loans (DPLs) enable the IBRD and IDA to evade their responsibility to prevent negative impacts from the projects and programs they finance.[408] An entirely separate set of environmental and social policies, *the Policy and Performance Standards on Environmental and Social Sustainability*, applies to the World Bank, the International Finance Corporation and the Multilateral Investment Guarantee Agency. The IFC's new policy framework adopted in 2012 is reported to use some human rights language but still falls short of what would be required by international human rights norms. The new framework does not require its clients to undertake a HRIA, stating only that it might be "appropriate" in limited high risk circumstances.[409]

The World Bank's establishment of the Nordic Trust Fund (NTF) in 2009 also serves to support a human rights culture at the World Bank. The NTF is an internally focussed grant making mechanism which convenes a series of research activities with the UN agencies as part of Kofi Annan's mainstreaming human rights agenda and oversees the human rights aspects of

[408] See also Bretton Woods Project, *"Programmed for Results? Concerns raised over new World Bank lending instrument,"* Bretton Woods Update No.77 (Sept. 14, 2011).

[409] *Submission for Report on Business and Human Rights and the UN System to Office of the United Nations High Commissioner for Human Rights*, 28 March 2012, on behalf of Amnesty International at al. Available at http://www.hrw.org/news/2012/03/28/submission-report-business-and-human-rights-and-un-system Last accessed 1 June 2012. See also REES, C. & VERMIJS, D. (January 2008) Mapping Grievance Mechanisms in the Business and Human Rights Arena. *Corporate Social Responsibility Initiative, John F Kennedy School of Government, Harvard University,*

the IFC activities.[410] The NTF establishes convergence between World Bank projects and human rights policies in pursuit of development.[411]

In relation to the IMF, few mechanisms presently exist. One of the strongest methods is the attachment of human rights conditions to IMF loans. Some human rights organisations have gone further to demand that the IMF refuse loans on the grounds of transparency as discussed above.[412] However, these requests have not been realised and there are human rights arguments for the avoidance of action which could amount to economic sanctions.[413]

3. The WTO's Responsibility for Human Rights

A key critique of the WTO is that it limits the ability of states to implement human rights measures. Such measures which the WTO is alleged to constrain include trade sanctions aimed at punishing states which breach human rights, trade sanctions aimed at products produced in a way that breaches human rights, and measures which regulate or prevent the entry of goods and services that might otherwise harm the human rights of the state's own population.[414]

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[410] For an overview of NTF activities see NORDIC TRUST FUND, Progress Report, September 2009 - October 2010. World Bank Resources pubs. Available here: http://siteresources.worldbank.org/PROJECTS/Resources/1171NTFReportProof8.pdf Last accessed 12 June 2012.

[411] See http://blogs.worldbank.org/category/tags/nordic-trust-fund for more details.

[412] See HUMAN RIGHTS WATCH, Press release; *IMF: Withhold Funds to Angola Require Detailed Explanation of $32 Billion Accounting Gap*, March 27 2012. Available here: http://www.hrw.org/news/2012/03/27/imf-withhold-funds-angola Last accessed 12 June 2012.

[413] MARKS, S. P. (1999) Economic sanctions as human rights violations: reconciling political and public health imperatives. *American Journal of Public Health*, 89.

[414]JOSEPH, S. (2011) *Blame it on the WTO? : a human rights critique*, Oxford, Oxford University Press, p.5.

Furthermore, it is alleged that WTO principles and obligations can serve to prevent states prioritising human rights policies in their economic relations.[415] Most notoriously, in 2000, the Sub-Commission on the Promotion and Protection of Human Rights issued a landmark report[416] in which it described the WTO's impact as 'almost entirely negative'. Similar findings have been made in reports by adjacent UN Committees,[417] where the WTO has been accused of institutional bias against the interests of developing states in the granting of exclusive patents that hinder developing states' ability to realise certain human rights such as the right to health and the right to food.

3.1. The WTO's 'Constitution'

Similar to the World Bank, human rights norms were not integrated into the

[415] For example the 'Burma law', enacted by the US State of Massachusetts to pressure Burma to improve its human rights conditions through restrictions of economic relations with Burma, is often cited as an example whereby using or withholding trade for a 'social goal' was penalised by the WTO on the grounds that it violated the 'non-discrimination' principle enshrined in the *WTO Agreement on Government Procurement (GPA).* This case warrants further investigation however it is distinguished from the central issue of this thesis on the grounds that it effectively amounted to economic sanctions on the Burmese government, rather than on ensuring corporate behaviour respects human rights.

[416] Report by the Sub-Commission on the Promotion and Protection of Human Rights, J OLOKA-ONYANGO, J., AND DEEPIKA, U., '*The Realisation of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*', UN doc. E/CN.4/Sub.2/2000/13 (15 June 2000).

[417] UN ECOSOC, Commission on Human Rights, Report of the High Commissioner, 27 June 2001, '*The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights'* E/CN.4/Sub.2/2001/13; UN ECOSOC, Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32, 15 January 2002, '*Globalization and its Impact on the Full Enjoyment of Human Rights*', E/CN.4/2002/54; UN ECOSOC, Report of the High Commissioner, 25 June 2002, '*Liberalization of Trade in Services and Human Rights',* E/CN.4/Sub.2/2002/9, UN ECOSOC, Report of the High Commissioner, 2 July 2003, '*Human Rights, Trade and Investment'*, E/CN.4/Sub.2/2003/9.

constituent documents of the World Trade Organisation; the *General Agreement on Tariffs and Trade (GATT)* in 1947. It is worth noting that apart from a few exceptions, notably in ILO, UNESCO and WHO rules, human rights were not effectively integrated into the law of most worldwide organisations which emerged around the same period.[418] In addition, human rights were not integrated in either the updated *GATT 1994*, or the *Uruguay Round Agreement Act 1995*.[419] That said, the *Marrakesh Agreement* of 1994 establishing the WTO, demonstrates some evolution in approach, as it sets out the WTO's first goal, namely that of *"improving standards of living*", followed by *"ensuring the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development"*.[420] Yet, explicit reference to human rights remains absent. Petersmann explains the WTO's reticence towards human rights as relating to a perception of the liberalisation of welfare-reducing trade barriers and the promotion of the international rule of law as "*obviously beneficial for all*

[418] Petersmann claims that this was in order to "*facilitate functional international integration (such as liberalization of trade and payments), notwithstanding different views of governments on human rights and domestic policies (such as communism). The focus on enlarging equal liberties was in accordance with prevailing concepts of 'justice' in the United States whose government had elaborated the blueprints for the post-war international order*." PETERSMANN, E. U. (2002) Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of World-wide Organisations: Lessons from European Integration. *European Journal of International Law*, 13.

[419] *Marrakesh Declaration* of 15 April 1994, the 'Final Act' signed 15 April 1994, and the 'Agreement establishing the WTO' adopted 15 April 1994.

[420] Agreement establishing the World Trade Organization, Marrakech, 15 April 1994, 33 ILM (1994) 1143, http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm Last accessed 12 June 2012.

citizens".[421] The 'development credibility' deficit at the WTO is well-established on the basis of the persistence of tariff peaks, production and export subsidies for agricultural commodities in the OECD, the implementation problems associated with a number of WTO agreements and the international property regime however.[422]

3.2. The WTO's Relationship with the UN

Unlike the World Bank and the IMF, the WTO is not subject to a similar 'relationship agreement' with the UN. Nonetheless the WTO is considered a subject of public international law. Whilst this assumption may be based on the high degree of legal formulation of the WTO, it is confirmed by the express reference to international law contained in Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*

[421] PETERSMANN, E. U. (2000) The WTO Constitution and Human Rights. *Journal of International Economic Law*, 3**,** 19-25; "*As in the EEC Treaty 1957, human rights were not mentioned in GATT and the WTO Agreement because the liberalisation of welfare-reducing trade barriers, and the promotion of the international rule of law, were perceived as obviously beneficial for all citizens.*" Petersmann identifies this as indicative of the previous 'negative' integration method of human rights and suggests that the WTO should move to a more 'positive' integration by invoking additional constitutional WTO safeguards limiting abuses of government powers, in a way similar to that of the EEC. See also Christine Breining-Kaufmann's description of the common origins of international trade and human rights in BREINING-KAUFMANN, C. (2005) The Legal Matrix of Human Rights and Trade Law. IN COTTIER, P., BURGI (Ed.) *Human Rights and International Trade.* Oxford University Press, p.96.

[422] WATKINS, K. & FOWLER, P. (2002) *Rigging the Risks and Double Standards: Trade, Globalisation and the Fight Against Poverty*, Oxfam International. See also GUHA-KHASNOBIS, B. (2004) *The WTO, developing countries, and the Doha development agenda : prospects and challenges for trade-led growth*, Basingstoke, Palgrave Macmillan.

(concerning customary rules of treaty interpretation).[423] In addition, jurisprudence of the Appellate Body has confirmed that the WTO is not a self-contained regime and must not be dealt with as a treaty system segregated from the larger body of international law.[424] It is to be assumed that such institutions will operate within the context of principles and norms of general international law.[425] Likewise, the rules of the WTO are subsumed within the wider corpus of international law. Pauwelyn asserts: "*no academic author (or any WTO decision or document) disputes that WTO rules are part of the wider corpus of public international law*."[426] Given that the *UN Charter* is considered to constitute peremptory norms of general international law there are clear grounds for its application to the WTO.

3.3. Mechanisms of Human Rights Integration

Initial efforts to appease, if not integrate, human rights concerns in the WTO came in the form of the Dispute Settlement Understanding (DSU) introduced in 1995. However, the DSU's real benefit in relation to advancing extraterritorial human rights obligations is limited. In 2010 it was reported that developing states initiated 11 cases per year on average for the period 2001-2008.[427] The

[423] See FRANCIONI, F. (2006) WTO Law in Context: The Integr ation of International Human Rights and Environmental Law in the Dispute Settlement Process'. IN SACERDOTI, G., YANOVICH, A. & BOHANES, J. (Eds.) *The WTO at Ten: The Contribution of the Dispute Settlement System.*

[424] *US Appellate Body report, US – Gasoline*, DSR 1996: 1, 3, pp 16-17.

[425] See PETERSMANN, E. U. (2000) The WTO Constitution and Human Rights. *Journal of International Economic Law,* 3**,** 19-25

[426] PAUWELYN, J. (2001) The Role of Public International Law in the WTO: How far can we go? *American Journal of International Law*, 95 p. 538.

[427] These are the most recent figures available at the time of writing. See BROWN, C.P., MCCULLOCH, R., (2010) Developing Countries, Dispute Settlement, and the Advisory

scarcity of cases brought before the DSU is often explained by the perception that developing states lack the legal resources to navigate the DSU procedures and that they fear deterring future trade through bringing such actions.[428] The Advisory Centre on WTO Law was established in 2001 by WTO parties in recognition of developing states' need for legal assistance in this regard.[429]

Efforts elsewhere to build human rights and development into the trade agenda have proved similarly limited. The *Doha Declaration on the TRIPS Agreement and Public Health 2001* demonstrated the ability of the WTO to incorporate human rights concerns into its decision making on trade, although this remained at the non-binding level.[430] The Doha Development Round may also be perceived as a response to growing demands from the human rights community.[431] In particular, it aims to address the 'development credibility' deficit for the WTO outlined in section 3 above.

In 2008 the stalling talks at Doha reached stalemate when an agreement could not be reached over agricultural import rules. Developing countries mainly represented by Brazil, China, India, South Korea and South Africa would not

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Centre on WTO Law, *Policy Research Working Paper 5168*, The World Bank Development Research Group, Trade and Integration Team, January 2010.

[428] LOW, P., (2007) 'Is the WTO Doing Enough for Developing Countries?' IN BERMANN, G. A. & MAVROIDIS, P. C. , (eds) *WTO law and developing countries*, New York, NY, Cambridge University Press.

[429] For more details see the Advisory Centre's website, available at: http://www.acwl.ch/e/index.html Last accessed 12 June 2012.

[430] *Doha Declaration on TRIPS and Public Health*, adopted 14 December 2001, WTO Doc WT/MIN(01)/DEC/2.

[431] For discussion see HARRISON, J. (2007) *The human rights impact of the World Trade Organisation*, Oxford, Hart Pub, p 163 onwards.

concede to the programme of agricultural subsidies advocated by the USA, EU and Japan. In one sense, the collapse of negotiations was a victory for developing countries who rejected an unfavourable deal, although it also signalled the end of efforts to meet the development objectives set out in the *Doha Ministerial Declaration 2001*.[432] The Doha talks have since stumbled forward but with little sign of either camp, developing or developed states, offering a new agreement.

Other gestures to suggest that the WTO is beginning to respond to concern for human rights norms come in the form of collaboration between the WTO and non-trade institutions. Examples are WTO representation in the annual meetings of ECOSOC[433] and a first unofficial dialogue with the UN on the right to health through liaison with the UN Special Rapporteur on the right to health, Paul Hunt, at the WTO Secretariat.[434] As with the World Bank, human rights language is increasingly used in official addresses by WTO representatives. Yet to what effect remains questionable. As Andrew Lang points out, the nature of the international trade regime is "*ambiguous, evolving, and internally contested*".[435]

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[432] *Doha WTO Ministerial Declaration 2001* WT/MIN(01)/DEC/1 20 November 2001.

[433] UN ECOSOC, Summary by the President of the Economic and Social Council of the Special High-Level Meeting of the Council with the Bretton Woods Institutions and the World Trade Organisation (New York, 14 April 2003) (A/58/77 - E/2003/62) (9 May 2003).

[434] UN ECOSOC, Report of the Special Rapporteur Paul Hunt. '*The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health',* Mission to the World Trade Organisation. Addendum: (E.CN.4/2004/49/Add.1) (2004).

[435] LANG, A. (2011) *World trade law after neoliberalism : re-imagining the global economic order,* Oxford, Oxford University Press, p 2.

3.4. Composition of States

Instances where the human rights obligations of state members have been recognised in progressive jurisprudence emerging from the WTO may be representative of a "*shift in regulatory philosophy*"[436] at the WTO. For example, cases such as the Hormone Beef case[437] and the EC-Asbestos case[438] as well as the *Agreement on Trade Related Aspects of Intellectual Property Rights 1995 (the TRIPS Agreement)* demonstrate some response to concerns over members states' obligations in relation to the right to health.[439] Furthermore, evidence that the WTO is actively seeking to avoid conflict of interest through encouraging harmonisation may be found in the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement),* the *WTO Agreement on Technical Barriers to Trade (the TBT Agreement)* and the *TRIPS Agreement.*[440] Andrew Lang describes demand by states for limiting the intrusiveness of WTO regulations into other policy areas as follows: "*The call for coherence, in this argument, then, was another way of expressing the view that the scope and intrusiveness of WTO disciplines should be limited, and WTO Members' 'regulatory autonomy' should be expanded.*"

[436] HARRISON, J. (2007) *The human rights impact of the World Trade Organisation,* Oxford, Hart Pub, p 44.

[437] See Appellate Body Report, *EC Measures concerning Meat and Meat Products (Hormones),* WT/DS 26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998.

[438] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R, adopted 5 April 2001, DSR 2001.

[439] See *'WTO Agreements & Public Health: A Joint Study by the WHO and WTO Secretariat',* 2002, WTO secretariat publications. Available here http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf Last accessed 12 June 2012. See also MARCEAU, G. (2002) WTO Dispute Settlement and Human Rights. *European Journal of International Law,* 13**,** 753-814.

[440] HARRISON, J. (2007) *The human rights impact of the World Trade Organisation,* Oxford, Hart Pub, p 44.

[441] These important developments may generate an avenue for greater respect of member states' policy space and some redressing of the balance between trade and human rights. Indeed, they deserve greater attention than is afforded them here. The policy of trade 'openness' at the WTO does however entail that "*rules and systems are likely to be adopted that are to a certain extent favourable to the most important and influential players*".[442]

4. MNCs' Responsibility for Human Rights

Criticism of MNCs often relates to their unaccountability. As corporations have become increasingly powerful, states have become increasingly reluctant to intervene in market activity, preferring to deregulate in order to attract foreign direct investment. This in turn has generated a race to the bottom whereby states routinely strip away regulatory standards in the areas of environment and human rights in order to offer corporations a more lucrative regulatory environment than that offered by neighbouring states. By encouraging states to compete with each other to offer the more welcoming regulatory environment, corporations have gained enormous power to impose agreements reflecting their interests and limiting the state's capacity to regulate.[443]

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[441] LANG, A. (2011) *World trade law after neoliberalism : re-imagining the global economic order*, Oxford, Oxford University Press, p 127

[442] HARRISON, J. (2007) *The human rights impact of the World Trade Organisation*, Oxford, Hart Pub, p 44.

[443] See further SUDA, R. (2006) The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization. IN SCHUTTER, O. D. (Ed.) *Transnational Corporations and Human Rights.* Hart Publishing.

These circumstances of disparate bargaining power result largely from MNCs ability to relocate all or part of their operations to another state, together with their importance to host state economies.[444] In this way jurisdictional ambiguity surrounding MNCs has concealed the weak nature of consent underlying developing states' international economic agreements. Developing states should be able to refuse agreements which restrict domestic policy-making yet they do not always hold sufficient bargaining power to do so.[445] The fear of deterring foreign direct investment prevents developing states from imposing suitable conditions on corporate activity and instead multinationals may demand valuable incentives for their investment –such as tax concessions, financial assistance or exemptions from labour and environmental standards.[446]

In the worst cases this has resulted in the creation of geographical areas called 'Free Trade Zones' (FTZs) or 'Export Processing Zones' (EPZs) where minimal regulation in terms of labour or environmental standards applies.[447] In

[444] ZERK, J. A. (2006) *Multinationals and corporate social responsibility : limitations and opportunities in international law*, Cambridge, Cambridge University Press. p. 47.

[445] See NARLIKAR, A. (2003) *International trade and developing countries : bargaining coalitions in the GATT & WTO*, London, Routledge.

[446] ZERK, J. A. (2006) *Multinationals and corporate social responsibility : limitations and opportunities in international law*, Cambridge, Cambridge University Press. p 47.

[447] For recent expert analysis on EPZs see the ILO's online resource guide available athttp://www.ilo.org/public/english/support/lib/resource/subject/epz.htm. For a recent ILO report see MCCALLUM, JAMIE K, (2011) *Export processing zones: comparative data from China, Honduras, Nicaragua, and South Africa*, International Labour Office, ILO publications. For a powerful description of a FTZ in Cavite, the Philippines, see KLEIN, N. (2001) Chapter Nine: The Disgarded Factory. *No Logo.* Flamingo. See also DINE, J. (2005b) *Companies, international trade, and human rights*, Cambridge, Cambridge University Press,

response to this trend, the UNCTAD World Investment Report 2011 reiterates the need for international coordination in order to *"avoid a global race to the bottom in regulatory standards, or a race to the top in incentives, and to avoid the return of protectionist tendencies."*[448] Yet encouragement is surely not enough, and corporations must be held responsible for the conditions they create. Following the method applied in relation to IFIs above the following section grounds corporate responsibility for human rights in three sources; their constitutional origins, their composition of individuals, and the question of whether corporations should be granted separate legal personality.

4.1. MNCs 'Constitutions' – The Articles of Agreement

The existence of a corporation, its structure and its operations of control are defined within its constitutional documents. These are the *Memorandum of Association*. The *Articles of Association* form a secondary document. The precise form of the constitutional documents depends upon the type of corporation.[449] Within the constitutional documents the corporation sets out its responsibilities generally with primary responsibility to shareholders and investors.[450] The primacy of the profit motive has often been explained on the basis of shareholders' interests. In recent years this has evolved into corporate

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ZERK, J. A. (2006) *Multinationals and corporate social responsibility : limitations and opportunities in international law,* Cambridge, Cambridge University Press.

[448] UNCTAD (2011), *World Investment Report, 2011 – Non-Equity Modes of International Production and Development,* p.110. Citing Zhan, James (2011) "Making industrial policy work". Project Syndicate. Available at www.project-syndicate.org.

[449] See further DINE, J. (2000) *The Governance of Corporate Groups,* Cambridge, Cambridge University Press.

[450] See KEAY, A. R. (2011) *The Corporate Objective,* Cheltenham, Edward Elgar.

human rights and environmental concerns. The Corporate Social Responsibility (hereinafter 'CSR') movement has driven an extension from corporate responsibilities towards shareholders to corporate responsibilities towards consumers, employees and the general public. CSR is essentially voluntary in nature although it is possible to contend that its voluntary nature is now debatable. CSR is an effective regulatory device but is arguably deeply problematic as a mechanism of fairness in terms of democracy and distributive justice. If companies do comply it is generally on the grounds that it will *not* prevent them from making the largest profit possible. Indeed, more often than not, when corporations do comply with CSR standards it is on the premise that it may assist with profit-making.[451]

4.2. MNCs Mechanisms for Human Rights Responsibility

(i.) International Institutional Control

In the absence of international legal personality, international institutions may attempt to hold corporations to account by other means. Due to the increasingly timid nature of the state in respect of corporations' human rights obligations, the international institutions such as the UN have begun to advise states on how to regulate corporations. In the 1970's, under the first wave of the New

[451] See for example the report by the AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL–CIO), (2013) '*Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Workers Rights'*, April 2013. Available here: http://www.scribd.com/doc/137523674/CSR-Report. Last accessed 5 May 2013. For theoretical background on CSR see ZERK, J. A. (2006) *Multinationals and corporate social responsibility : limitations and opportunities in international law*, Cambridge, Cambridge University Press.

International Economic Order, the UN,[452] the OECD[453] and the ILO[454] each attempted to respond to this imbalance by establishing their own principles on the conduct of MNCs in relation to development and human rights. However, the inability of these mechanisms to establish effective regulation of multinational corporations led to their redundancy and a general perception of these mechanisms as 'weak' instruments of international law.[455] In the 1990s many of the original codes of conduct were revised.

The ILO and OECD codes share similarities in that both codes are voluntary, both codes envisage the primacy of national law and both are addressed to MNCs and national enterprises. In addition, under the OECD codes, member

[452] The UN constituted a Commission on Transnational Corporations (E.S.C. RES. 1913, U.N. ESCOR, 57TH Sess., Supp. No. 21, U.N. Doc. E/5570/ADD. 1 (1975)) but failed to establish draft norms on the code of Transnational Corporations due to disagreements between industrialized and developing countries. See generally MUCHLINSKI, P. (2007) *Multinational enterprises and the law,* Oxford, Oxford University Press.

[453] *OECD Guidelines for Multinational Enterprises* adopted 21 June 1976.

[454] *ILO Tripartite Declaration of Principles concerning MNEs and Social Policy*, Nov 1977, (revised Nov 2000). The aim of the Tripartite Declaration of Principles, then, is to '*encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise, taking into account the UN resolutions advocating the Establishment of a New International Economic Order.*' (para 2). Apart from specific references to fundamental worker's rights as guaranteed under conventions and recommendations adopted within the ILO – including the *ILO Declaration on Fundamental Principles and Rights at Work,* adopted in June1998 by the International Labour – Conference – such as references to the principles of freedom of association and the right to collective bargaining, the prohibition of arbitrary dismissals or the protection of health and safety at work, the Tripartite Declaration contains a general provision relating to the obligations to respect human rights – Para 8 on General Policies.

[455] See generally D SCHUTTER, O. (2006) The Challenge of Imposing Human Rights Norms on Corporations. IN DE SCHUTTER, O. (Ed.) *Transnational Corporations and Human Rights.* Hart pubs, chapter 1.

countries are advised to establish "national contact points" (NCPs) as complaints to monitoring bodies. The NCPs are able to hear complaints regarding the overseas activities of national companies and offer advice, although as strictly non-adjudicatory bodies they cannot issue legally binding decisions. In a bid to strengthen the powers and procedures of the NCP, Denmark passed law to allow the Danish NCP to undertake independent investigations of companies and issue a statement on compliance with the OECD guidelines. The new mechanism does not have the power to issue sanctions however.[456]

The UN's attempts to regulate corporations directly include the creation of the Commission on Transnational Corporations in 1974,[457] Kofi Annan's Global Compact in 1999,[458] and the subsequent drafting of the UN norms on the human rights obligations of MNCs and other business entities in 2003.[459] Both the Global Compact and the UN Norms demand that MNCs are not complicit[460] in human rights abuses but do not impose any legally binding

[456] See OECD Watch statement Oct 05, 2012, '*OECD Watch welcomes Denmark's strengthened NCP: the New Mediation and Complaints Mechanism, with a mandate to investigate allegations and make recommendations'* http://oecdwatch.org/news-en/oecd-watch-welcomes-denmark2019s-strengthened-ncp

[457] The Commission was established by ECOSOC. Resolution. 1913, U.N. ESCOR, 57TH Sess., Supp. No. 1A, U.N. Doc. E/5570/ADD. 1 (1974).

[458] Creation of the UN Global Compact, the UN Sub-Commission for the Promotion and Protection of Human Rights approved in Resolution 2003/16 of 14 August 2003.

[459] *'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights'* adopted 30 May 2003, Un Doc. E/CN.4/Sub.2/2003/12/Rev.1.

[460] According to the landmark ruling of the US Court of Appeal for the Ninth Circuit, in the case of UNOCAL operations in Burma, whereby UNOCAL was found to be complicit in human rights abuses through the commissioning of Burmese soldiers to protect its Yadana gas

obligations on corporations. Following Ruggie's admission that the UN Norms on the Responsibilities of TNCs and Other Business Entities with Regard to Human Rights 2003 did not create binding obligations for corporations, questions were raised as to the autonomy and meaning of this norm-drafting activity.[461] For example in a hearing with the Human Rights Council a coalition of human rights groups raised concerns that "*an over-reliance on voluntary initiatives […] would be both inappropriate and inadequate"*.[462]

(ii) UN Guiding Principles on Business and Human Rights

Despite growing criticism surrounding Ruggie's Business and Human Rights mandate, efforts to draft guidelines for business in respect of human rights continued and gathered momentum as Ruggie's "Protect, Respect, and Remedy" framework.[463] In March 2011 Ruggie issued the "final product"[464] of

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pipeline knowing they committed murder, rape, and forced labour of local Burmese people, corporate complicity in human rights abuses implies three things: "*practical assistance being given to the perpetrator; assistance having a substantial effect on the commission of the criminal act, and finally the knowledge criterion*". See the Business and Human Rights Resource Centre report*, 'Exploring Responsibility and Complicity'*, 8 December 2005, London.

[461] UN Report of SRSG, (John Ruggie) on the issue of human rights and transnational corporations and other business enterprises, 9 February 2007, *"Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts"*, UN Doc: A/HRC/4/035.

[462] UN HUMAN RIGHTS COUNCIL, *4th session, 12 to 30 March 2007, Oral Intervention by Amnesty International, ESCR net, Human Rights Watch, International Commission of Jurists, and the International Federation for Human Rights to the Human Rights Council, 4th Sess., Report of the Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Interactive Dialogue (March 2007), *available at* http://www.escr-net.org/sites/default/files/NGO_Statement_at_HRC_28_March_JRuggie.pdf

[463] John Ruggie, Special Representative of the Secretary General (SRSG), 2008. *"Protect, Respect and Remedy: A Framework for Business and Human Rights,"* UN Doc. A/HRC/8/5 (7

this mandate, the *UN Guiding Principles on Business and Human Rights 2011* (hereinafter *'the UN Guiding Principles'*).[465] In June 2011, the UN Human Rights Council adopted the UN Guiding Principles and established a working group on the dissemination and implementation of the norms. This marked the first time that the UN Human Rights Council or its predecessor, the UN Commission on Human Rights, had taken such a step. Ruggie asserts that; "*the Council's endorsement establishes the Guiding Principles as the authoritative global reference point for business and human rights."*[466] Yet, the Council's endorsement does not give the principles the status of legal obligation. The final product was met with mixed reactions. Whilst they were met with a lukewarm response from the business sector,[467] the NGO sector has been

April) (SRSG Report 2008), available at http://www.businesshumanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2008. Last accessed March 20th 2013.

[464] John Ruggie uses this term in his blog entry on the *'UN Guiding Principles for Business and Human Rights', for Harvard Law blog,* 9th April 2011. Available at; http://blogs.law.harvard.edu/corpgov/2011/04/09/un-guiding-principles-for-business-human-rights/

[465] UN Report of SRSG, John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework",* A/HRC/17/31, 21 March 2011. Available at; http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf (Last accessed 1st June 2012).

[466] UNOG News Report (16 June 2011), *UN Human Rights Council Endorses New Guiding Principles on Business and Human Rights 2011*. Available at: http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear_en%29/3D7F902244B36DCEC12578B10056A48F?OpenDocument.

[467] For discussion of how firms have responded to the drafting of the UN Guiding Principles see AARONSON, S. A. & HIGHAM, I. (2013) Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms. *Human Rights Quarterly,* 35**,** 333-364.

particularly critical over weaknesses within the *UN Guiding Principles.*[468] The interpretation and evolution of these norms is the subject of a case study demonstrating the suppression of norms of fairness in international law-making in the following chapter. Ultimately, it is argued that these layers of governance are poor substitutes for redress of the structural design of international law. In particular, the attachment of 'multi-nationality' to corporations and the detachment of 'international legal personality' to corporations, which are integral to international law's structural design.

[468] See for example HUMAN RIGHTS WATCH, (June 16, 2011), *UN Human Rights Council: Weak Stance on Business Standards,* http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-businessstandards; ARTICLE 19, *Joint Statement Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises* (26 May 2011), *available at*http://www.unhcr.org/refworld/category,REFERENCE,ART19,,,4df85acf200,0.html; FIDH *U.N. Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies,* (June 17, 2011), http://www.fidh.org/UN-Human-Rights-Counciladopts-Guiding-Principles. A more detailed analysis of the shortcomings in the draft *Guiding Principles* signed by over 120 NGOs is available at *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights,* FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-onthe-draft,9066; FIAN Statements on States and Companies Obligations to respect and protect human rights abroad in response to UN *Draft Guidelines on "Guiding Principles for the Implementation of the United Nation's Protect, Respect, Remedy Framework".* Available at http://www.fian.org/fileadmin/media/publications/2011_2_StatesObligations_HR_Abroad.pdf and http://www.fian.org/fileadmin/media/publications/2011_2_Comnpanies_Obligations_HR_Abroad.pdf Last accessed 1 June 2013. For a fuller list of submissions on the consultation to the draft Guiding Principles see publicly accessible list on the Business and Human Rights Resource Centre website: http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions. All last accessed 1 June 2013.

4.3. Composition of Corporations

To a large extent, jurisdictional ambiguity created by multi-nationality has been blamed for the accountability dilemma of MNCs. Host states risk deterring FDI when ambiguity or varying interpretations or corporate nationality mean that responsibility may be sourced back to the home state. However, analysis of the problem as a jurisdictional issue underestimates the facility and flexibility of international law. As in the case of IFIs, much of the ambiguity surrounding the human rights obligations of MNCs can be dispersed by considering the state's role in controlling corporations. By perceiving the MNC as a network of linked companies, each of them incorporated under the legal system of the country in which they are operating, it is possible to transform the jurisdictional issue of 'multi-nationality' into the rather simple one of multiple states and multiple companies - a question of state responsibility over the acts of companies operating on its territory.[469] Responsibility for the actions of subsidiaries and affiliates would be seen as the concern of the home state of the parent when control over the operation resides there.

This view adheres to the human rights framework's stance on the role of the state in relation to privatisation. Under Eide's tripartite obligation of states to protect, respect and fulfil, the obligation to protect requires the state and all its organs to protect the individual's rights from violation by third parties.[470] This

[469] DINE, J. (2012) Jurisdictional arbitrage by multinational companies: a national law solution? *Journal of Human Rights and the Environment,* 3**,** 44-69.

[470] The concept was originally developed by Asbjorn Eide in EIDE, A. (1987) Right to Adequate Food as a Human Right. *Final Report, Office of the High Commissioner for Human*

is supported by the conception of states as the primary bearer of human rights obligations as confirmed by the *Maastricht Guidelines 1997*; '*the State remains ultimately responsible for guaranteeing the realisation of economic social and cultural rights'*.[471] Further, the UN Committee on Economic, Social and Cultural set out clear guidelines regarding the state's role in monitoring the human rights compliance of corporations in its General Comment No 14. Therein it is stated that the state must ensure four conditions in the quality of the privatised service: *availability, acceptability, quality, and accessibility. (Accessibility is held to be comprised of four over-lapping dimensions; non-discrimination, physical accessibility, economic accessibility, information accessibility).*[472] This formula is useful but it does not address the unequal bargaining pressure involved in international economic agreements between powerful corporations and developing states. In order to address this asymmetry, it is necessary to create a relationship between the developing state and the centre of control of the corporation. This relates to extraterritorial obligations and also to the international personality of corporations.

Rights, E/CN.4/Sub.2/1987/23 and later adopted and further developed by UN human rights bodies.

[471] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)*, ss.2.

[472] *CESCR General Comment No. 14*, the Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (20 January 2003) para 12.

4.4. The Legal Personality Debate

(i.) The Non-Application of Personality to Corporations[473]

Corporations are legally considered to lack the 'international legal personality' to be legitimate subjects of international law.[474] Efforts to revise the notion of legal personality to encapsulate MNCs as subjects of international law have been made on several grounds.[475] The following analysis seeks to demonstrate that there is as much legal reasoning to support the application of international legal personality to corporations as there is to prohibit it. It is argued that the onus of proof must shift from an onus on establishing the legitimacy of attaching human rights obligations to international economic actors to an onus

[473] It should be noted that a relevant similar construction could be applied to the international financial institutions and the World Trade Organisation. For examples see WAHI, N. (2006) Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability. *University of California, Davis, Journal of International Law and Policy,* 12, SKOGLY, S. (2001) *The human rights obligations of the World Bank and the International Monetary Fund,* London, Cavendish.

[474] See for example MALANCZUK, P. (1997) *Akehurst's Modern Introduction to International Law*. At p. 102; TOMUSCHAT, C. (2003) *Human Rights – Between Idealism and Realism* Oxford University Press, p 91

[475] See for example ALLOTT, P. (1990) *Eunomia – New Order for a New World.* Oxford University Press. p 372: *"[I]nternational law must abandon the conceptual category of subjects of international law";* KLABBERS, J. (2003) (I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors. IN PETMAN, J. & KLABBERS, J. (Eds.) *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniem.* Leiden, Martinus Nijhoff. At pp 351, 354,369. For opposing views see: FRIEDMAN, W. (1964) *The Changing Structure of International Law,* London, Stevens and Sons. At p. 223 where it is claimed that any extension of subjectivity is subversive and as untenable as eliminating the public private division. See also KOROWICZ, M. S. (1956) The Problem of the International Personality of Individuals. *American Journal of International Law,* 50 wherein Korowicz questions the value of attaching personality to corporations.

on establishing the legitimacy of the construction of actors which are unaccountable within international law.

A strict textual interpretation of international law would follow Oppenheim's principles according to which international legal personality is the preserve of states and all other capacity may be described as duties granted to corporations by states.[476] This position is reinforced by assumptions based on omission of corporations in legal texts, in particular the failure in the *Rome Statute of the International Criminal Court* to agree to bring corporations within the jurisdiction of the new international court.[477] Watts and Jennings proceed to make the distinction between rights "*which might necessarily*" be bestowed by a state on its internal subjects and "*international rights*" to stand as subjects of international law.[478] Following this logic, states routinely grant *rights* and *obligations* to individuals as corporations under international law but have refused to grant non-state entities the status of 'international legal personality'.[479] Similar traditional interpretations stress the need for some form of community acceptance through the granting by states of rights and /or

[476] JENNINGS, R. & WATTS, A. (1992) *Oppenheim's International Law Introduction and Part 1*.16 See also the *Mavrommatis Palestine Concessions case* (1924) PCIJ, series A, No2, p12, line 10.

[477] Clapham explains that this omission was seized upon in the context of human rights litigation against Talisman Oil in the US Courts as evidence of "*a lack of any accepted rules or standards for corporate criminal responsibility under international law*". CLAPHAM, A. (2006) *Human rights obligations of non-state actors*, Oxford, Oxford University Press, p 244.

[478] JENNINGS, R. & WATTS, A. (1992) *Oppenheim's International Law Introduction and Part 1*. 16 See also the *Mavrommatis Palestine Concessions case* (1924) PCIJ, series A, No2, p12, line 10.

[479] For a historical overview see PORTMANN, R. (2010) *Legal personality in international law*, Cambridge, Cambridge University Press.

obligation under international law to the entity in question.[480] The reasoning behind this may stem from the self-interest of states or from fear of granting corporations yet greater power through personality. [481]

(ii). Challenging the Non-Application of International Legal Personality to Corporations

According to international law, de facto participation is not equivalent to acting on the international scene in legally relevant ways, and thus de facto participation does not convey the status of international legal personality.[482] Whilst this state-centric interpretation has long been held as the verifiable source of international law, these interpretations may be countered by both alternative textual interpretations and by teleological interpretations.

Some scholars have offered differing textual interpretations that treat individuals as subjects of international law. Korowicz argues that the idea that the provisions of international law are *"directly binding on individuals without the intermediary of their state is at least as old as the science of international law which originated in the sixteenth century."* Korowicz refers to natural law

[480] See BROWNLIE, I. (2008) *Principles of public international law*, Oxford ; New York, Oxford University Press, p. 57; MENON (1992) The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine. *Journal of Transnational Law and Policy*, 1, at p.152 et seq.; JÄGERS (1999) The Legal Status of the Multinational Corporation under International Law. IN ADDO, M. K. (Ed.) *Human Rights Standards and the Responsibility of Transnational Corporation*, p. 262.

[481] For example CASSESE, A. (1986) *International Law in a Divided World*, Clarendon Press. p. 103. This view would also seem to be in line with the reasoning of Hans Morgenthau.

[482] See for example SHAW, M. N. (2003) *International Law*, Cambridge, Cambridge University Press, p176 et seq.

doctrines of Grotius,[483] Pufendorf [484] and Hobbes [485] which stress that natural law binds both states and individuals.[486] It is also possible to reason that wherever private international law implicates individuals it also includes corporations. As Ramastry argues: *"To the extent that individuals have rights and duties under customary international law and international humanitarian law, multinational corporations as legal persons have the same set of rights and duties."*[487] In this respect, it is important to note that the *UDHR* is addressed to states, organisations and individuals alike.[488]

Given its implications, the reasoning behind the exclusive granting of international legal personality to states must be subject to scrutiny. As Addo points out: *"It is important to keep in mind that legal personality is a legal*

[483] Korowicz cites secondary references on Grotius. See BOURQUIN, M. (1926) Grotius et les Tendances Actuelles du Droit International. *Revue du Droit International et de Legislation Compare*, p.88

[484] PUFENDORF, S. (1688) *De jure naturae et gentiuum libri octo,,* Amsterdam, Andreas Hoogenhuysen pubs. Vol II, Chapter III.

[485] HOBBES, T., TUCK, R. & SILVERTHORNE, M. (1998) *On the citizen*, Cambridge, Cambridge University Press, chapter XIV, ss.4.

[486] KOROWICZ, M. S. (1956) The Problem of the International Personality of Individuals. *American Journal of International Law,* 50.

[487] RAMASTRY (2002) Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and their impact on the Liability of Multinational Corporations. *Berkeley Journal of International Law, 20,* p. 96. Ramastry goes on to claim that national courts in jurisdictions with developed systems of corporate criminal liability have begun to treat corporations in the same way as natural persons with regard to international customary law, at p.101. However this is subject to considerable qualification for discussion see ALSTON, P. (2005a) *Non-state actors and human rights*, Oxford, Oxford University Press.

[488] "*Nothing in this Declaration may be interpreted as implying for any State, group or person 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*" Article 30 *Universal Declaration of Human Rights 1948.*

fiction, a legal tool that serves practical purposes."[489] A progressive, teleological interpretation of the role of international legal personality proposes the extension of the concept on the basis of necessity, history and customary law evolution.[490] Nowrot and Clapham are amongst those who advocate the rebuttable presumption of normative responsibilities of MNCs.[491] Nowrot bases his view on necessity: *"[I]f international law withholds legal status from effective […] entities, the result is a legal vacuum undesirable both in practice and principle."*[492] Clapham, on other the hand, grounds his reasoning in capacity. Clapham advocates an extension of human rights obligations to non-

[489] ADDO, M. K. (1999) *Human rights standards and the responsibility of transnational corporations,* The Hague ; London, Kluwer, p. 262. Referring to Reparations for Injuries Suffered in the Service of the United Nations ICJ Reports 1949, p. 174. Addo also agrees that the lack of a central governing body in international law that can confer or withdraw legal personality is problematic as it enables the will of the most important legal subjects to play *"a decisive part in the concept"*, p. 262.

[490] Further unpacking of the concepts of international personality has come from Jan Klabbers who advocates 'recognition' as the defining element of legal personality; KLABBERS, J. (2003) (I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors. IN PETMAN, J. & KLABBERS, J. (Eds.) *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniem.* Leiden, Martinus Nijhoff.; See also on international legal personality on the basis of community acceptance: BROWNLIE, I. (2008) *Principles of public international law,* Oxford ; New York, Oxford University Press, at p. 57; CRAWFORD, J. (1979) *The Creation of States in International Law,* Oxford, Oxford University Press, p.25.

[491] NOWROT, K., (2005) New Approaches to International Legal Personality of Multinational Corporations : Towards a Rebuttable Presumption of Normative Responsibilities, *European Society of International Law conference paper,* available at http://www.esil-sedi.eu/english/pdf/Nowrot.PDF (last accessed 20th February 2012.) See also HIGGINS, R., (1985) 'Conceptual thinking about the individual in international law' in FALK, R. A., KRATOCHWIL, F. & MENDLOVITZ, S. H. (1985) *International law : a contemporary perspective,* Boulder, Colo.; London, Westview.

[492] NOWROT, K., (2005) New Approaches to International Legal Personality of Multinational Corporations : Towards a Rebuttable Presumption of Normative Responsibilities, *European Society of International Law conference paper,* available at http://www.esil-sedi.eu/english/pdf/Nowrot.PDF Last accessed 20th February 2012.

state actors without necessarily extending legal personality to corporations. Clapham summarises the main objections from a human rights perspective to the attachment of human rights obligations to corporate entities under four headings; the trivialisation argument, the legal impossibility argument, the policy tactical argument, and the legitimisation of violence argument.[493]

The shift from personality to capacity introduces space for moral responsibility to the discussion of international legal personality. *Should* corporations have personality by virtue of their power? As Dine and Ireland have pointed out, corporations obey both a formal written charter and an unwritten *social* charter from which expectations of morally acceptable behaviour might emerge.[494] The shift from the legal to the moral accompanying the shift from personality to capacity can also be related to a shift in the traditional understanding of the role of human rights. Human rights were originally conceived as limitations on the state power, although this power once held by states has become heavily compromised by the rise of corporate actors in the twenty-first century. Although human rights were originally designed to create legal limits to protect the individual against state interference, they were also justified by the need to

[493] CLAPHAM, A. (2006) *Human rights obligations of non-state actors*, Oxford, Oxford University Press. Along similar lines, David Kinley and Junko Tadaki propose that "*it is possible to invest in TNCS sufficient international legal personality to bear obligations, as much as to exercise rights*." KINLEY, D. & TADAKI, J. (2004) From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations in International Law, *Virginia Journal of International Law*, 44**,** 931 – 1022, p 947.

[494] DINE, J. (2000) *The governance of corporate groups*, Cambridge, Cambridge University Press.

protect the inherent dignity of the individual.[495] Arguably, that same moral basis, the protection of the inherent dignity of the individual, demands that the international community extend or as Cassese writes 'upgrade' the application of human rights so that they might apply to corporations.[496]

Yet, as Muchlinski points out, the arguments against this extension are long established and based *"on a remarkably resilient model of a liberal market society characterized by a clear distinction between the public and private spheres*".[497] Of these arguments, perhaps the most interesting are those that invite questions about the nature and legitimacy of rights themselves. For example, there are arguments based on a perception of rights as policy choices of states, or based on the (mis)conception that corporations might be able to influence social and economic rights but could do nothing for civil and political ones. In addition, there is the argument that corporations cannot have human rights responsibilities without first having human rights themselves.[498] Interesting though these are, the real objections seem to be those couched in the

[495] According to Hart human rights seek to preserve individual liberty or autonomy see HART, H. (1973) Bentham on Legal Rights,. IN SIMPSON, A. (Ed.) *Oxford Essays in Jurisprudence,* pp 171-201; Similarly Dworkin rationalises human rights on the basis that they seek to protect human dignity, see DWORKIN, R. (1985) *A Matter of Principle*, Harvard University Press.

[496] CASSESE, A. (1986) *International Law in a Divided World*, Clarendon Press, p 103.

[497] MUCHLINSKI, P. (2001) Human Rights and Multinationals - is there a Problem? *International Affairs,* 77**,** 31-47, p. 35. See also MUCHLINSKI, P. (2012) Implementing the UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulations. *Business Ethics Quarterly,* 22**,** 145-177.

[498] See BISHOP, J., DOUGLAS (2012) The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations. *Business and Ethics Quarterly*, 22See generally EMBERLAND, M. (2006) *The human rights of companies : exploring the structure of ECHR protection,* Oxford, Oxford University Press.

practicalities, notably those of avoiding a 'free rider' problem.[499] - Not to mention the expense and administration of any human rights responsibility, and of course, deterrence to the rapacious growth of global capitalism.

Both strands of argument can be overcome by a view of international law and international trade that responds to present realities and social expectations. Perception of the corporation and demands on corporate behaviour is changing in recognition of their significance in structuring the global economy and in light of increasing awareness of the impact which corporate behaviour has on social provision locally and globally. Recent campaigns against corporate tax avoidance are important conduits for awareness raising in this regard. Secondly, as Muchlinski points out there is increased awareness of the clout that corporations bear in global economic structuring and growing demand that the *'democratic deficit'* behind global business regulation be tackled.[500] As will be discussed in more detail in Chapters 6 and 7, it is argued herein that the obstacles to a more robust governance of corporations are more likely to be found in ideology and the "*limits of our imagination*".[501] Rosalyn Higgins is

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[499] Muchlinski defines the free rider problem as whereby "*the more conscientious corporations that invest time and money in observing human rights, and in making themselves accountable for their record in this field, will be at a competitive disadvantage in relation to more unscrupulous corporations that do not undertake such responsibilities*". MUCHLINSKI, P. (2001) Human Rights and Multinationals - is there a Problem? *International Affairs,* 77, 31-47, p 35.

[500] Ibid. p 36. Citing PARKINSON, J. E. (1993) *Corporate power and responsibility*, Oxford, Clarendon Press.; DINE, J. (2000) *The governance of corporate groups,* Cambridge, Cambridge University Press; BRAITHWAITE, J. & DRAHOS, P. (2000) *Global business regulation,* Cambridge, Cambridge University Press.

[501] KOSKENNIEMI, M. (2001) *The gentle civilizer of nations : the rise and fall of international law, 1870-1960,* New York, Cambridge University Press, p 6.

compelling in her claim that: "*[T]he whole notion of 'subjects' and 'objects' has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.*"[502]

5. Conclusion

Despite *grounds* for attaching obligations of democracy and distributive justice to IFIs and MNCs through human rights obligations, the *mechanisms* to deliver these obligations are insufficient. Moreover, these mechanisms are often opposed by duly-enacted law in the shape of international economic agreements or by legal doctrines such as the non-application of international legal personality to corporations. This splintering of objectives in international law makes it very difficult for the obligations that exist to attain greater normative force and become universalised as envisaged in an international obligation to trade fairly or through any other means. Moreover it suggests that the global inequality resulting from international trade, historically and presently, is the result of structural design of international law. The following chapters develop this critique by exploring the normative and structural obstacles internal to international law that suppress the evolution of norms of fairness in international law.

[502] HIGGINS, R. (1994) *Problems and process : international law and how we use it*, Oxford, Clarendon.

Chapter 6: Normative Obstacle to Fairness in International Law

"Both, trade regulation and human rights protection,

aspire in their own ways after welfare in the pursuit of human happiness."

Thomas Cottier[503]

1. Introduction

This chapter considers *normative* obstacles to the construction of an obligation to trade in a way that does not impede processes of democracy and distributive justice between individuals and states, - the obligation to trade fairly. The following sections examine normative obstacles occurring on theoretical and practical levels. The image that emerges is that the *theoretical* obstacles generate the *practical* obstacles. In order to demonstrate the link between theory and practice in this context, the third section of this chapter offers two case studies, - one on aspects of the ILO labour standards regime and the other on the *UN Guiding Principles on Business and Human Rights 2011*. It is argued that it is not the practicalities of implementation but theoretical underpinnings that prevent stronger standards in the area of labour standards and human rights obligations of corporations. The chapter concludes by comparing the manifestation of different theoretical underpinnings in the organisational structuring of international human rights law organs and

[503] COTTIER, T., PAUWELYN, J. & BURGI BONANOMI, E. (2005) *Human rights and international trade*, Oxford, Oxford University Press, p 1.

international economic law organs. The next chapter will explore obstacles that are *structural* rather than *normative* in nature.

2. Practical Obstacles

There is much criticism of institutional efforts at corporate regulation,[504] yet there is not enough analysis regarding exactly *why* previous efforts have failed to bear impact. In order to begin to unravel the reasons behind their limitations it is necessary to consider the nature of soft law. What constitutes soft law is open to debate. A useful point of definition is to consider that even treaty law can be considered to be soft law if there is no means to enforce its implementation. For example, human rights and environmental norms may be considered within this category.[505] Guzman and Meyer identify language included in the *Universal Declaration of Human Rights, the Helsinki Final Act*, the *Basel Accord on Capital Adequacy*, decisions of the UN Human Rights

[504] See for example KINLEY, D., NOLAN, J. & ZERIAL, N. 2007. The Politics of Corporate Social Responsibilty: Reflections on the United Nations Human Rights for Corporations. *Companies and Securities Law Journal*, 25; Also Human Rights Watch Press Release (2011) UN Human Rights Council: Weak Stance on Business Standards. 16 June. http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards Accessed 21 May 2013; JERBI, S., (2009) Business and Human Rights at the UN: What Happens Next? *Human Rights Quarterly* 31: 299-320; JERBI, S., (2011) UN Adopts Guiding Principles on Business and Human Rights - What Comes Next? http://www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html Accessed 21 May 2013

[505] BOYLE, A., (1999) Some Reflections on the Relationship of Treaties and Soft Law. *International and Comparative Law Quarterly* 48, 901-913.

Committee, and rulings of the International Court of Justice (ICJ) as examples of soft law.[506]

Soft law is generally considered to apply to states but in lieu of attaching international law personality to corporations, soft law has become a dominant feature of corporate regulation. Although soft law bears few binding legal consequences, this regulation may nonetheless impact global normative behaviour. This flexibility, which encourages the participation of all interested parties, is the key advantage of soft law regulation. Soft law can recognise the role of non-state actors in ways which are not easily achieved through traditional law-making processes. Moreover, soft law compliance mechanisms may in some instances provide a substitute for legally binding obligations for transnational corporations.

Consequently, soft law is often proposed as a substitute where legally binding obligations are not available or unimaginable. Yet as Christine Chinkin has pointed out, soft law is in fact a poor substitute for hard law.[507] Nonetheless, it is understood that the process of negotiating and drafting soft law may foster compliance and international stability through regulatory norms.[508] This is substantiated by Schaffer in his study on the influence of public-private

[506] GUZMAN, A. T., MEYER ,T. L., (2010) International Soft Law. *Journal of Legal Analysis* 2:171-225, p 171.

[507] CHINKIN, C.M., (1989) The Challenge of Soft Law: Development and Change in International Law. *International and Comparative Law Quarterly* 38:850-866, p 850.

[508] Id.

partnerships on WTO litigation.[509] The problem that Chinkin alludes to is that when law lacks the rule of law, as is the case with soft law, it is open to capture. In the absence of an obligation to comply, other reasons to comply must be found (and this may entail the subversion of the content of the obligation as will be further discussed below).

A useful approach to understanding why states and corporations might comply with soft law norms is offered by Gavin Anderson. According to Anderson, the non-contractual nature of the *Universal Declaration of Human Rights 1948 (UDHR)* becomes quasi-contractual when both citizens and states place legitimate expectations on states to uphold its standards.[510] Consequently, state compliance with the *UDHR* is driven primarily by reputation and recognition.[511] Similar processes may occur in relation to the expectations of consumers on corporate behaviour. Paddy Ireland has described this as a

[509] SHAFFER, G. C., (2003) *Defending Interests: Public-private Partnerships in WTO Litigation*. Brookings Institution Press, Washington DC. Shaffer focuses mainly on how private firms collaborate with relevant government institutions in the US and the EU to challenge various trade barriers before the WTO dispute settlement system.

[510] See ANDERSON, G. 2006. Corporate Governance: A (Legal Pluralist) Constitutional Perspective. *In:* MACLEOD, S. (ed.) (2006) *Global Governance and the Quest for Justice.* Hart.

[511] As Shelton points out "*[f]urther, compliance may result not from the possibility of sanctions but from recognition of the need to ensure sustainability of the common good. Public goods theory may be more appropriate, in fact to the subjects of environment and human rights than game theory, which may apply to arms control and trade"* in SHELTON, D. (2000) *Commitment and compliance : the role of non-binding norms in the international legal system,* Oxford, Oxford University Press. p. 14. On the question of why states comply with voluntary norms, see also BROWN WEISS E & (EDS), J. H. K. (1998) *Engaging Countries: Strengthening Compliance with Environmental Accords,* Boston, The MIT Press.

corporation's 'implicit social contract'.[512] A survey by Lewis in 2002 finds that 80% of people feel that '*large companies have a moral responsibility to society*'.[513] The existence of an implicit social contract gives grounds for a moral obligation, although the legal one is still elusive. In 2004, Christian Aid made a convincing case that despite corporate claims, voluntary regimes have failed to stop major human rights violations in several countries.[514]

Human rights awareness and civil society pressures are often cited as the driving force behind MNC's voluntary CSR codes of conduct. Whilst human rights language is generally used in CSR documents, these documents may lack clarity on the conditions of implementation. The voluntary basis of these commitments has led to strong criticism and dissatisfaction at the absence of robust regulation within international law.[515] To this end, it is useful to

[512] See IRELAND, P., (2003) Recontractualising the Corporation: Implicit Contract as Ideology. In CAMPBELL, D., COLLINS, H., WIGHTMAN, J., (EDS) Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts. Hart Publishing, Oxford, pp 255-288. See also IRELAND, P., (2003) Property and Contract in Contemporary Corporate Theory. Legal Studies 23:453–509; ARMOUR, J., DEAKIN, S., LELE, P., SIEMS, M. (2009) How Do Legal Rules Evolve? Evidence from a Cross-country Comparison of Shareholder, Creditor and Worker Protection. American Journal of Comparative Law 57:579-640.

[513] LEWIS, S., (2003) Reputation and Corporate Responsibility. *Journal of Communication Management* 7:356-366.

[514] CHRISTIAN AID (2004) Behind the Mask: The Real Face of Corporate Social Responsibility. Christian Aid Reports, London. Similar criticisms have been elsewhere. See ADDO, M. K. (1999) *Human rights standards and the responsibility of transnational corporations*, The Hague ; London, Kluwer. SULLIVAN, R. (2008) *Corporate responses to climate change : achieving emissions reductions through regulation, self-regulation and economic incentives*, Sheffield, Greenleaf.

[515] See for example International Council on Human Rights Report Policy 2002, p. 8: "*By definition, voluntary initiatives apply only to those who accept them. A company might accept a code of conduct because of genuine commitment to the principles or because its reputation is at stake. Even where there is genuine commitment, voluntary codes may not be respected if*

consider the extent to which ethical trade initiatives have fostered compliance through soft law built through public /private partnerships. The Kimberley Process,[516] Rainforest Alliance,[517] and the Fairtrade Labelling Organisation[518] serve as examples whereby public-private drafting processes were followed by certification systems. In these instances, independent certification acts as an additional enforcement mechanism to the point that the norms could be considered contractual.[519] These systems are not without their blind-spots, biases and democratic deficits and Chapter 3 has considered the extent to which these may be unassailable in respect of the Fairtrade Movement. The important point for now is that there are mechanisms available to enhance compliance with soft norms and that compliance and enforcement may be less mysterious than is commonly understood. The real obstacles obstructing the implementation of these norms may be theoretical, as the next section will discuss in more detail.

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their principles clash with other, more powerful commercial interests. People sometimes argue that, if it makes good commercial sense to respect human rights, then market forces will ensure compliance. It is not self-evident however, that human rights norms are always "good for business". Many companies have prospered under authoritarian regimes. In any case, the issues are often too complex for markets to understand and respond to. It would be difficult, for example, to insert into market mechanisms incentives and disincentives which would give competitive advantage to those companies that behave ethically."

[516] The Kimberley Process Certification Scheme. http://www.kimberleyprocess.com. Accessed 21 May 2013.

[517] The Rainforest Alliance Certification Scheme. http://www.rainforest-alliance.org/. Accessed 21 May 2013.

[518] The Fairtrade Labelling Organisation International. http://www.fairtrade.net/. Accessed 21 May 2013.

[519] JONES, B. & HARTLIEB, S. (2009) Humanising Business Through Ethical Labelling: Progress and Paradoxes in the UK. *Journal of Business Ethics,* 88**,** 583-600 And CASTALDO, S., PERRINI, F., MISANI, N. & TENCATI, A. (2009) The Missing Link Between Corporate Social Responsibility and Consumer Trust: The Case of Fair Trade Products. 84**,** 1-15.

3. Theoretical Obstacles

Throughout the twentieth century the underlying conceptual framework of the International Monetary Fund (IMF), the World Bank and the US Treasury Department, (and consequently of international economic law,) migrated from one of 'economic stability' to one of 'wealth before welfare'. Keynesian economics were replaced by neoliberal fundamentalism wherein 'trade liberalisation, privatisation and stabilisation' became the standard reform agenda to which much of Latin America and Sub-Saharan Africa were subjected.[520] This trend was packaged by the Bretton Woods institutions as the 'Washington Consensus' in 1989 and adopted as the new mandate of global economic institutions, frequently expressed in 'Structural Adjustment Programmes' of the World Bank and the IMF. This trend has also come to be known as "embedded liberalism".[521] This period saw states in many of the world's least developed countries, eager in the pursuit of economic reform,

[520] The plan for this policy was set out by economist John Williamson in WILLIAMSON, J., 1989, *What Washington Means by Policy Reform ,in* WILLIAMSON, J, Latin American Readjustment: How Much has Happened, Washington, Institute for International Economics. Williamson has since acknowledged flaws flowing from the original Washington Consensus strategy and has attempted to plug the gaps in an expanded reform agenda, which places emphasis on crisis-proofing of economies, "second generation" reforms, and policies addressing inequality and social issues, see KUCZYNSKI, P., AND WILLIAMSON, J., (ED.) 2003. After the Washington Consensus: Restarting Growth and Reform in Latin America. Washington, D.C.: Institute for International Economics). See also WILLIAMSON, J, *The strange history of the Washington consensus,* Journal of Post Keynesian Economics Volume 27, Number 2 / Winter 2004 / 05 195 – 206.

[521] See RUGGIE, J. G. 1983. International Regimes, Transactions and Change: Embedded Liberalism and the Postwar Economic Order. *In:* KRASNER, S. D. (ed.) *International Regimes.* Ithaca, NY: Cornell University Press. For discussion see LANG, A. 2006. Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime. *Journal of International Economic Law,* 9**,** 81-116. See also HARVEY, D. 2005. *A brief history of neoliberalism,* Oxford, Oxford University Press.

step aside as provider for their citizens to become instead facilitator for corporate entry within their territory.[522]

If the Washington Consensus ever did hold credibility as a mechanism for poverty alleviation, this credibility has since been lost.[523] Accompanied by financial liberalisation and the opening of international capital flows, the process of liberalisation soon spun out of control. Whilst the policy is now widely discredited (or repackaged at least), the legacy of the Washington

[522] See RODRIK, D., (2006) *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform,* Journal of Economic Literature Vol. XLIV, pp. 973–987: "*There was more privatization, deregulation, and trade liberalization in Latin America and Eastern Europe than probably anywhere else at any point in economic history. In Sub-Saharan Africa, governments moved with less conviction and speed, but there too a substantial portion of the new policy agenda was adopted: state marketing boards were dismantled, inflation reduced, trade opened up, and significant amounts of privatization undertaken*." Also: "*The introduction of the Washington Consensus involved not simply a swing from state-led to market-oriented policies, but also a shift in the ways in which development problems were framed and in the types of explanation through which policies were justified*." See also NELLIS, J., (2003) *Privatization in Africa: What Has Happened? What Is To Be Done?* Center for Global Development Working Paper 25.

[523] See STIGLITZ, J., (1998) *Ninth Prebisch Lecture at UNCTAD*, 19 November 1998, Geneva, where he explains that the Washington Consensus has failed to foster development because it "*all too often confused means with ends-taking means such as privatisation, 'getting the price right' and trade liberalization as ends in themselves*." Available on the World Bank's website: http://www.worldbank.org last accessed on 20th February 2012. See also, CHOMSKY, N. 1999. *Profit over people : neoliberalism and global order,* New York ; London, Seven Stories Press.; and GEORGE, S., (2011) *Abandon the Washington Consensus, Forge the Istanbul Consensus*, Transnational Institute online article, May 2011, available at http://www.tni.org/article/abandon-washington-consensus-forge-istanbul-consensus (last accessed 20th February 2012). See also generally KLEIN, N. 2007. *The shock doctrine : the rise of disaster capitalism,* New York, Metropolitan Books/Henry Holt.

Consensus persists in trends of deregulated labour markets and privatisation of basic public goods (such as water and sanitation, healthcare and education).[524]

At the heart of the trade and human rights paradigm there remains controversy over the best method of human rights provision. This controversy manifests itself in the trade-off between economic growth and social provision. Should economic growth be pursued at the expense of social provision? Equally, should social provision be pursued at the expense of economic growth? Trade that is untrammelled by the limitations of human rights and environmental standards finds defences such as '*bad jobs are better than no jobs at all.'* The legacy of the Washington Consensus[525] encourages the belief that economic growth is the most effective vehicle for 'development' and this lends legitimacy to the de facto hierarchy between trade and human rights law. Consequently, the extent to which corporate regulation is conducive to higher human rights is contentious in some spheres. The question of corporate regulation is intrinsically linked to market regulation. The twentieth century was driven by the reign of free markets on the belief that markets were the most efficient mechanisms of resource distribution. Friedrich von Hayek's endorsement of the market, as guaranteeing the equality of all individuals in

[524] Notwithstanding the manifest other legal mechanisms of exploitation of the poor such as the TRIPS rules that restrict access to affordable medicine; the privatization of health care, education, or water supply ensuing from GATS negotiations which outprice many people from accessing basis services and which puts at risk control of the quality of the services provided by those privatized enterprises. See generally; HARRISON, J. 2007. *The human rights impact of the World Trade Organisation,* Oxford, Hart Pub.; ZAGEL, G.M., (2007) "Human Rights Accountability of the WTO", in Human Rights 2, pp. 335-379.

[525] See further FAUNDEZ, J., (2010) *Rule of law or Washington Consensus: the evolution of the World Bank's approach to legal and judicial reform in* PERRY-KESSARIS, (ED) A. *Law in the pursuit of development : principles into practice?* Abingdon, Routledge.

their pursuit of freedom whilst preserving individual autonomy, continues to dominate mainstream economic thinking.[526]

Hayek's theory found moral justification on the basis that contrary to seemingly personal processes of the state, the *"impersonal process of the market [...] can be neither just nor unjust, because the results are not intended or foreseen."*[527] This finds support in Milton and Rosa Friedman's theory that uninhibited markets and laissez faire economics is the best foundation for any society. Their approach is based on a libertarian defence of personal freedom: "*A society that puts equality before freedom will get neither. A society that puts freedom before equality will get a high degree of both."* [528]

Yet theories claiming that the morality of the market ensures the fairest allocation of goods overlook the billions of people who are excluded from and exploited by the present conditions of international trade. Marxist perspectives reason that markets only exacerbate inequalities on the basis that the transfer of responsibility for delivery of basic goods and public services from the mandate of governments to non-elected and largely unaccountable corporate actors prevents equitable and democratic distribution. Marx argued that market relations reduce work to a means of survival and make individuals into mutual enemies, transforming social life into a *helium ominium contra omnes* (the war

[526] See HAYEK, F., (1945) 'The Use of Knowledge in Society', 4, (XXXV), *American Economic Review,* pp 510 – 530. See also, HAYEK, F. A. V. (1944) *The road to serfdom,* [S.l.], George Routledge and Sons Ltd.

[527] Id.

[528] Milton Friedman in 'Created Equal', the last of the 'Free to Choose' television series (1990, Volume 5 transcript).

of all against all).[529] This approach was supported by other socialist thinkers of the time such as Polanyi who contested the natural spontaneity of markets.[530] According to Polanyi, markets are not natural; rather they are historically constructed, as is the self-interested behaviour that markets induce amongst humankind.

Even Adam Smith's vision of the market is unlikely to accord with the prevailing global economic order. Rather than the hegemony of capital over labour that we are faced with today, Smith's ideal was a market comprised solely of small buyers and sellers. Smith made it clear that the optimal arrangement for society would only be possible where no buyer or seller is sufficiently large to influence the market price, so that the market would provide a fair price for land, labour and capital. Yet this assumes a significant degree of equality in the distribution of economic power, and how it might be achieved is not evident.[531] In the present day however, the limits that Smith recommended have been forgotten and Smith's central idea that the market would provide the best allocation of goods has been stretched to justify a relentless global pace of deregulation and privatisation of resources. Smith's forewarnings of monopolies is skipped over in the co-option of his theory by Libertarians.

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[529] The Economic-Philosophical Manuscripts of 1844 cited in KATZ, C.J., (1993) Marx's Blind Spot: Review of Stanley Moore: Marx Versus Markets. (University Park, PA: Pennsylvania State University Press,) 126.

[530] See POLANYI, K. (1944) *The great transformation,* New York, Octagon Books, 1975, pp 65-67-68-76.

[531] See KORTEN, D. C. (2000) *When corporations rule the world,* Goa, Other India Press.

Chomsky describes the invisible hand of the market as destroying the possibility of a decent human existence through destroying community, the environment, and human values generally and even the masters themselves. He advocates that states must intervene in order to prevent this outcome. [532] Ironically, on the contrary, throughout the latter part of the twentieth century, deregulation has been steadily promoted as a response to flailing economies and societies rather than identified as a causal factor. Moreover, markets have become the answer to everything, *especially* government failure particularly in the context of developing states where privatisation is considered as a good governance method with which to advance development and human rights.[533]

This conflict recently resurfaced in articles concerning sweatshops published in *Human Rights Quarterly*.[534] Benjamin Powell furnishes his objection to setting limits on trade (specifically labour standards) with the scenario wherein the closure of a sweatshop in Bangladesh led to a large number of the children employed there turning to prostitution.[535] Zwolinski poses the following juxtaposition as key to any critique of labour standards: *What happens when the exploitation of child labor is legally prohibited, but the neglect of children living in poverty is not?*[536] In so doing Benjamin Powell and Matt Zwolinski

[532] See CHOMSKY, N., (1993) "Notes of NAFTA: "The Masters of Man"", The Nation, March 1993.

[533] See KARNS, M. P. & MINGST, K. A. (2010) *International organizations : the politics and processes of global governance,* Boulder, Colo., Lynne Rienner Publishers.

[534] ARNOLD, D. G. & HARTMAN, L. P. (2006) Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops. *Human Rights Quarterly,* 28**,** 676-700.

[535] POWELL, B. Ibid. In Reply to Sweatshop Sophistries.

[536] See ZWOLINSKI, M. (2007) Sweatshops, Choice, and Exploitation. *Business Ethics Quarterly,* 17.

conflate the role of the state with that of corporation and refuse to consider the structural impact of corporations on the power of the state. The 'race to the bottom' paradigm (wherein states compete against each other to offer the lowest regulatory environment for corporate investors) is overlooked by this analysis, which suggests that corporations are not encouraging deregulation, just taking advantage of it.[537]

An understanding of the pressures faced by states in order to attract investment recasts the role of the corporation in a less than benevolent light. Is anyone really convinced that states willingly invite corporations to exploit their populations whilst siphoning profits back to their home state? Or that states willingly hand over policy space to corporations at a low price? The strength and conviction of developing states at the Doha Round stands to reason that developing states are more than enthusiastic about finding routes to escape their entrenched economic status, - a plight which is often described as a 'prisoner's dilemma'. Developing states do need foreign direct investment but this investment need not come with ensuing labour exploitation and domestic policy influence. [538]

[537] Other essays in the discussion include: ARNOLD, D. G. & BOWIE, N. E. Ibid. Respect for Workers in Global Supply Chains: Advancing the Debate over Sweatshops. ARNOLD, D. G. (2003) Exploitation and the Sweatshop Quandry. *Business Ethics Quarterly,* 13, SOLLARS, G. G. & ENGLANDER, F. (2007) Sweatshops: Kant and Consequences. *Business Ethics Quarterly,* 17.

[538] For an analysis of the role of host state legal systems could and in some cases do play in mediating relations between foreign investment, civil society and government actors see PERRY-KESSARIS, A. (2008) *Global business, local law : the Indian legal system as a communal resource in foreign investment relations,* Aldershot, Ashgate.

In Chapter 2, the current structure of international law was viewed as failing to deliver on the concepts of justice discussed; libertarianism, utilitarianism, and egalitarianism. As Kant has identified, it is a strange freedom that is maximised under the current climate of liberal capitalism. Arguably, absolute market freedom enslaves both rich and poor to consumption and debt. It is herein argued that it is the persistence of this ideology behind the surface expressions of implementation obstacles that generates the greatest obstacles to norms of fairness.

In an effort to make the link between ideology and its practical implications, the following section considers the suppression of norms of fairness (as democracy and distributive justice) within two branches of standards attached to corporations; labour standards and secondly, the *UN Guiding Principles on Business and Human Rights*. It is suggested that the backdrop of neoliberal ideology has driven the gradual erosion of labour standards, and that this in turn has hindered the potential of labour standards to serve as a channel of exchange and wealth distribution. The reduction of normative power of the *UN Guiding Principles* resulting from corporate pressure also stands to demonstrate normative obstacles to efforts to place limits on trade and corporate behaviour. Thereafter, the concluding section of this chapter looks at the extent to which a difference in ideology can be detected in the organisational strategies of international trade institutions as compared to international human rights institutions broadly so-called.

4. Case Study of Labour Norms

As the central institutional for international labour standards, the ILO is centred upon what has been described as "*the most sensitive political nerve of all modern societies"*[539] the commodification of labour. The ILO, created in the aftermath of World War I by the *Treaty of Versailles 1919*, is uniquely structured as a tripartite body comprising three types of members; trade unions, employers and government representatives from member states. The institution sought to build universal and lasting peace based upon social justice.[540] The ILO's ability to engage in political and ideological conflicts between communism and capitalism is due to the centrality of labour to these debates and also due to its unique organisational structure, which integrated trade unions.

Since its creation the ILO has undergone several changes. From a base of fifty-two mainly western industrial states in 1946, the ILO's members grew to eighty in 1958 and one hundred and seventy seven in 2003, thus more than trebling in just over half a century. In 1960, fifteen new African countries joined the organisation. This surge in membership was reflected in the philosophy of the organisation, charged with a new politicisation aimed at regulating MNCs.[541] The ability of the ILO to develop this new focus benefitted from its unique, non-hierarchical structure and from the participation of trade unions.

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[539] LANGILLE, B. A. (1999) The ILO and the New Economy: Recent Developments. *International Journal of Comparative Labour Law and Industrial Relations*, 15**,** 229-258, p 234.

[540] *ILO Constitution 1919.* Preamble.

[541] See HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications, p 34.

The politics of the ILO were thrown into question when the Soviet Union, which lost ILO membership when it was excluded from the League of Nations in 1939, was readmitted in 1954. Other communist states subsequently followed, for example the People's Republic of China resumed participation in 1983. Features of the communist states such as trade union monopoly, the lack of independence of the official trade unions, and rules concerning social 'parasitism', were held by ILO committees to be incompatible with ILO conventions on freedom of association and forced labour. According to Alcock this revived the pre-War dispute as to how tripartism, based on the idea of independent employers' and workers' representatives, could operate in the case of a country where there was no distinction between state government and employer.[542] This issue was never satisfactorily resolved. Within the trade unions a split in opinion was established between the western-leaning International Confederation of Free Trade Unions (ICFTU), which enjoyed close relations with the ILO, and the communist-led World Federation of Trade Unions (WFTU).

The 'class collaboration' or ideology cocktail that was once so starkly engendered in the ILO has been muted since the collapse of communism in the Soviet Union and Central and Eastern Europe.[543] The institutional identity of the ILO has developed alongside the spread of liberal capitalism amongst its

[542] ALCOCK, A. E. (1971) *History of the International Labor Organization*, New York, Octagon Books, pp 284-317. Cited in HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications, p 34.

[543] HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications, p 35.

member states to promote labour rights as compatible with capitalism rather than as in conflict with it. Labour rights naturally link trade and human rights in that they fulfil both social and economic functions. In an IMF working paper, Stephen Golub writes: "*It is difficult if not impossible to separate the economic and moral dimensions of a harmonised set of core labour standards.*"[544] In Golub's view, international compliance with core labour standards can be best defended as a way of *"increasing the legitimacy of a liberal international trading system, as well as being desirable in itself."* [545]

This fits with the theory advocated by Donnelly that the modern capitalist economy created a new range of threats to human dignity and thus was one of key factors behind the need and demand for human rights.[546] However, it is also important to note that human rights and labour rights have developed along parallel but separate tracks, even though human rights treaties include various rights relevant to labour. Indeed, rights such as the right to form and join trade unions, the right to free choice of employment, the right to equal treatment, rights which prohibit forced labour and child labour are generally referred to as 'economic rights' within the human rights framework.[547]

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[544] GOLUB, S. (1997) International Labor Standards and International Trade, *IMF Working Paper* WP/ 97 /37, 1997 at pp. 19-22, cited in KAUFMANN, C. (2007) *Globalisation and labour rights : the conflict between core labour rights and international economic law,* Oxford, Hart, p 88.

[545] Ibid p 88.

[546] DONNELLY, J. (2003) *Universal human rights in theory and practice,* Ithaca, N.Y. ; London, Cornell University Press, p 64.

[547] For speculation on the reasoning behind the evolution of parallel tracks of labour rights and 'economic' rights see HEPPLE, B. (2005) *Global Trade and Labour Laws*, Hart publications, p. 23

Reference to the prevailing politics of the IFIs reveals that the prioritisation of the economic over the social is characteristic of the IFIs more generally. Moreover, and more worryingly, this mandate shift is commonly considered legitimate. Kaufmann describes how the prioritisation of the economic over the social represents a divergence from the original principles of the Bretton Woods Institutions and what later became the *GATT*. Originally conceptualised to foster "social justice and peace", economic efficiency has now become the primary objective of the *GATT*.[548]

4.1. The Economic Function of Labour Rights

Labour rights are often considered an economic necessity from a utilitarian point of view. Kaufmann classifies the major economic arguments in favour of harmonised core labour standards as follows:

- *"International market failures: international market failures require joint action by government.*
- *Unfair competition (social dumping): Countries with low labour standards have an unfair competitive advantage in international trade.*
- *Race to the bottom: Unfair competition will cause a 'race to the bottom' as countries attempt to attract capital and investments by lowering their labour standards and thus reducing the cost of production.*
- *Welfare of workers in developing countries: The standard of living in developing countries will benefit from higher labour standards.*"[549]

[548] KAUFMANN, C. (2007) *Globalisation and labour rights : the conflict between core labour rights and international economic law*, Oxford, Hart, p.100.

[549] Ibid, at p. 88.

This goes some way to explain why they have generally been supported by developing states, but not in all instances. As discussed earlier, there is some opposition to labour rights on the grounds that they impose obstacles to trade for developing states. This may be due to doubt amongst developing states that the application and enforcement of labour standards will be equal amongst states. This may be true particularly in light of developed states dominance within international bodies such as the ILO and the WTO.

4.2. The Social Function of Labour Rights

Labour rights also serve important social functions. Labour rights are the most significant agent for distributive justice today. It is through labour rights that many states have established a minimum wage, often termed 'just and favourable remuneration for workers and their families', and social insurances such as maternity and sickness benefits and pensions. The ILO standards carry a number of rights which have been enshrined in the International Bill of Human Rights, such as i) Freedom of Association[550]; ii) The right to be free from forced or compulsory labour[551]; iii) The effective abolition of child

[550] Article 23(4) Universal Declaration of Human Rights (UDHR) and Article 22 International Covenant of Civil and Political Rights (ICCPR) (and also included as an economic and social right, the right to form and join trade unions is included in Article 8 *International Covenant of Economic Social and Cultural Rights (ICESCR))*.

[551] This can be interpreted from Article 4 UDHR: "*the right not to be held in slavery or servitude*" and Article 23 *UDHR:* "*everyone has the right to work, to free choice of employment […]*"; also Article 8 *ICCPR:* "*No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited; No one shall be held in servitude; No one shall be required to perform forced or compulsory labour (except in the conditions of imprisonment).*"

labour;[552] iv) Protection against discrimination.[553] Beyond this, just and favourable conditions of work are included under Article 7 *ICESCR* and Article 24 *UDHR*. The right to work is included in Article 23(1) *UDHR* (and Article 6 *ICESCR*; Article 23 *UDHR* states that everyone who works has the right to just and favourable remuneration ensuring for him or herself and his or her family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. EU provisions go farther regarding protection of dignity. *The Charter of Fundamental Rights of the European Union* contains a general reference to working conditions protecting a worker's dignity in Article 31.[554]

4.3. Reduction of Labour Rights to 'Core Labour Rights'

A radical shift in the elaboration of international labour standards came in 1998. *The ILO Declaration on Fundamental Principles and Rights at Work (1998)* (hereinafter the *ILO Declaration*,) presented a very broad if not universal consensus on the content of core labour rights. According to the *ILO Declaration* the following standards constitute the core labour standards:

- Freedom of association and the effective recognition of the right to collective bargaining;

[552] Article 3 *Convention on the Rights of the Child* (CRC) (1989): *"the right of the child to be protected from economic exploitation.*"

[553] Article 7 *UDHR*, Article 26 *ICCPR* and features in almost every human rights document (although some instruments contain a right not to be discriminated against which applies only to the human rights contained in the instrument itself.

[554] Article 31, *Charter of Fundamental Rights of the European Union*, (2000/C 364/01) 18.12.2000 Official Journal of the European Communities C 364/1EN (the EU Charter). See also Article 26 which protects the right to dignity at work, and applies both to sexual harassment and to other forms of bullying. further discussion of the crossover of labour rights and economic and social rights.

- The elimination of all forms of forced or compulsory labour;
- The effective abolition of child labour;
- The elimination or discrimination in respect of employment and occupation.[555]

The ILO Declaration states that all members, even if they have not ratified the relevant ILO Conventions,[556] have constitutional obligations by virtue of ILO membership, to respect, promote and realise these core labour rights.

It is hard to view the reduction of the extensive list of labour rights to a cluster of four as in any way progressive. More alarming is the fact that the revised list does not contain any of the economic and social components of rights at work. These are aspects of labour rights that generate material benefits attached to work, such as maternity provisions, holidays and sickness pay. As Alston observes: *"The bottom line is that the Declaration proclaims as 'principles' a range of values which had already been recognized as rights exactly 50 years earlier in the Universal Declaration of Human Rights."*[557]

The impact of the promotion of these four labour rights as core labour standards on the wider labour standards regime cannot be underestimated. It

[555] LANGILLE, B. A. (1999) The ILO and the New Economy: Recent Developments. *International Journal of Comparative Labour Law and Industrial Relations,* 15, 229-258, p 229.

[556] The relevant ILO Conventions are *ILO Conventions on core labour rights, convention no 29, Forced Labour 1930, Convention no 105, Forced Labour, 1957, Convention no 87, Freedom of Association 1948.*

[557] ALSTON, P. (2004) Core Labour Standards and the Transformation of the International Labour Rights Regime. *European Journal of International Law,* 15, ALSTON, P. (2004) Core Labour Standards and the Transformation of the International Labour Rights Regime. *European Journal of International Law,* 15**,** 457-521, p 483.

has essentially codified a hierarchy among labour standards. Indeed, as Alston puts it, "*those rights which did not make it into the premier league were inevitably relegated to second-class status*."[558] Those rights left out include the right to a safe and healthy workplace, the right to some limits on working hours, the right to reasonable rest periods, and protection against abusive treatment in the workplace. Also excluded are the economic supports for social provisions such as maternity provisions, pensions and holidays which serve important distributive functions.[559]

Furthermore, various studies support the claim that some labour rights have greater distributive effect than others.[560] Notably, the rights to freedom of association and collective bargaining primarily serve a distributive function, although they may also have a positive economic impact. In this respect, attempts by states and corporations to suppress labour rights and the direct impact of this suppression on fairness within international law are of concern. Suppression of the right to freedom of association and collective bargaining are

[558] ALSTON, P. (2004) Core Labour Standards and the Transformation of the International Labour Rights Regime. *European Journal of International Law*, 15, 457-521, p 488.

[559]See further COMPA, L. (2000) Is There an Emerging Transnational Regime for International Labour Standards? (remarks). *American Society of International Law Proceedings*, 93, p 15.

[560] See OECD, (1996) *Trade, Employment and Labour Standards: A study of Core Workers' Rights and International Trade* at 222 and OECD (2000) *International Trade and Core Labour Standards. Cited in* KAUFMANN, C. (2007) *Globalisation and labour rights : the conflict between core labour rights and international economic law*, Oxford, Hart., p 89. See also See MORICI, P. AND SCHULZ E., (2001) *Labor Standards in the Global Trading System*, Economic Strategy Institute publications, for an overview and discussion of the different economic arguments.

particularly notable as discussed in Chapter 3.[561]

5. Case study of *UN Guiding Principles on Business and Human Rights 2011*

As described in Chapter 5, the *UN Guiding Principles on Business and Human Rights 2011* (hereinafter the *UN Guiding Principles*,) were introduced amidst the already contested and criticised context of John Ruggie's Business and Human Rights mandate. The *UN Guiding Principles* are the latest in a line of efforts to catch corporate activity within the net of human rights law by the UN. As with previous efforts, the *UN Guiding Principles* fall short of generating legally binding duties. As this was an explicit criticism of previous efforts, and given the demand for legally-binding obligations and the background of debate between business interests and civil society organisations over whether the principles ought to be binding, the non-binding outcome would seem to represent a victory for corporate lobbying. What is more, it is argued that the *UN Guiding Principles* represent a reduction of existing obligations in this area and their application continues to reduce scope for human rights obligations in international trade. The following section examines responses to the norms and their subsequent impact on norm-making.

[561] Although there is not space to go into detail on this, examples abound. See for example HUMAN RIGHTS WATCH (2007),*"Discounting Rights: Wal-Mart's Violation of US Workers Freedom of Association",* Human Rights Watch pubs, May 2007, Vol 19, No2. See also GOPALAKRISHNAN, R., "Freedom of association and collective bargaining in export processing zones: Role of the ILO supervisory mechanisms", *ILO Working Paper No. 1*, Geneva 2007.

As stated above, the main objection to the *UN Guiding Principles* made by the NGO sector is that they misrepresent existing obligations under international human rights law as non-binding guidelines rather than obligations. In two joint statements issued in response to the *UN Guiding Principles* by the FIAN,[562] the extent of existing states and companies' obligations to respect and protect human rights abroad is reaffirmed. The statements make the point that the *UN Guiding Principles* fail to acknowledge the following obligations; (1) States carry a legal duty under international human rights law to respect human rights abroad; (2) States are required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction; (3) Business enterprises carry a legal respect-obligation under international human rights law.

[562] FIAN Statement on States Obligations to respect and protect human rights abroad in response to Draft Guidelines on "*Guiding Principles for the Implementation of the United Nation's Protect, Respect, Remedy Framework*" of the UN Secretary General's special representative on business and human rights, John Ruggie. Issued 31.01.2011 endorsed by civil society organisations and human rights experts. Available at http://www.fian.org/fileadmin/media/publications/2011_2_StatesObligations_HR_Abroad.pdf Last accessed 1 June 2013. FIAN Statement on Companies' Obligations to respect and protect human rights abroad in response to Draft Guidelines on "Guiding Principles for the Implementation of the United Nation's Protect, Respect, Remedy Framework" of the UN Secretary General's special representative on business and human rights, John Ruggie. Issued 31.01.2011 endorsed by civil society organisations and human rights experts. Available at http://www.fian.org/fileadmin/media/publications/2011_2_Comnpanies_Obligations_HR_Abroad.pdf Last accessed 1 June 2013. See also *U.N. Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies*, FIDH (June 17, 2011), http://www.fidh.org/UN-Human-Rights-Counciladopts- Guiding-Principles. A more detailed analysis of the shortcomings in the draft *Guiding Principles* signed by over 120 NGOs is available at *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights*, FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-onthe-draft,9066.

In contradiction with the CESCR, Guiding Principle 6 puts forth only that states "*should*" take steps to require human rights compliance by state-owned companies. The CESCR formulates a clear requirement for states to respect human rights in other countries and to prevent state-domiciled companies from violating the rights in other countries.[563] This has since been reiterated and substantiated in the *Maastricht Principles,* in particular in Guiding Principle 9 (in relation to states' obligations to regulate the extraterritorial activities of businesses domiciled in their territory and /or jurisdiction). In General Comment 14, the Committee on Economic, Social and Cultural Rights (CESCR) stresses such an obligation: "*States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law*."[564] The CESCR in General Comment 15 says that states should "take steps to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries."[565] Similar statements are made in General Comments 12[566] and 19.[567] This obligation has since been reiterated and substantiated in the *Maastricht Principles*, in particular in Principle 12.

[563] *CESCR General Comment 12,* para.36; *CESCR General Comment 14,* para.39; *CESCR General Comment 15,* para.31; *CESCR General Comment 19,* para.53.

[564] *CESCR General Comment 14* para 39.

[565] *CESCR General Comment 15* para 33.

[566] *CESCR General Comment 12* para 36.

[567] *CESCR General Comment 19* para 54.

Thirdly, in respect of companies, FIAN submits that "*Ignoring the legal quality of the respect-obligation of business in international human rights law and making it a responsibility in the sense of a mere "expectation of society" […] tends to undermine the state's obligation to protect*."[568] Guiding Principle 5 of the *UN Guiding Principles* is cited as an example whereby respect for human rights by businesses is described as a mere "expectation" of states and becomes a requirement only "*where appropriate*".[569] Moreover, it is submitted by FIAN that this approach "*has absurd consequences*"[570] whereby companies would be granted impunity for breaching international human rights law. The contradictory nature of the *UN Guiding Principles* is also highlighted in light of the fact that Guiding Principle 23 formulates that victims have to find an effective remedy through *"appropriate means*" including judicial means, yet "*judicial means are not available if the legal nature of business enterprises' obligation to respect is not acknowledged*."[571] Consequently, not only do the

[568] FIAN Statement on Companies' Obligations to respect and protect human rights abroad in response to Draft Guidelines on "Guiding Principles for the Implementation of the United Nation's Protect, Respect, Remedy Framework" of the UN Secretary General's special representative on business and human rights, John Ruggie. Issued 31.01.2011 endorsed by civil society organisations and human rights experts. Available at http://www.fian.org/fileadmin/media/publications/2011_2_Comnpanies_Obligations_HR_Abroad.pdf Last accessed 1 June 2013.

[569] Principle 5, *UN Guiding Principles.*

[570] Ibid fn 568.

[571] FIAN Statement on Companies' Obligations to respect and protect human rights abroad in response to Draft Guidelines on "Guiding Principles for the Implementation of the United Nation's Protect, Respect, Remedy Framework" of the UN Secretary General's special representative on business and human rights, John Ruggie. Issued 31.01.2011 endorsed by civil society organisations and human rights experts. Available at http://www.fian.org/fileadmin/media/publications/2011_2_Comnpanies_Obligations_HR_Abroad.pdf Last accessed 1 June 2013. See BILCHITZ, D. (2010) The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations? *Sur International Journal on*

UN Guiding Principles negate any progress towards the evolution of third generation extraterritorial human rights responsibilities but they also effectively let corporations off the hook and may be used to that effect as will be explained further in relation to the evolution of the *UN Guiding Principles* as norms.

In relation to the wording and normative meaning of the *UN Guiding Principles* there are also concerns over the use of 'responsibility' and the introduction of inferred differentiated responsibilities amongst corporations. The *UN Guiding Principles* state that the responsibility to respect human rights requires that business enterprises: "*(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."*[572] Responsibility is subject to a sliding scale of level of duty. For example, Guiding Principle 14 asserts; *"the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors (size, sector, operational context, ownership and structure) and with the severity of the enterprise's adverse human rights impacts."* Guiding

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Human Rights, 12 *available at* http://www.surjournal.org/eng/conteudos/getArtigol2.php?artigo=12,artigo-10.htm (explaining that, in an effort to find consensus, Ruggie undermined basic human rights standards by failing to state that corporations are bound to these standards under international law). Cited in BLITT, R. C. (2012) Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance. *Texas International Law Journal* 48, p 35.

[572] Principle 13, *UN Guiding Principles.*

Principles 15 and 17 go on to enunciate this as a responsibility towards due diligence. [573] Guiding Principle 15 asserts that business enterprises should carry out human rights due diligence in order to *identify, prevent, mitigate and account* for how they address their adverse human rights impacts. Guiding Principle 17 sets out that the process of due diligence should relate to direct and indirect adverse effects of corporate activity on human rights, should vary in accordance with the scale of the business entity and should be on-going.

The result is ambiguity and uncertainty about the extent of corporations' responsibilities. Moreover, this would appear to be inconsistent with earlier reports by the John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (hereinafter SRSG),[574] to the Human Rights Council, which state that the corporate responsibility to respect human rights exists independently of

[573] Principle 15, *UN Guiding Principles*; In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. Principle 17, *UN Guiding Principles* sets out that the process of due diligence should relate to direct and indirect adverse effects of corporate activity on human rights, should vary in accordance with the scale of the business entity and should be on-going.

[574] UN SRSG, RUGGIE, J., (2009), *Clarifying the Concepts of "Sphere of Influence" and "Complicity"* A/HRC/8/16 (May 15, 2008); UN SRSG, RUGGIE, J., *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006); UN SRSG, RUGGIE, J., *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); UN SRSG, RUGGIE, J., *Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Human Rights Council, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007); UN SRSG, RUGGIE, J., *Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010); UN SRSG, RUGGIE, J., *Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

states' human rights obligations under national or international law, and that all business enterprises have the same responsibilities to respect all human rights irrespective of the country, sector, or specific context in which they operate.[575]

Beyond the introduction of due diligence for companies there is little elaboration regarding the content of the duties inferred. For example, Guiding Principle 8 encourages states to ensure policy coherence between government departments and corporate activity in their territories whilst also encouraging human rights due diligence by export credit agencies.[576] Guiding Principles 9 and 10 recognise the problems relating to policy space and ask states to both actively protect their own policy space in order to meet human rights obligations and conversely asks states to respect other states' policy space to this end when negotiating within multilateral institutions. There is little recognition of the race to the bottom, and the implications for home-states or corporations. Indeed, the responsibility lies with host states (often developing states). They do not address the agency problems of developing states – the prisoner's dilemmas for example. They seem to overlook that it is the actors with power who have the capacity to change behaviour in this paradigm.

Another weakness of the *UN Guiding Principles* is that they do not fully stipulate what is inferred by human rights and instead select certain

[575] *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights,* FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-onthe-draft,9066. Para 3. A view shared by Jena Martin Anderson in *The End of the Beginning?: A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective, 17 Fordham Journal of Corporate and Financial Law, 871, 2012. p 931.*

[576] Principle 8, *UN Guiding Principles.*

international instruments as representing the "core internationally recognised human rights."[577] Guiding Principle 12 suggests a narrow approach to international human rights by framing "*internationally recognized human rights […] at a minimum, as those expressed in the International Bill of Human Rights [IBHR] and the principles concerning fundamental rights set out in the International Labour Organization's [ILO] Declaration on Fundamental Principles and Rights at Work.*"[578] The *ICCPR* and the *ICESCR* are included within the IBHR and the Commentary accompanying Guiding Principle 12 acknowledges that; *"business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights."*[579] Nonetheless, reference to the *ILO Declaration* has been criticised as being a choice made at the exclusion of binding human rights instruments that have more state parties and more formalised tools of implementation and enforcement.[580]

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[577] The instruments listed are "the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions, as set out in the Declaration on Fundamental Principles and Rights at Work." In Commentary to Principle 12, *UN Guiding Principles*, John Ruggie, (SRSG), 2011. "*Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*," Advance Edited Version (21 March) UN Doc A/HRC/17/31 available at http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf. Last accessed May 15th 2012.

[578] Principle 12, *UN Guiding Principles.*

[579] Commentary to Principle 12, *UN Guiding Principles.*

[580] Blitt describes this linkage as "*curious*" and points out that it "*comes at the expense of forgoing explicit reference to the core international treaties that establish a broader range of compulsory norms beyond the declaration's narrow focus.*" In BLITT, R. C. (2012) Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance. *Texas International Law Journal* 48 Muchlinski agrees on this. See MUCHLINSKI, P. (2012) Implementing the UN Corporate Human Rights

The *UN Guiding Principles* have also attracted criticism on the basis that they do not provide a right to an effective remedy for victims.[581] Principle 25 establishes that as part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to an effective remedy. Principle 26 stipulates that states take appropriate steps to ensure that legal, practical and other relevant barriers, which could lead to a denial of access to remedy in respect of business-related human rights abuses, be addressed. Despite this, it has been argued that the draft *UN Guiding Principles* "*do not adequately reinforce the central importance and established guarantees under international law of the human right to an effective remedy, and in particular the right to reparation as a substantive dimension of the right to an effective remedy*."[582] Instead, much of the focus of the guidance is on

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Framework: Implications for Corporate Law, Governance and Regulations. *Business Ethics Quarterly*, 22**,** 145-177, p.148.

[581] See for example: ARTICLE 19, Joint Statement Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises (26 May 2011), *available at* http://www.unhcr.org/refworld/category,REFERENCE,ART19,,,4df85acf200,0.html.

International Federation for Human Rights Press Release 17 June 2011; "UN Human Rights Council adopts Guiding Principles on business conduct, yet victims still waiting for effective remedies." Available at; http://www.fidh.org/UN-Human-Rights-Council-adopts-Guiding-Principles. Last accessed May 15th 2012. *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights*, FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-onthe- draft,9066. Para 5. Last accessed 2 June 2013.

[582] *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights*, FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-onthe-draft,9066. Para 5. Last accessed 2 June 2013.

grievance mechanisms which are voluntary in nature and do not provide an appropriate and adequate means of safeguarding human rights against business abuse.

In a statement issued by the NGO, Article 19, it is noted that the *UN Guiding Principles* mandate lacks the standard capacity of other UN Special Procedures to receive information relating to specific instances and conduct country visits. [583] The statement argued that there is a strong need for clear follow-on mechanisms attached to the *UN Guiding Principles* and that the Human Rights Council should bring the business and human rights mandate in line with other thematic mandates by including the explicit remit to seek and receive information concerning alleged business-related human rights abuses. The statement urged the Human Rights Council to assess, analyse and give recommendations regarding the implementation of the *UN Guiding Principles*.

The statement also suggested that the Council "*carry out periodic consultative reviews with stakeholders to evaluate the functionality of the UN Guiding Principles and to consider other relevant issues; identify and where practicable facilitate advisory and capacity-building services to governments, civil society and victims of business-related human rights abuses, in collaboration with the Office of the High Commissioner for Human Rights; and coordinate with other international, regional and national mechanisms to*

[583] ARTICLE 19, Joint Statement Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises (26 May 2011), *available at* http://www.unhcr.org/refworld/category,REFERENCE,ART19,,,4df85acf200,0.html.

ensure the highest standards of human rights protection across relevant multilateral, regional and national organs and instruments."[584] This was supported by a Joint Civil Society Statement on the Draft UN Guiding Principles on Business and Human Rights commenting that the *UN Guiding Principles* should take a comprehensive approach to remedies (rather than the limited approach that they do take).[585]

5.1. Evolution of Principles to Rules?

The *UN Guiding Principles* set a dangerous precedent by contributing to a trend of non-binding law in an area characterised by non-compliance of existing binding law. In this respect the UN Guiding Principles do not strengthen extraterritorial responsibility of corporate responsibility for human rights beyond what was in place previously, the 2003 UN norms on TNCs. In fact they risk reducing the strength of prevailing obligations through the conspicuous absence of firmer obligations. This is a view shared by many within the human rights community as described above. The inherent value of the promulgation of soft law on business and human rights must in itself be

[584] ARTICLE 19, *Joint Statement Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises* (26 May 2011), available at http://www.unhcr.org/refworld/category,REFERENCE,ART19,,,4df85acf200,0.html.

[585] *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights*, FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-onthe-draft,9066. Para 5. Last accessed 2 June 2013.

subject to scrutiny. Rather than soft law hardening into hard law, there is the very real danger that hard law may soften into soft law.[586]

Rather than defending the softening of obligations implicit in the *UN Guiding Principles*, it has been argued instead that they merely provide the necessary platform for further consolidation and formalisation of evolving legal principles and social expectations for further rule-making by states at the national and global levels.[587] For example, Muchlinski claims that corporate duties must first evolve in the domestic sphere through state regulation of corporations, and from this, future international legal responsibility should not be ruled out.[588] Spurred by widespread criticism from civil society organisations and human rights experts, considerable efforts to ensure the recognition and integration of the *UN Guiding Principles* have been made by Ruggie's team subsequent to the finalisation of the norms.

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[586] See for example the European Commission's development of *non-binding* sector-specific human rights guidance for employment and recruitment agencies, ICT and Telecommunications firms, and oil and gas firms. EC Report, *Sustainable and Responsible Business: Business and Human Rights,* April 2013, *available at* http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/. Last accessed 1 June 2013.

[587] JERBI, S., Institute for Human Rights and Business Press Release, 17 June 2011, *"UN Adopts Guiding Principles on Business and Human Rights - What Comes Next?"* Available at: http://www.ihrb.org/commentary/staff/un_adopts_guiding_principles_on_business_and_human_rights.html. Last accessed 20th February 2012.

[588] MUCHLINSKI, P. (2012) Implementing the UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulations. *Business Ethics Quarterly*, 22**,** 145-177, p 151.

In a rebuke to Christopher Albin-Lackey's report in Human Rights Watch's 2013 annual report,[589] Ruggie argued that the core elements of the *UN Guiding Principles* have been "*incorporated by numerous other international and national standard setting bodies, each of which has its own implementation mechanisms, as well as by businesses and other stakeholder groups*".[590] He listed some of the major developments that have occurred since June 2011, building on the *UN Guiding Principles* to include:

- *The new OECD Guidelines for Multinational Enterprises, which have a human rights chapter drawn from the Guiding Principles, and which provide for national complaints mechanisms in the forty-two adhering states concerning the conduct of multinationals operating in or from those states.*
- *New provisions in the OECD Common Approaches for Export Credit Agencies, which affect access to capital at the national level.*
- *The new International Finance Corporation Sustainability Principles and Performance Standards, which affect access to international capital—amplified manifold because they are tracked by 80+ private sector lending institutions.* [591]

[589]ALBIN-LACKEY, C., (2013) "*Without Rules: A Failed Approach to Corporate Accountability*", Human Rights Watch report. Available here: http://www.hrw.org/world-report/2013/essays/112459?page=4 Last accessed 1 June 2013.

[590] RUGGIE, J., (2013) Progress in Corporate Accountability 04 February 2013, published on the Institute for Business and Human Rights website, available at http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html. Last accessed 1 June 2013.

[591] On the IFC Performance Standards see blog by SEIER,F., "IFC Performance Standards vs Human Rights Due Diligence: Mind the Gap!" November 29th, 2011 available at http://www.right2respect.com/2011/11/ifc-performance-standards-vs-human-rights-due-diligence-mind-the-gap/ Last accessed 1 June 2013. Wherein it is acknowledged that the IFC

- *ISO26000, which energises a world-wide army of consultants eager to help companies come into compliance.*
- *In the European Union, the Commission has asked member states to submit national plans for implementing the Guiding Principles, and the Commission itself is developing additional guidance for several industry sectors and for small and medium-sized enterprises.*
- *In the United States, the concept of human rights due diligence, a central component of the corporate responsibility to respect human rights under the Guiding Principles, has found its way into Section 1502 of the Dodd-Frank Wall Street Reform Act, in relation to conflict minerals procured in the Democratic Republic of Congo.*
- *The US government has also referenced the Guiding Principles as a benchmark in a new reporting requirement for US entities investing more than $500,000 in Myanmar, now that most economic sanctions have been suspended.*
- *ASEAN is exploring ways to align its new business and human rights program with the Guiding Principles; the African Union is on a similar track.*
- *The number of companies developing human rights policies, due diligence procedures and grievance mechanisms is rising significantly.*

Performance Standards do not refer to the Ruggie Framework and Guiding Principles. Among the 8 separate standards, they make reference to "human rights" only 3 times, and "human rights due diligence" and the "corporate responsibility to respect human rights" are not mentioned at all.

- *International business associations and labour federations have issued user guides to the Guiding Principles; civil society groups invoke them in their work, as do National Human Rights Institutions.*
- *The American Bar Association has formally endorsed the GPs and "urged" not only governments and the private sector but also law firms, as businesses in their own right, "to integrate [them] into their respective operations and practices."*[592]

None of the initiatives listed above generate binding legal obligations on states. Indeed, one of the these initiatives, the *Dodd-Frank Wall Street Reform Act*, seeks to generate binding obligations in relation to supply-chain management but has been forced to make their guidelines for corporations 'voluntary' by a monopoly of industry representatives led by the American Petroleum Institute.[593] Measuring the impact of voluntary regulations on the amount of voluntary regulations they inspire is a strange measurement indeed.

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[592] RUGGIE, J., (2013) Progress in Corporate Accountability, published on Business and Human Rights website, 04 February 2013, available at http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html. Last accessed 1 June 2013.

[593] The lawsuit was filed by the American Petroleum Institute, the Chamber of Commerce of the United States of America, the Independent Petroleum Association of America and the National Foreign Trade Council against the US Securities and Exchange Commission in the United States District Court for the District of Columbia on October 10, 2012. Reported in Global Witness Press Release of 12th October 2012, 'Global Witness condemns API lawsuit to strike down Dodd-Frank oil, gas and mining transparency provision,' 12th October 2012, available at: http://www.globalwitness.org/library/global-witness-condemns-api-lawsuit-strike-down-dodd-frank-oil-gas-and-mining-transparency. Last accessed 1st June 2013. See also ALBIN-LACKEY, C., (2013) "*Without Rules: A Failed Approach to Corporate Accountability*", Human Rights Watch report. Available here: http://www.hrw.org/world-report/2013/essays/112459?page=4 Last accessed 1 June 2013.

The real issue concerns the integration of the *UN Guiding Principles* into the domestic courts' jurisprudence, as that is where soft law initiatives, may be developed into binding obligations. Although on some accounts the *UN Guiding Principles* may bolster competence to regulate corporations through municipal courts, it seems equally likely that they may also serve to limit the development of corporate obligations.[594] Through application in domestic courts the existing quasi-legal obligations may be cemented into customary obligations. The risk is that courts may prefer not to stray from conventional international law wisdom into unchartered waters of corporate responsibility or worse yet, use the *UN Guiding Principles* as evidence of the non-binding nature of corporate responsibilities. Therein there is the danger that international obligations will be softened into quasi-legal obligations. Preliminary litigation concerning the *US Alien Torts Statute* would suggest that the softening of international obligations into quasi-legal obligations may already be occurring, as the following section explains.

5.2. *Kiobel* and Damage Limitation

In his above cited statement on *Progress in Corporate Accountability* published on 4th February 2013, Ruggie draws attention to a critical US Supreme Court case, *Kiobel v. Royal Dutch Petroleum*, brought under the *Alien*

[594] Although some might argue that it bolsters competence to regulate corporations through municipal courts. See MUCHLINSKI, P. (2012) Implementing the UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulations. *Business Ethics Quarterly,* 22**,** 145-177.

Tort Statute (hereinafter the '*ATS*').[595] Ruggie contests the "*mischaracterisations*" of the *UN Guiding Principles* by Shell in the *Kiobel* case.[596] In a bid to correct these mischaracterisations, Ruggie is keen to point out that he filed an amicus brief to the Court on this case and also that he recommended that *"an intergovernmental process reaffirm the applicability to companies of international standards prohibiting gross human rights abuses, potentially amounting to international crimes."*[597] He is keen to do so because reference made to the *UN Guiding Principles* in *Kiobel* stands to testify that the *UN Guiding Principles* hold the capacity to negate developments made in establishing extraterritorial human rights obligations.

The case was brought by Nigerian nationals residing in the United States, to US federal courts under the *ATS* alleging that respondents (certain Dutch, British, and Nigerian corporations) aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The petitioners alleged that the oil companies in cooperation with the Nigerian military undertook a campaign of torture, executions and detentions to crush opposition to an oil development in the Ogoni Niger River Delta. In the Second Circuit, the court of appeal dismissed the complaint completely on the grounds that the

[595] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S April 17 (2013), For a collection of some of the news articles and commentaries on the case see the (reasonably balanced) list compiled Business and Human Rights Institute: http://www.business-humanrights.org/Documents/SupremeCourtATCAReview#109932 and also the collection of summaries of the case on http://opiniojuris.org/2013/04/17/kiobel-insta-symposium/

[596] RUGGIE, J., (2013) Progress in Corporate Accountability, published on Business and Human Rights website, 04 February 2013, available at http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html. Last accessed 1 June 2013

[597] Ibid.

law of nations does not recognise corporate liability. Given the significance of the case, and due to attention from the human rights community,[598] the US Supreme Court granted certiorari. The court also ordered a supplemental briefing on whether and under what circumstances courts may recognise a cause of action under the *ATS* for violations of the law of nations occurring within the territory of a sovereign other than the United States.[599]

The Supreme Court found that under the *ATS,* states cannot be held liable for violations of customary international law. This reasoning was based on the doctrine of presumption in statutory interpretation which stipulates that when a law gives no clear indication of application to conduct outside of the US, it does not apply.[600] The Supreme Court held that "*the presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption*."[601] Citing *Sosa* v. *Alvarez-Machain,*[602] the Supreme

[598] See for example the amica curia submitted from human rights organisations petitioning for certiorari on the basis that the second circuit court had overlooked a well-recognised source of international law, namely general principles of law. Brief of Amici Curiae Centre for Constitutional Rights, International Human Rights Organisations and International Law Experts in Support of Petitioners, July 13, 2011, p 3 http://sblog.s3.amazonaws.com/wp-content/uploads/2011/10/Center-for-Constitutional-Rights-Kiobel-Amicus.pdf. Last accessed 5 June 2013. A list of amicus briefs submitted see: http://ccrjustice.org/ourcases/current-cases/kiobel

[599] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S April 17 (2013), Slip Opinion. Available at: http://business-humanrights.org/media/documents/kiobel-supreme-court-17apr-2013.pdf. Last accessed 1 June 2013.

[600] Citing *"[w]hen a statute gives no clear indication of an extraterritorial application, it has none*," *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S April 17 (2013), Slip Opinion, p.1 Available at: http://business-humanrights.org/media/documents/kiobel-supreme-court-17apr-2013.pdf. Last accessed 1 June 2013.

[601] In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S April 17 (2013), Slip Opinion, p.1.

Court acknowledged that the *ATS "permits federal courts to "recognize private claims [for a modest number of international law violations] under federal common law."*[603] Yet it was also acknowledged that *Sosa* has limited federal courts to recognising causes of action only for alleged violations of international law norms that are '*specific, universal, and obligatory'*.[604]

Ruggie submitted an amici curiae brief together with Philip Alston and the Global Justice Clinic of NYU[605] petitioning for the Supreme Court to reassess the Second Circuit decision. The brief reasserted that the SRSG (UN Special Representative to the Secretary General, John Ruggie,) recognised in the *UN Guiding Principles* that corporations may have direct liability under international law for gross human rights abuses, including international crimes such as genocide, torture, slavery, and crimes against humanity. Furthermore the brief clarified that *"The SRSG also concluded that states are generally not required to—but nor are they prohibited from—regulating the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction, where there is a recognized jurisdictional basis.*"[606] Moreover, in his brief, Ruggie directed responsibility for the mischaracterisations of his work to Shell's attorneys and asked whether "*the corporate responsibility to respect human*

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[602] *Sosa* v. *Alvarez-Machain*, 542 U. S. 692 at 732.

[603] In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S April 17 (2013), Slip Opinion

[604] *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, pp 695-698.

[605] RUGGIE, J., ALSTON, P., (2012) Brief Amici Curiae of Former UN Special Representative for Business and Human Rights, from Professor John Ruggie: Professor Philip Alston; and the Global Justice Clinic at NYU School of Law in Support of Neither Party, submitted 12 June 2012. Available at http://shiftproject.org/sites/default/files/No.%2010-1491%20ac%20UN%20Special%20Representative.pdf Last accessed 1 June 2013.

[606] Ibid. p 15.

rights should remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself?"[607]

In issuing opinion, the Court was careful to leave open a number of significant questions regarding extraterritoriality and specifically the reach of the *ATS*. Justice Kennedy highlighted that other cases may arise with allegations of serious violations of international law principles protecting persons, which are covered neither by the *Kiobel* decision nor the *US Torture Victim Protection Act 1991, adding that*; *"in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."*[608] The decision has also opened questions in relation to existing decisions on the *ATS*. The Court granted *certiorari* in *Daimler Crysler AG v. Bauman* (11-965)[609] and ordered a reconsideration in *Rio Tinto PLC v. Sarei* (11-649).[610] This represents a considerable set-back for

[607] Continues: "*Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests? Or would the commitment to socially responsible conduct include an obligation by the company to instruct its attorneys to avoid such far-reaching consequences where that is possible?"* RUGGIE, J. G., (2012) '*Kiobel and Corporate Social Responsibility: An Issues Brief*,' Corporate Responsibility Coalition website, September 4, 2012. Available at http://corporate-responsibility.org/wp-content/uploads/2012/09/ruggie-kiobel-and-corp-social-resonsibility-sep-2012.pdf http://corporate-responsibility.org

[608] Concurring opinion of Justice Kennedy in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S April 17 (2013), Slip Opinion. Available at: http://business-humanrights.org/media/documents/kiobel-supreme-court-17apr-2013.pdf Last accessed 1 June 2013.

[609] *Daimler Crysler AG v. Bauman* (11-965) US 2011.

[610] *Rio Tinto PLC v. Sarei* (11-649) US 2011.

the establishment of existing obligations and norms of fairness in international law.

In the latest developments at the US Supreme Court the fears of many human rights experts seem to have been realised. The voluntary nature of the *UN Guiding Principles* coupled with the inherent limitations of the statements therein within an established landscape of legal positivism has resulted in a reduction of recognised obligations on corporations. In the battle of sources, faced with fierce opposition from private interests, courts are reluctant to act as enforcer for obligations which have the effect of curbing business activity. The extent to which such an outcome ought to have been foreseeable by the drafters of the *UN Guiding Principles* is a question worth exploring, although beyond the scope of this thesis.

6. Integrating Democracy into International Norm-Making

The emergence of new international actors within world politics has characterised international law throughout the 20th century until the present day. MNCs, NGOs and terrorist organisations have each presented challenges to the existing structure of state–centric international law. International law has not reacted to the emergence of complex new actors in a unified manner. Rather, various bodies of international law have taken their own approach to integrating these actors, some with more success than others. In particular, at opposing ends of the spectrum, the varying approaches taken by organs of international economic law and organs of international human rights law, may be seen as representing a clash of ideologies implicit in our institutions of

international law. In order to support the proposition that corporations have gained norm-making powers within international law, the following sections considers differences in the nature of norms emanating from the UN and from the IFIs in their relationships with MNCs. Divergence in approach and treatment of MNCs will be considered in relation to three themes; status of actors, policy space attribution and priority, processes which integrate MNCs interests.

6.1. Status of Actors

UN specialised bodies on international human rights law have adopted a clear approach of integration of new actors. They have done so by granting rights and corresponding obligations to individuals as new subjects of international law through the direct application of the universal human rights covenants. For example the UN human rights Covenants, ICCPR, ICESCR, CAT, CEDAW etc. address themselves to individuals as actors within international law. Furthermore, MNCs, corporations and NGOs have been granted observer status and limited rights in certain UN human rights forums, (for example ECOSOC and UN Committee on the Rights of the Child) but are not generally acknowledged as subjects of international law.

On the other hand, international economic law rarely accommodates individuals, NGOs or corporations as actors in legal terms. With this said however, on occasion NGOs have been admitted as amici curiae at the discretion of dispute settlement bodies, although NGOs have not been given observer status in international trade forums. Even the relatively recent

introduction of the WTO Dispute Settlement mechanism has not opened the gates when it comes to the recognition of non-state actors (as discussed in Chapter 5.[611]

6.2. Policy Space Attribution and Prioritisation

The conflict between international economic law and human rights law manifests itself in the struggle for policy space.[612] Through trade liberalisation agreements made at the WTO such as the *WTO General Agreement on Trade in Services (GATS)* or the *WTO General Agreement on Tariffs and Trade (GATT)* a state might find that its policy space is squeezed by new trade rules.[*613*] Certain roots of global inequality can be traced to WTO negotiations where states are asked to open new service sectors to foreign competition. The foreign corporations may then evade any form of social responsibility directly through upholding environmental and human rights standards, or indirectly through paying tax. Furthermore, not only do these private actors not contribute to welfare policies, they may also actively reduce the number of policy options open to states. States then see their capacity to implement the

[611] See further VAN DEN BOSSCHE, P. (2008) NGO Involvement in the WTO: A Comparative Perspective. *Journal of International Economic Law,* 11**,** 717-749.

[612] See generally PAUWELYN, J. (2001) The Role of Public International Law in the WTO: How far can we go? *American Journal of International Law,* 95 and; MARCEAU, G. (2002) WTO Dispute Settlement and Human Rights. *European Journal of International Law,* 13**,** 753-814.

[613] MOSOTI, V. (2005) Law-making: Institutional Cooperation and Norm Creation in International Organizations. IN COTTIER, T., PAUWELYN, J. & BURGI, E. (Eds.) *Human Rights and International Trade.* Oxford University Press, p 167:*"If a State has agreed, through GATS, to open a particular service sector to foreign providers, it is then precluded from introducing new measures that might affect those foreign providers, such as measures requiring that the service providers respect certain new environmental or social standards.*"

policies required of them by human rights law as being severely compromised. Mosoti describes the pressure to liberalise at the WTO as a '*human rights risk*'.[614]

Thus, through facilitating conditions for the activities of transnational corporations, the WTO has generated reduction in policy space at the expense of human rights norms. This erosion of human rights policy space by trade policy, although commonplace, is fundamentally at odds with the principles of international law. As Cottier, Pauwelyn and Burgi propose in their introduction to *International Trade and Human Rights,*[615] according to the treaty interpretation provisions of international law,[616] the provisions of the WTO should be construed in accordance with human rights.

The WTO makes space for the consideration of such policies under the current principles and their exceptions in goods and services, particularly the possibility of protecting public morals, public health and the environment. Furthermore, reading the treaty obligations under human rights law and under international economic law in compatibility would be the legitimate way to

[614] Ibid p 169.

[615] COTTIER, T., PAUWELYN, J. & B*RGI BONANOMI, E. (2005) *Human rights and international trade*, Oxford, Oxford University Press, p 23.

[616] Vienna Treaty Articles 31-33 on interpretation. For discussion see: SINCLAIR, I. (1984) *The Vienna Convention on the Law of Treaties,* Manchester, Manchester University Press.; OPPENHEIM, L. F. L., JENNINGS, R. S., WATTS, A. & OPPENHEIM, L. F. L. I. L. *Oppenheim's international law. Vol.1, Peace*, 1992.; BROWNLIE, I. (2008) *Principles of public international law*, Oxford ; New York, Oxford University Press, LINDERFALK, U. & LINDERFALK, U. O. T. A. T. (2010) *On the interpretation of treaties : the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht, Springer.

proceed under the *Vienna Convention on the Law of Treaties*[617] which sets out the principles of interpretation under international law.[618]

Yet, rather than finding common ground between obligations from distinct international institutions, there has emerged a "*potential for turf wars"* between institutions to complete overlapping mandates.[619] Daniel Bradlow and Claudio Grossman argue that this is a one-sided process whereby: "*the progressive broadening of the operations of the international financial institutions has resulted in their work encroaching into the spheres of expertise of other international organisations*."[620] With this broadening of IFIs mandates the risk of capture of human rights policy space increases.

6.3. Processes

The variation in both the status of actors and the prioritisation of policy space between international economic law and international human rights law represents considerable substantive divergences between the two bodies of law. The third identified divergence, namely that of the role of new international actors in the processes of international norm creation, is perhaps the most

[617] *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, entered into force 27 Jan. 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[618] COTTIER, T., PAUWELYN, J. & B*RGI BONANOMI, E. (2005) *Human rights and international trade*, Oxford, Oxford University Press, p 23.

[619] MOSOTI, V. (2005) Law-making: Institutional Cooperation and Norm Creation in International Organizations. IN COTTIER, T., PAUWELYN, J. & BURGI, E. (Eds.) *Human Rights and International Trade.* Oxford University Press, p 167.

[620] See BRADLOW, D. & GROSSMAN, C. (1995) Limited Mandates and Interwined Problems: A new Challenge for the World Bank and the IMF. *Human Rights Quarterly*, 17, 411, pp 432 – 435.

significant in its ability to give new international actors, in particular TNCs, norm-creating power. As identified by Schaffer in his study on the influence of public-private partnerships on WTO litigation, the growing interaction between private enterprises, their lawyers, and US and European public officials in the bringing of most trade claims reflects a trend from predominantly inter-governmental decision-making towards multi-level private litigation strategies involving direct public-private exchange at the national and international levels. [621]

Research by Oxfam describes the capture of law that occurs when transnational corporations use powerful states to promote their interests and enforce their claims for stringent protection of intellectual property and to prise open key markets. In particular the report notes that *"[t]he European Union and the US have used the WTO to extend the investment rights of transnational companies.*"[622] The result is agreements which have been reached through undemocratic processes and bearing unfair consequences. Broader public consultation regarding proposed agreements and more prior assessment of the likely impacts of new rules would render these processes more democratic. Such processes represent current practice of the UN specialised human rights bodies, in particular the Committee on the Rights of the Child and should be

[621] SHAFFER, G. C. (2003) *Defending interests : public-private partnerships in WTO litigation,* Washington, D.C., Brookings Institution Press ; Bristol : University Presses Marketing. Shaffer focuses mainly on how private firms collaborate with relevant government institutions in the US and the EU to challenge various trade barriers before the WTO dispute settlement system.

[622] OXFAM Report (2002) *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty*. Oxfam Publishing, p 26.

integrated into decision-making within the IFIs, thus ensuring greater robustness, fairness, and legitimacy of any new agreements entered into.[623]

In relation to processes of decision-making, Mosoti identifies three ways through which compliance with the final norms may be improved. Firstly Mosoti advocates mutual observation in the decision-making organs.[624] Civil society does not generally have observer status in economic forums but it does in social forums. At the WTO for example, a number of international inter-governmental organisations (UN, UNCTAD, IMF, WB, FAO WIPO, OECD) have observer status in the General Council owing to the inter-linkages and need for coordination and collaboration in the fulfilment of their separate mandates.[625] Secondly, formal agreements requesting cooperation between bodies,[626] which require that the relevant organisations submit recommendations and feedback reports on the implementation of norms. The third process, which Mosoti recommends, is 'Memoranda of Understanding'[627] which may take various forms but which foster inter-institutional collaboration and engender cooperation.

[623]DOMMEN, C. (2005) Two Practical Suggestions for Promoting Coordination and Coherence: Commentary on Victor Mosoti. IN COTTIER, T., PAUWELYN, J. & BURGI, E (Ed.) *Human Rights and International Trade.* Oxford University Press, p 201.

[624] MOSOTI, V. (2005) Law-making: Institutional Cooperation and Norm Creation in International Organizations. IN COTTIER, T., PAUWELYN, J. & BURGI, E. (Eds.) *Human Rights and International Trade.* Oxford University Press, p 171.

[625] Ibid.

[626] Agreement between the UN and the ILO Art IV, 115 UN Treaty Series 194 (1948).

[627] MOSOTI, V. (2005) Law-making: Institutional Cooperation and Norm Creation in International Organizations. IN COTTIER, T., PAUWELYN, J. & BURGI, E. (Eds.) *Human Rights and International Trade.* Oxford University Press, p 172.

7. Conclusion

This chapter has demonstrated that in attempting to apply obligations of fairness on international trade embodied in human rights obligations, both theoretical and practical obstacles are encountered. Examination of the changing nature of labour rights and of the suppression of human rights duties attached to corporations demonstrates how the interests of powerful economic actors become enshrined in law. Both the ILO's labour standards and the *UN Guiding Principles* can be perceived as efforts to place ethical obligations on trade through international law. Yet as the case studies demonstrate, rather than law placing limits on the market, the market is placing limits on law. A libertarian theory of justice has been constructed around the free market which hardens as practical obstacles to compliance with the evolution of soft law norms. This is fundamentally at odds with a contractarian theory of justice which demands processes of distributive justice and democracy. Consequently, a hierarchy of international economic law over human rights law is constructed, as human rights obligations for international economic actors remain, ultimately, at the level of soft law. The following chapter will consider the suppression of norms of fairness are embedded in the structural design of international law.

Chapter 7: Structural Obstacles to Fairness in International Law

> *"It is obvious that the state system is at the core of the Westphalian experience, but that it is itself both partly a guiding and incoherent myth that does not now and never did correspond with patterns of behaviour in international politics that were shaped by war and inequalities of power /wealth."*
>
> Richard Falk.[628]

1. Introduction

This chapter presents obstacles to international law's ability to place ethical obligations of fairness on trade as *structural* in nature. Specifically, it considers the bearing of international law's state-centric structure on space for procedural and substantive aspects of fairness as democracy and distributive justice. Several critiques of state-centricity as the existing structure are advanced. Firstly, the historical prelude of state sovereignty as a legal construct is presented. Subsequently, the impact of state-centricity on democracy and its impact on distributive justice are considered separately. It is argued that given the economic and political restraints on state power, states do not serve as effective conduits for global processes of democracy nor of distributive justice. The chapter concludes by acknowledging the lack of alternatives to the state-centric model.

[628] FALK, R. (2002) Revisiting Westphalia, Discovering Post-Westphalia. *Journal of Ethics,* 6**,** 311-352, p 320.

2. The structure of international law

Whilst for Karl Polanyi it was the market,[629] nowadays it is the corporation that is most often vilified as the source of global inequality. Yet the corporation is but a legal construct. It may be said therefore, that the roots of global inequality lie within law. More specifically, these roots may be entangled within the boundaries, both conceptual and physical, that international law has constructed. Whilst our international institutions wrestle with the regulation of corporations, as discussed in preceding chapters, the underlying reality is that the state-centric structure of international law may be at odds with the needs of peoples and individuals in an economically interdependent world.

Moreover, economic globalisation has diminished the importance of traditional boundaries of geography. Consequently, the fragmentation of geographically-based communities and the construction of identity-based communities cast doubt over the utility and continued relevance and legitimacy of 'nationality' as a means of organising societies. The concept of state sovereignty, therefore, the cornerstone of international law, is based on geographical boundaries which no longer hold the significance they once did. In sovereignty what was intended as a fortress may have become a prison.

Yet, regardless, the international community continues to cling to the state as the only legitimate vehicle of international law. Only states are recognised as actors before the International Court of Justice, only states are treated as full members of the United Nations, and only states can sign international treaties.

[629] POLANYI, K. (1944) *The great transformation,* New York, Octagon Books, 1975.

The supremacy of the state is further embedded in the principle of non-intervention - a principle which sits uncomfortably with the spread of cosmopolitanism globally. Similarly, the doctrine of *pacta sunt servanda* enshrines treaty law with an almost sacred infallibility, enthroning the state as gatekeeper of international law.

2. 1. From Principles to Rules

This chapter proceeds on the premise that the construction of state sovereignty is in fact merely an illusion generated by legal positivism. Sociological interpretations of international law recognise the role of non-state actors in shaping international law. Had the natural law construction of international law not been dislodged by positivism in the eighteenth century we may now be living in an entirely different world. The polarity of actors with personality and those without may have been avoided. Consequently, responsibility for all manner of violence against humanity and the environment may not have been so easily tucked away behind the thin veil of incorporation.

The rejection of natural law theories (Grotius,[630] Vitoria,[631] Gentili,[632] etc.) in favour of more 'reason-based' law (Wheaton,[633] Westlake,[634] Hall,[635] etc.) in

[630] GROTIUS, H. (1625) *H. Grottii de Jure Belli ac Pacis libri tres, etc,* Parisiis, Apud W. Buon.

[631] BATE, J. P., NYS, E. & WRIGHT, H. F. *Francisci de Victorie de Indis et de jure belli relections. (Being parts of Relectiones Theologicæ. XII.) Edited by Ernest Nys. [Text revised by Herbert Francis Wright, and English translation by John Pawley Bate.] Lat. & Eng,* 1917.

[632] GENTILI, A., PHILLIPSON, C. & ROLFE, J. C. (1933) *De iure belli libri tres ... Vol. I. A photographic reproduction of the edition of 1612 ... Vol. II. A translation of the text, by John C. Rolfe, with an introduction by Coleman Phillipson, etc*, 2 vol. Clarendon Press: Oxford; Humphrey Milford: London.

the nineteenth century marked a critical junction in the evolution of international law. The move to positivism signalled a departure from a construction of international law based on a set of transcendental principles pioneered by Grotius which sought to govern relations between nations. The essence of these principles can be distilled as the following:

> *"First to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution or, as is commonly expressed, living together in a state of nature;*
> *Secondly, to apply those rules, under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other."*[636]

Obligations of mutuality and respect between communities were all but lost in transit when positivists sought to move international law towards a construction based on "*those rules that had been agreed upon by sovereign states, either explicitly or implicitly, as regulating relations between them".*[637] The positivist approach of European jurists protected the interests of European states by distinguishing between 'sovereign' peoples and other peoples and by consequently issuing international personality only to sovereign peoples. International personality permitted membership to the exclusive club of statehood. Positivists proceeded to reconstitute the entire framework of

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[633] WHEATON, H. (1846) *Elements of international law,* Philadelphia, Lea and Blanchard.

[634] WESTLAKE, J. (1894) *Chapters on the Principles of International Law,* Cambridge, University Press.

[635] HALL, W. E. (1880) *International Law*, Oxford, Clarendon Press.

[636] WHEATON, H. (1846) *Elements of international law,* Philadelphia, Lea and Blanchard.

[637] WESTLAKE, J. (1894) *Chapters on the Principles of International Law,* Cambridge, University Press. at vi. Cited in ANGHIE, A. (1999) Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law. *Harv. Int'l L. J.*, 40, p 17.

international law based on the premise that the sovereign state was the foundation of the whole legal system.[638]

2.2. Sovereignty as Exclusive and Illusive

Symbolically, the shift to positivism bore heavy consequences for those nations excluded from the elite group of 'sovereign states'. The underlying rationale of international law at this time shifted from the naturalist notion of a "*single, universally applicable law"* that *"governed a naturally constituted society of nations"*, to a positivist conception of international law as "*the exclusive province of civilised societies"*.[639] Positivism subsequently played an important role in the colonializing missions of the West.[640]

Castellino details the link between 'freezing' of boundaries and positivist doctrines of *terra nullius* and *uti possidetis juris*. Throughout the nineteenth and early twentieth century large areas of land were acquired, often from indigenous communities. '*Terra nullius'* was the legal doctrine used to legitimise these acquisitions and the boundaries around these areas later served as territorial demarcations on the basis of which valid statehood - and its accompanying right of territorial integrity - could be awarded. In order to prevent continual and contested re-acquisition of territories acquired via *terra*

[638] ANGHIE, A. (1999) Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law. *Harv. Int'l L. J.,* 40, p 12.

[639] Ibid, p 20. Anghie also highlights that the oppression of non-European peoples throughout this period is evident in the language that emerged from that period, ibid, p 7; "*Positivists developed an elaborate vocabulary for denigrating these [non-European] peoples, presenting them as suitable objects for conquest, and legitimising the most extreme violence against them, all in the furtherance of the civilising mission – the discharge of the white man's burden*."

[640] Ibid.

nullius, the doctrine of *uti possidetis juris* was applied. *Uti possidetis juris*, literally meaning '*as you possess under law*,' effectively served to freeze the boundaries and restrict further transition.[641]

On defining boundaries and establishing states, related concepts of 'recognition' and 'personality' became conceptual tools for exclusion of societies. Statehood brought privileges alongside responsibilities; the privileges of treaty-making acted as a gateway right to the subsequent privileges of resource trading and borrowing.[642] The notion that the mechanism of sovereignty, and related concepts such as recognition and personality, served to oppress non-European peoples is often omitted in modern edits of international law but has been widely acknowledged in critical legal scholarship, particularly that of Third World Approaches to International Law (TWAIL).[643] In a similar vein, critical legal thinkers have also identified legal doctrines which were

[641]CASTELLINO, J. (2008) Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools. *Brooklyn Journal of International Law,* 33, p 507.

[642] POGGE, T. (2006) Recognised and Violated by International Law: The Human Rights of the Global Poor. *Leiden Journal of International Law,* 18**,** 717-745, p 737.

[643] Namely Antony Anghie, Bhupinder Chimni, Robert Chu, James Cathii, Celestine Nyamu, Balakrishnan Rajagopal and Amr Shalakany who used this title for a series of conferences between 1994 and 1998. For a description of TWAIL's foundations and aims see MUTUA, M. (2000) What is TWAIL? *American Society of International Law Proceedings,* 94, p 31: "*TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy and politics to eradicate the conditions of underdevelopment in the Third World*."

specifically developed to grant corporations 'state-like powers' throughout history.[644]

It is by virtue of the exclusive nature of the privileges attached to sovereignty - privileges to make treaties, to trade a territory's resources and to borrow from financial institutions - that statehood itself may serve as an instrument of exclusion and oppression. These privileges stem from *proprietary* rights over areas of the Earth, which were often acquired through violence or oppression by states, and are not privileges granted on the condition of democratic governance by states. This distinction is highlighted by Thomas Lawrence when he states: "*So entirely is [international law's] conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organised and civilised, to come under its provisions."*[645]

2.3. Corporate Centricity?

In legal analyses of international law the state is the beating heart of international law.[646] By contrast, sociological interpretations of international

[644] CUTLER, A. C. (2008) Toward a radical political economy critique of transnational economic law. IN MARKS, S. (Ed.) *International Law on the Left: Re-examining Marxist Legacies.* New York, Cambridge University Press, p 206. See also MACLEAN, J. (2004) The Transnational Corporation in History: Lessons for Today? *Indiana Law Journal,* 7.

[645] LAWRENCE, T. (1895) *The Principles of International Law,* London, Macmillan, p 139. See also Hans Kelsen's conditions for a community to be a state in; KELSEN, H. (1941) Recognition in Law. *The American Journal of International Law,* 35.

[646] HALL, W. E. (1880) *International Law,* Oxford, Clarendon Press. OPPENHEIM, L. F. L., JENNINGS, R. S. & WATTS, A. (1905) *Oppenheim's international law. Vol.1, Peace,* OUP

law recognise the role of non-state actors in shaping international law.[647] Had the natural law construction of international law not been dislodged by positivism in the nineteenth century we might now be living in an entirely different world. For a start, an understanding of legal personality might have evolved to relate to capacity rather than status. As it stands however, corporate misdemeanours can be easily tucked away behind the thin veil of incorporation. The extent to which the modern state benefits or suffers from this relationship depends on the extent of their alliances with said corporations. The reality is that the majority of corporations are domiciled and owned by developed states.[648] It is developed states, therefore, which stand to benefit most when corporations siphon profits from their foreign operations back to their home states.

The deployment of corporations as a second engine of states has accelerated the denunciation of natural law approaches to international law, in favour of a more rule-driven, positivist approach. For states, consideration of general principles of international law may enter when states are held responsible for their obligations through adjudication before the International Court of Justice. Corporations, on the other hand, have been able to slip through the net of such

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Oxford. BROWNLIE, I. (2008) *Principles of public international law,* Oxford ; New York, Oxford University Press.

[647] WEBER, M., ROTH, G. & WITTICH, C. (1978) *Economy and society : an outline of interpretive sociology,* Berkeley, University of California Press. HIRSCH, M. (2005) The Sociology of International Law: Invitation to Study International Rules in Their Social Context. *University of Law Journal,* 55 COTTERELL, R. (2006) *Law in social theory,* Aldershot, Ashgate.

[648] See MAYO, E.:(2012) Co-operatives UK-Global Business Ownership Report 2012. Co-operatives UK. See also DUNNING, J. H. & LUNDAN, S. M. (2008) *Multinational enterprises and the global economy,* Cheltenham, Edward Elgar.

jurisdictions and generally operate within an alternative reality of private mediation through international arbitration forums. Deepening the divide is a failure to identify, let alone resolve, gaps overlaps and clashes between these two regimes.[649]

Other key aspects of statehood are similarly no longer readily identifiable; the waters of state characteristics, traditionally thought to include jurisdiction, nationality and citizenship, have become steadily murkier throughout the twentieth century. The cross-border flow of persons and assets has triggered new understandings of jurisdiction, which present choice rather than exclusivity of jurisdiction. With similar elasticity, nationality and citizenship have further diminished the function of the state beyond regulating for its 'citizens'.[650] Yet, the ways and means of international law have not evolved in accordance with our understanding of citizenship and the state in order to continue to serve society. Arguably, as per Polanyi, society has evolved instead to serve the market.[651]

It is proposed that it is not only society that has evolved to serve the market, but international law has also evolved along a similar trajectory. Rather than evolve to regulate business entities adequately, international law has entrenched the legal fiction of the state with, what Sol Picciotto describes as

[649] SHELTON, D. (2006) Normative Hierarchy in International Law. *American Journal of International Law,* 100.

[650] PICCIOTTO, S. (1999) Offshore: The State as Legal Fiction. IN HAMPTON, M. & ABBOTT, J. P. (Eds.) *Offshore Finance Centres and Tax Havens. The Rise of Global Capital.*

[651] POLANYI, K. (1944) *The great transformation,* New York, Octagon Books, 1975.

"*another layer of legal fiction";* the legal personality of business entities.[652] Picciotto explains that the concept of corporate personality in capitalist countries in the nineteenth century "*very quickly became a malleable form, in the hands of creative lawyers, to […] accommodate formal legal requirements to the strategies of capital accumulation*".[653] The removal of personal risk through legal personality endowed corporations with a unique feature that enabled them to take risks, both financial and social, which an individual simply could not routinely take. International legal personality was not similarly attached to corporations however as discussed in the preceding chapter.

The construction of law supporting the corporate entity has assisted their unprecedented growth. Legal regimes such as the international investment regime and international property rights regime, for instance, assign corporations with exclusive ownership and control over technology, territory and natural resources.[654] These regimes are constituted almost entirely of bilateral investment treaties or international investment agreements, many of which simply score out reference to prevailing principles of environmental or

[652] PICCIOTTO, S. (1999) Offshore: The State as Legal Fiction. IN HAMPTON, M. & ABBOTT, J. P. (Eds.) *Offshore Finance Centres and Tax Havens. The Rise of Global Capital*, p 46.

[653] Ibid p 3.

[654] BROWNLIE, I. (2008) *Principles of public international law,* Oxford ; New York, Oxford University Press, p 516-528. BEITZ, C. R. (1999) *Political theory and international relations,* Princeton, NJ, Princeton University Press. CHIMNI, B. S. (2008) An outline of a Marxist discourse on public international law. IN MARKS, S. (Ed.) *International Law on the Left.* New York, Cambridge University Press, p 78.

human rights law.[655] Ironically, this entity, which is granted personality within states, is not recognised outside of the state.[656] The corporation therefore serves as an effective 'deflection device',[657] deflecting responsibility away from that other legal fiction, 'the sovereign state', while the individuals responsible are protected by the corporate veil.

This has led to the present situation where the responsibility of private actors such as corporations is not effectively recognised nor penalised within the traditional international law paradigm. When, in the delivery of essential services leading to the provision of basic rights, the state passes the baton to corporations through a process of privatisation it effectively sends responsibility for these activities off the radar. This has been described as the 'invisibility' of the transnational corporation.[658] Since the activity may be controlled by one state but operationalised in another, holding corporations to account requires a coordinated response by states that rarely occurs in practice.

[655] SCHILL, S. W. (2007) Global Administrative Law Series Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law. *Institute for International Law and Justice Working Paper.*

[656] KLABBERS, J. (2003) (I Can't Get No) Recognition: Subjects Doctrine and the Emergence of non-State Actors. IN PETMAN, J. & KLABBERS, J. (Eds.) *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi.* CLAPHAM, A. (2006) *Human rights obligations of non-state actors,* Oxford, Oxford University Press.

[657] DINE, J. (2005b) *Companies, international trade, and human rights,* Cambridge, Cambridge University Press, p 43.

[658] JOHNS, F. E. (1995) The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory. *Melbourne University Law Review,* 19**,** 893 - 923.

In instances where damage occurs and the hosting state prosecutes, the home state may refuse to enforce the judgement.[659]

3. Structures and Procedural Fairness

3.1. Democracy and Statehood

The reduction of the state through alliances with corporations inevitably bears implications for *democracy*, literally meaning *'rule of the people'*. In a climate of corporate unaccountability, electoral politics appears as a façade rather than offering any real means of self-governance. It could be said that democracy has undergone a metamorphosis simultaneous to the state. Once consisting of socio-economic and institutional components,[660] post-Schumpeter[661] it has become confined to the institutional, or even simply the electoral.[662] The ability of politicians to represent a wide range of possibilities has been severely

[659] This situation occurred recently in the case of Chevron in Ecuador (although subsequently overturned). See *In Re: Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257, at 14 (3d Cir. May 25, 2011).

[660] Traditional writers such as Locke, Rousseau and Jefferson insisted that the 'essence' of democracy is to be found in complete political, social and economic equality. See M. REJAI, 'The Metamorphosis of Democratic Theory', 77 Ethics (1967) for discussion. This shift is detailed in DINE, J. & SHIELDS, K. (2008) Fair Trade and Reflexive Democracy. *European Business Organization Law Review (EBOR)*, 9, 163-186.

[661] SCHUMPETER, J. A. (1962) *Capitalism, Socialism and Democracy*, New York, Harper & Row. Like-minded thinkers of the same period include; DAHL, R. A. (1956) *A Preface to Democratic Theory*, Chicago, University of Chicago Press.; FRIEDRICH, C. J. (1950) *Constitutional Government and Democracy*, New York, Ginn & Co.; SCHATTSCHNEIDER, E. E.: (1960) The Semisovereign People New York, Holt Rinehart & Winston. LIPSET, S. M. (1963) *Political Man: The Social Bases of Politics*, New York, Doubleday & Co. Discussed in REJAI, M. (1967) The Metamorphosis of Democratic Theory. *Ethics*, 77.

[662] According to Schumpeter's definition; "*The democratic method is that institutional arrangements for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote*". See SCHUMPETER, J. A. (1962) *Capitalism, Socialism and Democracy*, New York, Harper & Row, p 269.

eroded by policy squeeze by economic interests. Nowadays, as Susan Marks argues, democracy is commonly evoked as purely institutional arrangements, organisational checklists and procedures.[663] It is manifested in modern versions of democracy found in post-communist and developing countries and is a shift away from relationships and processes to attention on forms and events.

This "*relatively-superficial*"[664] form of democracy is described as 'low-intensity democracy'. In Marks' critique, the democratic norm heralded by the UN falls into the category of 'low-intensity democracy'. Marks also draws an analogy between low-intensity democracy and low-intensity warfare; *"from this perspective low-intensity democracy is as much a form of intervention on the side of those resisting the redistribution of power and resources"*.[665] Marks advocates reaching beyond low-intensity democracy and pan-national democracy and connecting law with the project of cosmopolitan democracy led by David Held,[666] on the grounds that "*democracy must be conceived as requiring that all citizens have the chance to participate in decision-making which affects them*."[667]

Democratic decline has been explained as a result of 'willing capture' of the state,[668] sometimes as a result of 'Washington Consensus',[669] and other times,

[663] MARKS, S. (2000) *The riddle of all constitutions : international law, democracy and the critique of ideology,* Oxford, Oxford University Press, p 59.

[664] Ibid p 52.

[665] Ibid p 52.

[666] Ibid p 119.

[667] Ibid p 60.

[668] DINE, J. (2005a) *Companies, International Trade and Human Rights,* Cambridge, Cambridge University Press.

simply a result of 'globalisation'.[670] Democratic decline is compounded by the fact that when state authorities deviate from subservience to corporate interests, companies are able to evade regulation or leave.[671] This has led not only to the 'market state' but also to the fragmentation of power away from the traditional monolithic state structures. It has also led to the blurring of the boundaries between the public and private realms, including public and private law, as well as between the national and international.

Democracy within states pales into insignificance when power is international and multi-centric.[672] It is well established that decision-making within international forums and among states significantly impacts upon and shapes domestic policy within states.[673] In today's globalised context, the UN's reliance on the state as the bearer of democracy strikes an awkward irony. The demise of sovereignty is widely recognised as a symptom of globalisation and

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[669] CHOMSKY, N. (1999) *Profit over people : neoliberalism and global order*, New York ; London, Seven Stories Press.; and SUSAN GEORGE, *Abandon the Washington Consensus, Forge the Istanbul Consensus*, Transnational Institute online article, May 2011, available at http://www.tni.org/article/abandon-washington-consensus-forge-istanbul-consensus (last accessed 20th February 2012). See also generally KLEIN, N. (2007) *The shock doctrine : the rise of disaster capitalism*, New York, Metropolitan Books/Henry Holt.

[670]OCHOA, C. (2007) The Relationship of Participatory Democracy to Participatory Law Formation. *Indiana Journal of Global Legal Studies*, 15.

[671] Just one example is the extensive use of offshore tax havens. See ALLDRIDGE, P. & MUMFORD, A. (2005) Tax Evasion and the Proceeds of Crime Act 2002. *Legal Studies*, 25, p 253.

[672] SCHOLTE, J. A. (2004) *Globalization and governance : from statism to polycentrism*, Coventry, University of Warwick Centre for the Study of Globalisation and Regionalisation.

[673] MARKS, S. (2000) *The riddle of all constitutions : international law, democracy and the critique of ideology*, Oxford, Oxford University Press, p 119.

with it our context for both governance and democracy has changed.[674] As discussed in chapter 5, there is a need to re-envisage democracy as between individuals and centres of power. In the early twenty-first century those centres of power are more likely to be found within international institutions and corporations than within states.[675]

Furthermore, the legitimacy of representation of peoples by state leaders in international forums is problematic. A common way of denying that the present global institutional order is harming the poor and violating their human rights, is by appeal to the venerable precept of *volenti non fit injuria* – no injustice is being done to those who consent. Yet, regardless of the means by which they

[674] On the demise of sovereignty, see generally: BROWN, C. (2002) *Sovereignty, rights, and justice : international political theory today,* Cambridge, Polity. KEENE, E. (2002) *Beyond the anarchical society : Grotius, colonialism and order in world politics,* Cambridge, Cambridge University Press. JAMES, A. (1999) The Practice of Sovereign Statehood in Contemporary International Society. *Political Studies,* 47**,** 3 COX, M., DUNNE, T. & BOOTH, K. (2001) *Empires, systems and states : great transformations in international politics,* Cambridge, Cambridge University Press. JACOBSEN, T., SAMPFORD, C. J. G. & THAKUR, R. C. (2008) *Re-envisioning sovereignty : the end of Westphalia?,* Aldershot, Ashgate. LYONS, G. & MASTANDUNO, M. (1995) *Beyond Westphalia? : state sovereignty and international intervention,* Baltimore ; London, Johns Hopkins University Press. ANNAN, K. A.:(18 September 1999) Two Concepts of Sovereignty. *The Economist*, PHILPOTT, D. (2001) *Revolutions in sovereignty : how ideas shaped modern international relations,* Princeton N.J., Oxford, Princeton University Press.

[675] In 2001 it was claimed that corporations constituted fifty-one of the world's top one hundred powers, SARAH ANDERSON AND JOHN CAVANAGH, Top 200: The Rise of Corporate Global Power, Institute for Policy Studies publications, 4th December 2000. Although subsequently contested on the basis that corporate economies cannot be subtracted from states economies. See for example WOLF MARTIN, "Countries still rule the world: The notion that corporations wield more power than governments rests on flawed calculations and conceptual confusion" Financial Times; February 6, 2002, http://globalarchive.ft.com/globalarchive/article.html?id=020206001749&query Last accessed 20th February 2012.

obtained power or how that power is exercised, any group in power within a state is internationally recognised as the legitimate government of that country's territory and people.[676]

3.2. Injecting Democracy into Corporations

The Fairtrade movement and ethical shopping have generated trust networks between consumers and producers and enabling mediation between individuals and corporations. Not only is the Fairtrade movement well-placed to reflect the demands of global civil society through a system of 'multi-centric global governance',[677] it also crucially places labour at the centre of the process of democracy. Recognition of the role of labour in democracy is key to avoiding the capture of democracy. This doctoral thesis is motivated by a desire to understand how these processes of democratisation and distributive justice may become more widespread.

A fluid interpretation of democracy such as that advocated by Tilly portrays societies as always in a state of dynamic movement with constant pressures towards democratisation and de-democratisation.[678] Arguably, this process

[676] POGGE, T. (2006) Recognised and Violated by International Law: The Human Rights of the Global Poor. *Leiden Journal of International Law,* 18**,** 717-745, p 737.

[677] SCHOLTE, J. A. (2004) *Globalization and governance : from statism to polycentrism*, Coventry, University of Warwick Centre for the Study of Globalisation and Regionalisation.

[678] TILLY, C. (2007) *Democracy*, New York, Cambridge University Press. For counterviews see: See ELKINS, Z. (2000) Gradations of Democracy. *American Journal of Political Science*, 44**,** 293-300. Elkins points out that the fluid interpretation of democracy has not always been popular among academics: "*Przeworski, Alvarez, Cheibub and Limongi describe this practice as "ludicrous" and insist on dichotomous measures…*'. Elkins argues that an insistence on dichotomous measures appears both methodologically regressive and lacking in face validity.

must occur between peoples and powers – regardless of whether that power is wrested in states, corporations, institutions or elsewhere. Conversely, by virtue of its state-centric foundation, the UN human rights framework offers little in the way of mediation between individuals and corporations. Instead, the United Nations' aspirations towards democracy have focused on institution building and the implementation of electoral politics. As described in Chapter 4, the UN has recognised the need for integration of democracy into economics to a degree in various General Comments. Yet, the UN mechanism relies on the state to ensure these rights, and it does not offer adequate means of mediation between individuals and corporations.

3.3. Democracy and International Institutions

At the international level, regional and international economic agreements have weakened state power[679] to the extent that even should states be capable of 'democracy' at the domestic level, 'democracy' within international forums is obstructed. Competition for foreign direct investment leads states to make international economic agreements which may demand that those states strip their regulatory environment of social and environmental standards. Therefore, any policy and law-making undertaken via democratically elected governments may be trumped in the name of trade. What is more, these agreements often include provisions which impose higher costs on one party than on another for breaking the relationship. The most vulnerable parties in trade negotiations are

[679] BERNARD, N. (2002) *Multilevel Governance in the European Union*, The Hague, Kluwer Law International.; JOERGES, C. (June 2007) Integration through de-legalisation? An irritated heckler. *European University Institute's seminar on 'Governance, Civil Society and Social Movements'.*

usually those with a heavy concentration of exports in a few countries.[680] Through asymmetrical power relations between 'equal states' in international institutions, procedural inequality grows into substantive inequality.

Kaufmann, for example, grounds her support for centralised labour standards (as opposed to standards varying between states) on the basis of democracy. She claims that international institutions which allow for representation of various interest groups, such as the ILO, are the only ones which can meet the demand for democratic legitimacy. Furthermore, with regard to the inherent conflict between sovereignty and democracy, Kaufmann asserts; "*it seems that democracy should override sovereignty because it is the democratic process that restricts sovereignty by adhering to international standards.*" [681] Thirdly, Kaufmann makes a key point relating to equality of democracy between states when she points out that states with low labour standards can create a domino effect by limiting policy *options of another state that prefers higher labour standards*.[682]

Scholte contends that our current transformation of social space leads to a natural shift from statism to polycentrism as the primary mode of governance. Scholte explains that a move away from "*territorialism in geography has, not surprisingly, unfolded together with a move away from statism in governance."*

[680] See BEITZ, C. R. (1999) *Political theory and international relations,* Princeton, NJ, Princeton University Press, p 148.

[681] KAUFMANN, C. (2007) *Globalisation and labour rights : the conflict between core labour rights and international economic law*, Oxford, Hart.

[682] Ibid.

[683] He maintains nonetheless that states remain crucial nodes in this polycentric governance whilst acknowledging that they have conceded swathes of 'governance': "*Civil society has followed the trend from statism to polycentrism by shifting its focus from the state alone to a multi-layered and diffuse governance apparatus*." [684] The emergence of avenues of global democracy becomes a necessary expression of polycentric civil society. Modern democracy requires mediation between civil society and corporations.

4. Structures and Substantive Fairness

The following section considers the relationship between state-centricity and substantive fairness in the form of processes of distributive justice. The relationship between international law structures and distributive justice is examined on three levels: Firstly, the extent to which statehood contributes to inequality amongst and between states; secondly, consideration of ways in which the corporate structure may contribute to inequality; and thirdly, broadly, the impact of the architecture of international institutions on international inequality.

[683] SCHOLTE, J. A. (2004) *Globalization and governance : from statism to polycentrism*, Coventry, University of Warwick Centre for the Study of Globalisation and Regionalisation, p 3.

[684] Ibid. p 2.

4.1. Global Inequality and Statehood

A state's obligation towards a certain pattern of resource distribution is generally derived from the social contract theory of governance.[685] The modern democratic state employs a system of taxation which serves the distribution of basic goods like education, healthcare, courts etc. By meeting the demands of its citizens in this way a state maintains its popular sovereignty and underlines its legitimacy as a government. Alongside the growth of the corporation, the responsibility of the state for provision of basic rights has continually shrunk. In fitting with liberal capitalism, the individual recognises the reduced role of the state and accepts corporate expansion and competitive pricing for consumers as a reasonable trade-off for a fully functioning welfare state. [686]

The paradox of 'sovereign equality' is visible when statehood serves to exclude certain groups, communities, and people's recognition within international law. As a result of non-recognition, the privileges of statehood are withheld; privileges relating to treaty-making, resource management, and borrowing within international institutions.[687] The withholding of legal personality therefore impedes the entry of certain groups or peoples into international markets, subsequently impeding their economic growth. Many non-European nations, originally denied recognition, were later granted 'quasi-sovereignty' in

[685] ROUSSEAU, J.-J. (1762) *Du Contrat Social; ou, principes du droit politique*, Amsterdam. Although Hobbes critique of the state as anarchic and self-interested provides a valid counterpoint; HOBBES, T., MARTINICH, A. P. & BATTISTE, B. (2011) *Leviathan. Parts I and II*, Peterborough, Ont., Broadview ; London : Eurospan [distributor]. (Orig. 1651).

[686] CANEY, S. (2008) Global Distributive Justice and the State. *Political Studies,* 56**,** 487-518.

[687] POGGE, T. (2006) Recognised and Violated by International Law: The Human Rights of the Global Poor. *Leiden Journal of International Law,* 18**,** 717-745, p 737.

the process of decolonisation (some would argue when it became convenient for European states to do so). This legacy continues in indirect and also direct forms.[688]

Participation in the world economy can lead to exploitation of weaker states by direct foreign investment which siphons off the profits of such activities to the parent corporation, located in another state.[689] The multinational corporate structure has enabled developed states to exploit the resources of developing states whilst redirecting profits back to the home state of the corporation. In turn, this deterioration of international inequality may impact on domestic income inequality, particularly in developing states. This is likely to occur where the influence of foreign investors has led to the minimising of social policy objects and supported governments' commitment to what can be broadly described as *"inegalitarian domestic distributive policies"*.[690]

[688] For example in the case of Palestine. There are however signs of a thawing of this position. Recognition by UNESCO in October 2011 being a potential watershed. See Palestine Vote: Statement by UNESCO Director-General UN Doc: DG/2011/147, available at http://unesdoc.unesco.org/images/0021/002136/213660M.pdf See also; 'General Conference admits Palestine as UNESCO Member' 31.10.2011 – UNESCOPRESS. Also, subsequent vote by UN General Assembly of 'Non-Member Observer' status to Palestine at the 67th Session of the United Nations General Assembly, 29 November 2012. See UNGA report, UN Doc GA/11317, available here: http://www.un.org/News/Press/docs/2012/ga11317.doc.htm Last accessed 25th June 2013.

[689] See World Investment Report 2010: Investing in a low-carbon economy, July 22 2010. U.N. Doc UNCTAD/WIR/2010 ed. At p. xvii Also SALACUSE, J. W. (2010) The Emerging Global Regime for Investment. *Harvard International Law Journal,* 51.

[690] BEITZ, C. R. (1999) *Political theory and international relations,* Princeton, NJ, Princeton University Press, p 148.

The growth of power within corporations attributable to these developments has only enhanced their ability to exploit historic inequalities in power and wealth of states and can lead to increasing international distributive inequalities. In some instances this has also contributed to greater inequality within states.[691] Many developing states report a growing gap between the rich and poor as the benefits from trade and investment are unevenly distributed within the state.[692] The extent to which foreign direct investment contributes to inequality within states may depend on the policies pursued by the state.[693] However, the range of domestic policies pursued by developing states can be considerably restricted from the outset by external factors.

4.2. Global Inequality and Corporations

As corporations have become increasingly powerful, states have become increasingly reluctant to intervene in market activity, preferring to deregulate in order to attract foreign investment. In turn this has generated a race to the bottom whereby states routinely strip away regulatory standards in the areas of environment and human rights in order to offer corporations a more lucrative regulatory environment than that offered by neighbouring states. By encouraging states to compete with each other to offer a more welcoming regulatory environment, corporations have gained enormous power to impose

[691] See FINDLAY, R. (1970) *Trade and Specialisation*, Penguin. pp 118-22. BARRATT BROWN, M. (1974) *The Economics of Imperialism*, Penguin., especially chapter 5, pp 96-126. Cited in BEITZ, C. R. (1999) *Political theory and international relations*, Princeton, NJ, Princeton University Press. See DUNNING, J. H. & LUNDAN, S. M. (2008) *Multinational enterprises and the global economy*, Cheltenham, Edward Elgar.

[692] See BEITZ, C. R. (1999) *Political theory and international relations*, Princeton, NJ, Princeton University Press, p 146.

[693] See ibid, p.148.

agreements which reflect their interests and limit the state's capacity to regulate.[694] In his analysis of this trend, Ryan Suda identifies the unequal representation of interests in bilateral investment treaties whereby limitations are placed on host states capacity to impose human rights obligations on MNCs.[695] In recognition of this polemic, the *UNCTAD World Investment Report 2011* reiterates the need for international coordination.[696]

Corporations comprise a number of features which enable corporations (and concomitantly their stakeholders; founders and shareholders and effectively their home states) to accumulate wealth rapidly. Firstly, the corporate veil enables corporations to take risks without actual risk for the corporations employees.[697] Secondly, they are unelected and until recently were widely considered as accountable only to shareholders.[698] Thirdly, they act as convenient 'moral deflection devices', enabling states to renege their

[694] See for example SELL, S. K. (2003) *Private Power, Public Law,* Cambridge, Cambridge University Press.

[695] SUDA, R. (2006) The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization. IN SCHUTTER, O. D. (Ed.) *Transnational Corporations and Human Rights.* Hart Publishing. p 90

[696] WORLD INVESTMENT REPORT, (2011), Non-Equity Modes of International Production and Development, *UNCTAD Report,* p.110. See also: WORLD INVESTMENT REPORT 2006 - FDI from Developing and Transition Economies: Implications for Development; WORLD INVESTMENT REPORT 2003 - FDI Policies for Development: National and International Perspectives.

[697] In the UK this principle is considered to derive from the Limited Liability Act 1855 and jurified in the case of *Salomon v A Salomon & Co Ltd* [1897] AC 22. In the USA, the principle may be sourced to *Dartmouth College v. Woodward* 17 US 518 (1819).

[698] The perception that companies only responsibility was to increase its profits on behalf of shareholders has generally been attributed to Milton Friedman and was propagated in a number of his publications for example in FRIEDMAN, M. (September 13, 1970) The Social Responsibility of Business is to Increase its Profits *The New York Times Magazine.*

responsibilities towards citizens under labour rights, human rights, environmental rights etc.[699] Fourthly, corporations' ownership rights enabled them to own other companies, which in turn enabled them to operate as a chain of separate companies and ultimately escape both liability and tax obligations by rescinding back to the home corporation. A further significant development of note in the history of the corporation has been the growth of copyright and patents on knowledge and technology which has enabled corporations to amass knowledge and technology capital.[700]

The corporation's capacity to dictate the terms of international law has been exacerbated by the evolution of the 'multi-nationality' of corporations, whereby profit raised by a corporation can be completely removed from the host state of the operation. Jurisdictional ambiguity surrounding MNCs has concealed the weak nature of consent underlying developing states' international economic agreements.[701] Developing states should be able to refuse agreements which restrict domestic policy-making yet they do not always hold sufficient bargaining power to do so.[702] The fear of deterring foreign direct investment prevents developing states from imposing suitable

[699] See DINE, J. (2005a) *Companies, International Trade and Human Rights*, Cambridge, Cambridge University Press.

[700] This list does not pertain to be exhaustive.

[701] See GUZMAN, A. T. (1998) Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law*, 38**,** 639-688

[702] See NARLIKAR, A. (2003) *International trade and developing countries : bargaining coalitions in the GATT & WTO*, London, Routledge.

conditions on corporate activity.[703] It is widely accepted that developing states often regard the obtainment of foreign direct investment as essential for the economic growth, sometimes termed 'development', which may eventually finance social development; in order to deliver on economic, social and cultural rights, developing states claim they must first have the finances to do so.

4.3. Inequality and International Institutions

The demise of the state and the simultaneous rise of the corporation have been accompanied by the simultaneous rise of international institutions within international law throughout the twentieth century. This development has not only spurred the decay of the state but has also fuelled greater demand for global justice, as described in chapters 2 and 3. Greater demand for global justice may be born of the fact that, as Pogge puts it, the growth of international institutions has generated a shift from an interactional understanding of international law, and the world more generally, as constituted by actions performed by individuals and nation states, to an institutionalist understanding (whereby greater significance is given to the structural arrangements from which given situations and relationships and events arise).[704] The notion that the groundwork for today's institutions of international law was laid at a time when many peoples were classed as 'colonies' and denied statehood bears immense consequences for the legitimacy of our institutions of international law today. This background of

[703] See NAM, C. Y. J. (2006) Competing for Foreign Direct Investment through the Creation of Export Processing Zones: The Impact on Human Rights. IN DE SCHUTTER, O. (Ed.) *Transnational Corporations and Human Rights.* Portland, Hart Publishing.

[704] POGGE, T. (2004) What is Global Justice? *Real World Justice***,** 2-11.

empire-building may go some way to explaining why distributive justice has played but a cameo role in the narrative of international law throughout the twentieth century.

In the period ensuing decolonisation (1950s-1970s), developing states used their new status to express common interests and generate resistance to Western-led decision-making in the international institutions. At the height of their collective power during this period, developing states focused on the principle of self-determination, the prohibition on intervention in the domestic affairs of other states, international law on foreign direct investment, international economic law, the law of the sea, and the establishment of a New International Economic Order.[705] Distributive justice was central to the New International Economic Order project but failed to garner support amongst developed states and efforts were abandoned.[706] Some commentators report that this show of strength along with similar efforts in the forms of the Group of 77 and the Andean Pact in fact triggered a violent response from developed states.

[705] For further discussion see FIDLER, D. P. (2003) Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law. *Chinese Journal of International Law,* p 38.

[706] See WAELDE, T. (1994) *Requiem for the "New International Economic Order": Rise and Fall of Paradigms in International Economic Law (Centre for Petroleum & Mineral Law & Policy Professional Papers)*, University of Dundee, Centre for Petroleum and Mineral Law & Policy.

The start of this clawback by developed states is considered to be visible in the movement of intellectual property negotiations away from the *GATT*.[707] It is also represented in the rapacious growth of bilateral investment treaties (BITs) which encourage states, trading as individuals, to compete to outbid their neighbours.[708] The return to operating as individual states in the international investment regime marks a return to what Lorimer calls "*mock equality at congresses"* which occurred between 'small states' and the 'great powers' in the nineteenth century.[709]

Notwithstanding some triumphs at the WTO such as the failure of the *Multilateral Agreement on Investment (MAI)*[710] and the construction of *TRIPs,*[711] the discourse of distributive justice has generally been occluded by the discourse of 'development'. It is 'development' which serves the rationale for any obligations towards redistribution embodied in the Millennium Development Goals[712] and in the policy orientation surrounding the right to development.[713] However, the packaging of this obligation as one of

[707] BELLMAN, C. (2003) *Trading in Knowledge: Development perspectives in TRIPs, trade and sustainability.*, Earthscan, p 42.

[708] See SALACUSE, J. W. (2010) The Emerging Global Regime for Investment. *Harvard International Law Journal,* 51.

[709] LORIMER, J. (1883) *The institutes of the law of nations : a treatise of the jural relations of separate political communities,* Edin., Blackwood. See also CRAVEN, M. (2005) What Happened to Unequal Treaties? The Continuities of Informal Empire. IN CRAVEN, M. & FITZMAURICE, M. (Eds.) *Interrogating the Treaty. Essays in the Contemporary Law of Treaties.*, Wolf Legal Publisher.

[710] Multilateral Agreement on Investment (MAI), negotiated between 1995-1998 at the initiation of OECD Council of Ministers but not adoption.

[711] WTO Agreement on Trade Related Aspects of Intellectual Property Rights 1995

[712] As set out in the UN Millennium Declaration 2000.

[713] See above at Chapter 4, section 3.2.

development rather than distributive justice would appear to bear important implications for the nature of that obligation. Development is presented as an altruistic pursuit, a *third* generation right. What is more, it is not pursued equally across all states.[714] Like democracy, and also labour rights, 'development' is prone to capture by economic rationalisation under legal positivism; it is promoted so long as it pays to do so. The underlying legal and ethical grounds for such obligations are obscured.

5. Alternatives to State-Centricity?

Alternatives to a structure based on state sovereignty are not easy to find, yet sovereignty is changing. Jack H. Johnson proposes that "*new structures of production*" have resulted in "*greatly enhanced (and sometimes dangerous) interdependence*", which can do little to remedy and which often render older concepts of sovereignty or independence, "*fictional*".[715] In addition, these circumstances often demand action that no single nation state can satisfactorily carry out, and thus require some type of institutional coordination mechanism. In some of these circumstances, therefore, a powerful tension is generated between traditional "*core sovereignty*", on the one hand, and the international

[714] For this critique made in relation to the Millennium Development Goals see KURUVILLA, S., BUSTREO, F., HUNT, P., SINGH, A., FRIEDMAN, E., LUCHESI, T., GERMANN, S., LORAAS, K. T., YAMIN, A. E., ANDION, X. & FRENK, J. (2012) The Millennium Development Goals and Human Rights: Realizing Shared Commitments. *Human Rights Quarterly,* 34**,** 141-177 . For a critique of development in the twentieth and early twenty-first centuries see also generally AMIN, S. (2011) *Maldevelopment - Anatomy of a Global Failure,* Oxford, Pambazuka Press.

[715] JOHNSON, J. (2003) Sovereignty – Modern: A New Approach to an Outdated Concept. *American Journal of International Law,* 97.

institution, on the other hand.[716] Johnson proposes replacing the word "*sovereignty*" with the phrase "*sovereignty modern*" as a means of balancing contemporary demands on our understanding of "*core sovereignty*". He presents international institutions as examples of instances of avoidance of sovereignty concepts. An example is the World Trade Organisation, wherein membership is not limited to a sovereignty entity but, instead, to a "*state or separate customs territory possessing full autonomy in the conduct of its external commercial relations*".[717]

Benedict Kingsbury grounds his affirmation of sovereignty in his identification of three ways in which the theory of sovereignty has served as a useful substitute for *"a general theory of the legal management of inequality".*[718] These are firstly that the concept of sovereignty underpins a principle of sovereign equality that has attained an almost ontological position in the structure of the international legal system.[719] Indeed, there is no acknowledgement that unequal power structures are exasperated by unequal bargaining positions within the international legal system.[720] Secondly, the concept of state sovereignty allows questions of social and economic inequality among people to be treated in international law as a responsibility of territorial states. There is no acknowledgement of the varied capabilities of states to do

[716] Ibid p 784.

[717] Ibid p 789.

[718] KINGSBURY, B. (1998) Sovereignty and Inequality. *European Journal of International Law*, 9**,** 599-625, p 600.

[719] Ibid p 600.

[720] See CRAVEN, M. (2005) What Happened to Unequal Treaties? The Continuities of Informal Empire. IN CRAVEN, M. & FITZMAURICE, M. (Eds.) *Interrogating the Treaty. Essays in the Contemporary Law of Treaties.*, Wolf Legal Publisher, pp 43-80.

so. Thirdly, the theory of sovereignty provides the means by which people can express and be deemed to have expressed, consent to the application of international legal norms and to international institutional competences (expressly or tacitly).[721]

Kingsbury effectively describes sovereignty as a mechanism for procedural fairness with little attention to substantive outcomes. He admits there may be an element of superficiality to the idea of equality under international law in his statement that "*the system of sovereignty at least notionally precludes some forms of inequality, while helping to exclude other forms of inequality from real consideration."*[722] Rather than consider sovereignty as the source of international inequality, Kingsbury takes the traditional view of considering threats to sovereignty as sources of international inequality. Within this paradigm, sovereignty must be preserved as a last line of defence against the threats to sovereign equality which he describes as "*globalisation, democratisation, privatisation and the increasing self-assurance of liberal agendas.*"[723]

Kingsbury and Jackson, whilst moderately critical of the state mechanism, resist advocating a revision of the concept on the basis that no veritable alternatives exist. Kingsbury expresses concern that abandoning the concept of state sovereignty may lead to greater rather than lesser inequality. Kingsbury's

[721] KINGSBURY, B. (1998) Sovereignty and Inequality. *European Journal of International Law,* 9**,** 599-625, pp 600-02.

722 Ibid p 602.

723 Ibid p 602.

strongest point is that removing the privilege of sovereignty, without fundamentally restructuring the distribution of material power and authority globally, might result in severe suffering for some territories.[724] Jackson similarly argues that some valuable principles and privileges would be lost if the concept of sovereignty were to be abandoned but nonetheless questions the prioritisation of sovereignty.[725] Both consider composition of law which draws on the wider range of sources of international norm-making but neither adequately addresses the hollowing out of the state by corporations and subsequent power struggles between individuals and corporations. It is argued in this thesis that it is only by breaking down the corporation and linking responsibility for processes of democracy and distributive justice that international law might find renewed legitimacy.

6. Conclusion

As a result of greater awareness of the structural causes of global poverty, there is greater demand to revise institutional structures. It is well established that state-centricity has served as an instrument of oppression throughout the history of colonialism. The contradictions of 'sovereign equality' jar with the reality that there is very little equality between states. Continued insistence on the state as the vehicle for fairness as embodied in the human rights movement fails to acknowledge that state-centricity can be an exploitative structure. It encourages us as individuals to detach ourselves from the injustices that occur against individuals within, what Pogge terms, the "*black box*" of their own

[724] Ibid p 617.

[725] JOHNSON, J. (2003) Sovereignty – Modern: A New Approach to an Outdated Concept. *American Journal of International Law,* 97, 782, p 801.

state. The concept of global justice, as advocated by Pogge, *"breaks down the traditional separation of intranational and international relations and extends institutions moral analysis to the whole field."*[726] The growth of ethical trade movements such as the Fairtrade Movement demonstrates the desire and capacity of individuals to integrate fairness, or humanism, into global capitalism.

To advocate a revision of international law on the basis that it is generating inequality implies a presumption that inequality must be an unintended consequence of the legal order. A more pragmatic critique may be to understand law in general and international law specifically as a construct to serve those in power. As a consequence, throughout history, law has been designed to subject the masses to the will of the sovereign and generate inequality by default. Despite the rhetoric of 'sovereign equality', without adequate provisions for processes of democracy and distributive justice between peoples in an international legal climate that is increasingly positivist and capitalist in nature, the relationship between sovereign powers of diverse resource capability is ultimately one of entrenched asymmetry.

This chapter has sought to highlight the extent to which the construct of the corporation has served to cement the asymmetrical nature of relations between states within international politics. Moreover, it proposes that the process of inequality between states, which the corporation serves, may stem from a shift

[726] FØLLESDAL, A. & POGGE, T. W. M. (2005) *Real world justice : grounds, principles, human rights, and social institutions,* Dordrecht, Springer, p.5.

in mandate which occurred when European states embarked on the legal positivism mission. Following the departure from a principle-based concept of international law, the human rights framework has, in many instances, successfully offered an avenue of protest within international law. That said, the efficacy of the universal human rights mechanisms and machinery depends, to a great extent, on the efficacy of the state. In instances where the state is weak, or indeed too strong, alternative mechanisms of human rights protection are required. Notwithstanding the weaknesses of a state-centric human rights framework, the concern is that to cast corporations as human rights duty bearers would lead to even lower standards of human rights implementation. Valid though this concern is, it ensures that adequate human rights protection is confined to idealism.

Chapter Eight: Reflections

Evolving from a long line of efforts to integrate corporations into the international human rights framework, this thesis began, in earnest, in search of a new way to make trade fair. Beyond aid, or aid in the form of trade, this thesis worked from the premise that international law has the capacity to regulate trade to address global inequality. This thesis has sought to understand why it does not do so. The construction of an international obligation to trade fairly presented an opportunity to explore the internal and external limitations on the evolution of law.

No sooner had such an obligation been envisaged however than did obstacles appear on the horizon. On closer inspection these obstacles seemed to be firmly rooted in law and as native to the legal landscape as any claims to justice, if not perhaps more so. Obstacles of process and practice arose. Shapes shifted, so that power, which from one angle might appear to be a state, from another resembled a corporation, and vice versa. Ultimately the greatest of the obstacles to emerge represented 'power'.

As my research progressed it became apparent that a clear vision of modern international law requires moving beyond the decaying body of the state in order to recognise the wider array of actors competing for space and representation in law. More than this, it requires moving beyond the dichotomy between state and corporation and understanding the symbiotic relationship between these entities. Visualising both the state and the corporation as legal constructs leads to the realisation that the dichotomy between state and corporation is also legal fiction.

From this angle, the corporation's lack of legal responsibility for human rights is understood not as an oversight by the international community, rather, it is an integral component of the international law script; with it, so too therefore, is global inequality.

From the vantage point of summation, my initial research questions on the legal impact of Fairtrade were, and still are, symptoms of structural problems embedded within international law. Of these structural problems, arguably the devaluation and disuse of the general principles of international law is the original wound within the system, from which divergence between law and justice has ensued. The space for general principles at the heart of international law is where a constitution ought to lie, yet it does not. The move from natural law to positivism has meant the privileging of rules over principles, or, in other words, the privileging of surface expressions over internal grammar. Any space for moral community and global constitutionality within international law which may have existed during the period of natural law predominance has been closed with the ascent of positivism. As a result international law has grown to be a rule-based system wherein rules or 'law' can be effectively 'bought' by those with the greatest power. What is more, far from operating through an equality of states, the legal fiction of state sovereignty has masked the role of the corporation and of the market in international law-making.

That the state is no longer a valid vessel for the expression of a peoples will, has been established on various grounds within the thesis (and other grounds exist also). From this democratic wasteland however, green shoots of democracy survive

in the form of ‘community’. With globalisation communities have grown beyond the confines of territoriality, to circumvent the constraints of state-centricity to achieve both local and global impact. This can be seen in the progressive successes of global distributive justice movements concerned with labour (the Abolitionist movement and labour rights movements,) in achieving change and codification within international law. Yet the limits of law in protecting ‘human flourishing’ from the ruin of the market have also been exposed. It is through the organisation and altruism of civil society in the form of ethical consumerism that labour rights have reached those who are not protected by the state.

Due to the limits of extraterritorial human rights obligations, the traditional human rights framework simply does not provide for the realisation of the ‘universal’ rights which it envisages. In order for these rights to be delivered and realized it is necessary to deconstruct the obstacles to their realisation. Re-engineering the corporate form may be one route to greater distribution and greater democracy. Social movements have successfully challenged corporate exploitation through influencing a chain of legal developments which ensure better labour conditions, leading to greater distribution in the labour-capital relationship. The next step in the process lies in deconstructing the corporation from within through fragmenting the corporation through ownership, and then redefining (or recovering) ‘ownership’ so that resources adequately protect communities. Whilst the move to fragmentation has not yet begun, the move to more widespread worker-ownership has begun on the fringes of capitalism through progressive movements such as Fairtrade.

Notwithstanding certain realisms, this thesis ends therefore in optimism, with the conclusion that despite subjugation to the market, humanity still retains the energy and will to reject the market, challenge exploitation and build a fairer society. Progress has often been thwarted on the basis that there is no third way. Yet history reveals to us numerous ways in numerous contexts; indeed, that no two capitalisms or socialisms are the same. The events of 2011, the Arab Spring Revolutions and the Occupy Movement, stand as reminders of the strength of the human spirit. Whilst shaking the decaying carcass of the state, the hollowness of its supporting structures has also been exposed. If it is possible to envisage a society detached from a market now is the time to do so.

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