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TRANSNATIONAL CORPORATIONS (TNCs) AND THE EFFECTIVE IMPLEMENTATION OF SOCIAL AND ECONOMIC RIGHTS: CURRENT AND PROSPECTIVE AVENUES

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TRANSNATIONAL CORPORATIONS (TNCs) AND THE EFFECTIVE IMPLEMENTATION OF SOCIAL AND ECONOMIC RIGHTS: CURRENT AND PROSPECTIVE AVENUES

Analía Marsella

In this Essay, I explain the role and impact of transnational corporations in the process of development and implementation of economic and social rights at a global scale and identify the solutions that I regard as plausible. I do so from an international human rights perspective that integrates both the legal and non-legal approaches. I concentrate on the international aspects of legalization, adjudication, and policy making. First, I analyze social and economic rights in the current context, the old and most recent understandings, and the challenges posed by the phenomenon of globalization together with the rising of corporations in the international scene. Second, I examine the current legal framework by grouping States and transnational corporations in two different categories of duty-holders in connection with social and economic rights. On the one hand, I address the responsibilities of the States and the controversies concerning their duty to protect, and on the other hand, I assess the different possibilities of dealing with corporate liability. In my view, transnational corporations have clear duties under international human rights law and the fulfillment of these duties cannot depend on purely voluntary frameworks. I argue that combining a multilateral codifying approach with the power of the domestic courts may be the best alternative available to address the adverse impact of transnational corporations regarding social and economic rights. Additionally, the international human rights bodies must continue to exercise pressure on the States through further monitoring and enforcement of social and economic human rights standards.
I. INTRODUCTION

II. SOCIAL AND ECONOMIC RIGHTS IN THE CURRENT GLOBAL CONTEXT
   A. Overcoming the usual misunderstandings about social and economic rights
   B. Governance gaps and the weakness of a purely state-centered approach to the international law of human rights
   C. Corporations as rising international actors
   D. The eventual need for a revised international human rights legal framework

III. RESPONSIBILITIES OF STATES FOR ACTIONS OF TNCs
   A. Analysis of the duties of the States in connection with third parties, in particular TNCs, and social and economic rights. The duty to protect
   B. The increasing willingness of human rights bodies to hold States responsible for actions of non-state actors
      1. The Inter-American system of human rights
      2. The European system of human rights
      3. The African system of human rights
   C. The problem of extraterritoriality. Limits of international human rights law

IV. CORPORATE RESPONSIBILITY AND SOCIAL AND ECONOMIC RIGHTS
   A. Whether TNCs have legal international obligations. Corporate accountability
   B. The voluntary approach: self-regulation by TNCs and cooperative schemes
      1. Corporate social responsibility
      2. The U.N. Global Compact
      3. The European case
   C. Various attempts at the international level to regulate the responsibility of TNCs regarding human rights, in particular, social and economic rights
      1. The U.N. Norms. Binding international codes of conduct
      2. International quasi-regulation. Policy conditionalities
      3. Imposing direct international obligations on TNCs
   D. Domestic remedies and transnational litigation
      1. The U.S. Alien Torts Claims Act
      2. The European model: civil liability in European Union law

V. CONCLUSION
I. INTRODUCTION

In this Essay, I intend to examine the singularities underlying the issue of transnational corporations and economic and social rights. I attempt to explain not only the role of transnational corporations, but also their impact, current and potential, positive and negative, in the development and implementation of economic and social rights from a broadened human rights perspective. From this perspective —mainly international in focus—, I consider the current international legal framework and the conceptions that shape the discourse upon economic and social rights and corporate activity at the global level. My approach is both descriptive and normative. Additionally, I incorporated comparative elaborations when I deemed them necessary for the better understanding of the subject at issue. On the one hand, I intend to present and analyze the most relevant international instruments, case law, and doctrine for each question. On the other hand, based on the resulting assessment, I draw some preliminary conclusions that I summarize at the end intending to propose ways by which the protection of social and economic rights may be strengthened in connection with the phenomenon of the growing influence of transnational corporations in the global arena.

Of course, given the complexity of the matter and the multiplicity of tools available, I do not attempt to conduct a comprehensive survey of all of the current and potential developments in this field. On the contrary, I selected only those issues that I personally consider most interesting or necessarily unavoidable when considering the problem of the violations of social and economic rights that arise as a consequence of the actions of transnational corporations.
I am not going to address accountability issues concerning other non-state actors such as international organizations and nongovernmental organizations (NGOs), although I am aware of the serious consequences of some of their activities that may result in human rights abuses. I am neither going to focus on the wrongful or unlawful acts by corporations that belong to the realm of economic crimes. I am centering my analysis on current and prospective international legal and policy questions and solutions to the problem of the impact of transnational corporations in the realm of social and economic rights.

The Essay is organized in three parts. Following this introduction, in Part II, I explain how social and economic rights are being understood in an evolving context in which international relations are becoming less state-centric and transnational corporations are rising as powerful actors. I first argue that—notwithstanding the usual misconceptions about the nature and entity of social and economic rights—all governments have positive obligations concerning the realization of these rights. Second, I address the effects of globalization in human rights law and the current challenges for social and economic rights. The fundamental challenge, in the words of the U.N. Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, appears to be finding ways to breach the gaps regarding human rights in the

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1 E.g., regarding the potential adverse effects of economic sanctions imposed by the U.N. Security Council. See also infra note 248 at 50.
2 In another Essay I am examining the potential of transitional justice tools to address the responsibilities of transnational corporations, in connection with violations of economic, social, economic, and cultural rights in transitional contexts.
light of the growing impact of economic forces and the limited capacity of societies to manage their adverse consequences. Finally, I ask the question about the eventual need for a revised international human rights legal framework and conclude that an exclusively state-centered approach within the classic tradition of international law seems no longer capable of addressing the current challenges. However, its apparent failure triggered plenty of opportunities for enhancing cross-sector and cross-country cooperation and for innovative thinking that still have States as key protagonists.

In Parts III and IV, I address the salient aspects of the current legal framework, taking into account Ruggie’s proposal. Fortunately, there are many diverse avenues for enhancing the protection of economic and social rights in connection with abuses involving corporate actions, whether the violation appears to be a result of the sole conduct of the corporation or it arises from the joint governmental and corporate actions. First, I analyze the duties of the States and, subsequently, the corporate responsibilities regarding social and economic rights. In each Part, I integrated considerations about the remedies that are currently available and about the prospective solutions to increase the effectiveness of socio-economic rights implementation in connection with abuses involving corporate actions.

Regarding the responsibilities of the States in connection with non-state activities that I examine in Part III, the duty to protect is one of special relevance. As evidenced by my analysis, the content of the duty to protect from the actions of third parties has already been well established within the different human rights protection systems. In an expansive —but in my view, still realistic interpretation— this duty may even reach

home States (usually developed countries) for the activities of their corporations abroad. I conclude that, even if it is only by the application of the principles and values expressed in the most fundamental human rights instrument, all States have —surely at least to some minimum extent— the duties to prevent, investigate, and punish the violations of universally recognized social and economic rights. In fulfilling those duties, States should not necessarily be restrained to their territories as long as their interventions reasonably show sufficient respect for the sovereignty of the affected countries and are consistent with the dignity of its residents.

In Part IV, before analyzing the different avenues for dealing with corporate responsibility in connection with social and economic rights, I contend that the existing human rights instruments already offer a starting point for the liability of transnational corporations under international human rights law. I then focus my analysis of the responsibility of transnational corporations on the legal and quasi-legal means of regulating their behavior and holding them accountable. I examine both voluntary and regulatory approaches and their most relevant expressions as well as the mixed or hybrid framework that would integrate both. Subsequently, I briefly address the possibility of transnational litigation and the most notable points of convergence of the international and domestic legal orders —in particular in the United States and Europe— that may have an impact in this matter.

Summarizing, I am inclined to discard international quasi-regulation for its notorious disadvantages, particularly for presenting retaliatory schemes and for failing to address the North-South inequalities adequately. Also, I dismiss —at least for some time— the possibility of imposing direct international liability to corporations concerning social and
economic rights. I argue that, while the obligations to prevent, investigate, punish, and redress human rights abuses fall primarily to the States —and it will continue that way unless there is a significant judicial expansion at the international level which is unlikely to happen any time soon—, the various multilateral and cooperative efforts to increase the level of legalization and standardization in the realm of economic and social rights and corporate behavior are not only desirable, but also necessary to aid and incentivize the States to improve their records of compliance. Transnational litigation before the U.S. courts may present a viable alternative in the future, but it will not be able to offer adequate redress for violations of social and economic rights until the existence and relevance of these rights is firmly established in the American legal culture. On the contrary, transnational litigation in European court may currently present a suitable avenue for obtaining reparation from corporations which are at least partially responsible for abuses of social and economic rights. On their part, the international human rights bodies at the universal and the regional level must increasingly continue to exercise their influence on the States by performing functions of monitoring compliance, adjudicating disputes, and contributing with a progressive interpretation of the social and economic human rights standards. Regarding the basic terminology I employ, in the absence of a commonly agreed definition of transnational corporations (TNCs), I will generally use this term as a synonym for multinational corporations (MNCs) as well as for multinational enterprises (MNEs), as defined in the U.N. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (U.N. Norms).4

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II. SOCIAL AND ECONOMIC RIGHTS IN THE CURRENT GLOBAL CONTEXT

A. Overcoming the usual misunderstandings about social and economic rights.

Fortunately, many of the theoretical misunderstandings about social and economic rights have been largely settled. To the extent that some misconceptions remain current in practice, I attribute them mostly to the reluctance of governments to fulfill their international duties and not to the intrinsic nature of these rights or the difficulties in interpreting and applying the legal provisions. Neither political nor ideological considerations are strong enough nowadays to justify an approach that radically departs from the following points.

First, all internationally recognized human rights are to be understood as indivisible, interrelated and interdependent since not only “[t]he improvement of one right facilitates advancement of the others,” but also “the deprivation of one right adversely affects the others.” Internationally recognized human rights are those included in the International Bill of Rights —namely the Universal Declaration of Human Rights (UDHR), the

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6 Id.

7 Id.

International Covenant on Civil and Political Rights (ICCPR),\(^9\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—\(^10\) as well as in subsequent instruments elaborated under the auspices of the U.N. and its specialized agencies at the universal level and by regional organizations at the regional level.\(^11\) All the rights contained in those instruments “whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination”\(^12\) should be regarded as a whole since they “form a wide-ranging, but interrelated normative system.”\(^13\)

Second, despite the criticism that the ICESCR has attracted questioning its immediate binding force and the degree of enforceability of most of its provisions, the levels of obligation, precision, and delegation\(^14\) that can be verified in connection with this treaty and the evolution of its implementation, do not make it substantially different from other human rights treaties that are usually categorized as “hard law.”\(^15\) The ICESCR included a system of monitoring the fulfillment of duties and assessing the level of compliance by the States Parties. According to the provisions of its Part IV, the States Parties must

\(^12\) See U.N. Office for the High Comm’r for Human Rights, supra note 5.
\(^13\) Eide, supra note 11, at 9.
\(^14\) See generally Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 INT’L Org., LEGALIZATION AND WORLD POLITICS (SPECIAL ISSUE) 421 (2000) (discussing the advantages of international legalization and analyzing the dimensions of “obligation, precision, and delegation” of “hard” and “soft” law respectively).
\(^15\) Id. at 421 (“The term hard law as used in this special issue refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”).
submit regular reports detailing the measures they have taken and the progress achieved in connection with the implementation of the ICESCR for the consideration of the United Nations Economic and Social Council (ECOSOC). In 1985, the ECOSOC created a committee of independent experts, the Committee on Economic, Social and Cultural Rights (CESCR), to analyze these reports and issue recommendations to the States as deemed necessary. Furthermore, a draft Optional Protocol that would enable individual complaints for violations of the Covenant is currently under consideration.

In addition to issuing recommendations relating to particular countries, called “concluding observations,” the CESCR has been publishing its interpretation of the provisions of the ICESCR since 1989. These are called “general comments” and provide general guidelines as well as precise details concerning the content and the implementation of the rights recognized in the Covenant. So far, the Committee has issued nineteen general comments including one interpreting the nature of the obligations of State Parties to the ICESCR and clarifying their scope. Like the ICCPR, the ICESCR imposes obligations to the States with an immediate effect. These include obligations derived from the prohibition of discrimination and from the duty to “take steps” to achieve “progressively” the required standards of realization of economic, social, and

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The State Parties may select from a wide range of alternatives the means that they consider most appropriate under their particular circumstances to accomplish the full realization of the acknowledged rights. The means that may be considered “appropriate” include legislative measures, the provision of judicial remedies, administrative, financial, educational, and social measures. However, the ultimate determination as to whether all appropriate measures have been taken is made by the Committee. States should also refrain from deliberate retrogressive measures and are obliged to cooperate internationally.

In other general comments, the Committee elaborated on the minimum core obligations established by the ICESCR and the core content that is implied in different rights recognized in the Covenant. On the one hand, these comments address the general and specific legal obligations of the State Parties and the obligations of United Nations agencies and other international organizations, and on the other hand they address the issues of availability, accessibility, and adequacy of resources, as well as domestic implementation strategies pertaining to each right. Also other groups of experts continue elaborating on the implementation of the Covenant and on the nature and scope of the potential violations, in particular violations through acts of omission.

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19 See ICESCR, supra note 10, art. 2 (1).
20 General Comment 3, supra note 18, paras. 4–7.
21 Id. para. 4.
22 Like the rights to adequate housing (Nos. 4, 7), to adequate food (No.12), to education (No. 13), to the highest attainable standard of health (No. 4), and to water (No. 15), among other rights. For a full list and text of general comments see U.N. Office for the High Comm’r for Human Rights, Committee on Economic, Social and Cultural Rights: General Comments, http://www2.ohchr.org/english/bodies/cescr/comments.htm (last visited Dec. 15, 2008).
23 See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (1997) (elaborating on the Limburg Principles regarding the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies).
To be sure, international law of human rights expressed in different binding instruments “explicitly recognize individuals’ rights to housing, food, health care, work, and education”24 and makes governments undoubtedly “responsible for taking measured, concerted steps to respond to poverty, hunger, disease, unemployment, and other socio-economic crises.”25

B. Governance gaps and the weakness of a purely state-centered approach to the international law of human rights.

Since the existence and the effects of a worldwide globalization process have become evident, there is a growing concern in the international community regarding the vacuums in governance that underlie this phenomenon. These “governance gaps”26 created by globalization generate a difficult situation for the human rights regime, particularly in connection with corporate business.

Some scholars even fear that the paradigm embodied in the Universal Declaration of Human Rights (UDHR)27 that aims at achieving the dignity and well-being of all human beings and their communities is now being supplanted by a paradigm of “trade-related,” “market-friendly” human rights.28 Allegedly, this emergent paradigm seeks to promote and protect global capital in ways that sacrifices the human rights of individuals and communities for the sake of prioritizing corporate well being.29 On the other hand, they

25 Id.
26 Ruggie, Protect, Respect and Remedy, supra note 3, at 3, para. 3.
27 See UDHR, supra note 8.
29 Id.
see valuable opportunities in the process of world globalization. From the human rights perspective, they emphasize that the “globalization of the [S]tate”\textsuperscript{30} has the effect of “attenuat[ing] the classical notions of sovereignty”\textsuperscript{31} and that “[t]he extent of the erosion of the traditional notions of sovereignty is a function of practices of the politics of and for human rights.”\textsuperscript{32}

Surely, an exclusively state-centered approach to international law seems no longer capable of addressing the current challenges that the international community is facing such as the environmental degradation, the threats of non-conventional war and terrorism, widespread poverty, and the defective realization of human rights —including social and economic rights— at the global scale.

\textit{C. Corporations as rising international actors.}

As Jessica Mathews noted over a decade ago,\textsuperscript{33} the rise of multinational corporations to the global arena, together with their diversification and internalization of foreign elements, contrasts markedly with the insularity that characterized the mostly American multinational corporations of the sixties and the seventies, that were even perceived as tightly associated with their home country’s government and national interest.\textsuperscript{34} With the globalization of the marketplace for services and products in addition to the globalization of financial markets, the increase in private capital flows, the forming of transnational alliances and joint ventures, the growing number of international mergers and

\textsuperscript{30} Id. at 136.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{34} Id. at 56.
acquisitions, as well as the internal reorganization of multinational corporations, including the relocation of headquarters to foreign countries and the reassignment of corporate officers overseas—all changes enabled by the technological developments of the past decades—, multinational corporations started diffusing their power worldwide while nationalities and national borders blur.\textsuperscript{35} Regarding the impact of the “power shift”\textsuperscript{36} to non-state actors, in particular to transnational corporations, in the domestic legal orders, “[m]ore and more frequently [ ], governments have only the appearance of free choice when they set economic rules.”\textsuperscript{37} In Mathews’ view, markets were already “setting de facto rules enforced by their own power”\textsuperscript{38} back in the nineties.

More recently, the Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, concluded that “between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”\textsuperscript{39} the “fundamental challenge”\textsuperscript{40} is “[h]ow to narrow and ultimately bridge the gaps in relation to human rights.”\textsuperscript{41}

\textit{D. The eventual need for a revised international human rights legal framework.}

The obvious question to be posed is what type of shift in the human rights legal order is necessary to address the current challenges. If States no longer hold exclusive power

\begin{itemize}
\item \textsuperscript{35} \textit{Id.} at 56–57.
\item \textsuperscript{36} \textit{Id.} at 50–66.
\item \textsuperscript{37} \textit{Id.} at 57.
\item \textsuperscript{38} \textit{Id.} at 57.
\item \textsuperscript{39} Ruggie, \textit{Protect, Respect and Remedy, supra} note 3, at 3, para. 3.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\end{itemize}
over their territories, then it would be reasonable to claim that they can no longer be regarded as exclusively responsible for the human rights violations that occur under their respective jurisdictions. Furthermore, while the need for a revised international legal framework to address the particular issue of corporate activities affecting human rights is slowly becoming evident, the question of enforcement—in particular the establishing of adequate sanctions and reparations—remains one of the most problematic and controversial issues.

Nevertheless, there is currently a multiplicity of accountability mechanisms in force. As Kinley and Joseph noted, “numerous methods do exist for imposing forms of human rights accountability (legal and non-legal) on corporations.”42 According to them, “[s]ince early 1999 there has been a worldwide surge of interest in the nature and extent to which corporations are, or ought to be, made responsible for the protection and promotion of human rights”43 and, consequently, “[t]he catalogue of domestic and international accountability mechanisms, including recent initiatives and developments is numerous and diverse.”44

In fact, while acknowledging that “[t]he international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm”45 Ruggie shares the belief of many that “[t]here is no single silver bullet solution.”46

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43 Id.
44 Id.
45 Ruggie, Protect, Respect and Remedy, supra note 3, at 3, para. 1.
46 Id. at 4, para. 7.
Personally, I think that Ruggie’s is a realistic approach that does not lack of the necessary idealism. As complex problems require complex solutions, a multiplicity of diverse potential human rights perpetrators can only be counteracted by multiple and diverse protection and enforcement mechanisms. For instance, although I agree with Mathews in that it is likely that we will continue to observe a decline in the relative power of States,\footnote{See Mathews, supra note 33, at 65.} I think that national governments still have an essential role to play in connection with human rights protection and enforcement, particularly regarding socio-economic rights. In my view, not only would it be premature to argue that “Nation-states may simply no longer be the natural problem-solving unit,”\footnote{Id. at 65.} but also counterproductive in the light of the current reliance of international human rights protection systems on domestic enforcement. Moreover, there is no immediate prospect for the creation of international human rights courts that could have similar enforcement powers to those of the domestic courts and equivalent auxiliary forces at their disposal. It is unlikely that international courts lacking those powers could achieve comparable levels of effectiveness by operating exclusively on their own, from the filing of a petition or a complaint to the last step of the enforcement process. The closest case, though limited and subsidiary in nature, is the International Criminal Court (ICC)\footnote{See Rome Statute of the International Criminal Court, arts. 17, 63, 2187 U.N.T.S. 90, entered into force July 1, 2002 [hereinafter Rome Statute].} but still this court relies heavily on the cooperation of the States when investigating and trying cases and the enforcement of its decisions would be unimaginable without the States.
In April 2008, Ruggie released the report that was submitted in the Eight Session of the U.N. Human Rights Council in June 2008.\textsuperscript{50} In this report, he presented for the consideration of the Council a three-core-principled framework that was intended to provide guidance to the different actors in the business and human rights debate. The first principle concerns the duty of the States “to protect against human rights abuses by third parties, including business”;\textsuperscript{51} the second principle refers to “the corporate responsibility to respect human rights”;\textsuperscript{52} and the third principle addresses “the need for more effective access to remedies.”\textsuperscript{53} Because these three principles are all essential to the framework and entail “differentiated but complementary responsibilities,” they are to be understood as forming a “complementary whole in that each supports the others in achieving sustainable progress.”\textsuperscript{54}

In the following paragraphs, I will address the salient aspects of the current legal framework in the light of Ruggie’s proposal, referring first to the duties of the States and subsequently to the corporate responsibilities regarding social and economic rights. In each Part, I will integrate considerations about the remedies that are currently available and about the prospective avenues to increase the effectiveness of socio-economic rights implementation.

\textsuperscript{50} Ruggie, Protect, Respect and Remedy, supra note 3.
\textsuperscript{51} Id. at 1, 9–14.
\textsuperscript{52} Id. at 1, 14–21.
\textsuperscript{53} Id. at 1, 22–27.
\textsuperscript{54} Id. at 1, 4–5, para. 9.
III. RESPONSIBILITIES OF STATES FOR ACTIONS OF TNCs

A. Analysis of the duties of the States in connection with third parties, in particular TNCs, and social and economic rights. The duty to protect.

A more recent doctrinal elaboration refers to States as “primary” holders of human rights obligations, as opposed to “exclusive” duty-holders. The latter is regarded as the traditional understanding of state responsibility for human rights under international law and is still supported by those who regard human rights from a strictly state-centered perspective and resist any potentially expansive interpretation regarding the duty-holders for human rights. In any case, even tough human rights obligations are primarily held by States under current international law, States are required to implement their obligations at the domestic level by imposing duties that reach all persons within their jurisdiction.

One novelty related to this topic is the development of the notion of *horizontality* in international law. What some scholars call “horizontal” application of international human rights and some others “vicarious,” “indirect,” or “subsidiary” human rights liability, “has the effect of imposing responsibilities on [S]tates for the actions of those

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56 Reinisch, *supra* note 55, at 78.
57 Eide, *supra* note 11, at 22.
59 Reinisch, *supra* note 55, at 37, 79.
60 Id. at 79.
within their jurisdiction, such that the [S]tate can be held liable in international law for
human rights violations perpetrated by private entities, including corporations.\footnote{Kinley & Joseph, supra note 42, at 8.}

State obligations for human rights are generally classified in three categories: obligations to \textit{respect}, to \textit{protect}, and to \textit{fulfill} — the latter includes to \textit{facilitate} and to \textit{provide} \footnote{Eide, supra note 11, at 23.} (the duty to facilitate is sometimes termed as the duty to \textit{promote}). Although
these three levels of obligation are naturally interconnected, I am focusing on the second
level of obligations because of its particular relevance to the subject matter of this Essay.
Also, highly respected scholars like Asbjørn Eide regard the protective function of States
as the “most important aspect of state obligations” \footnote{Id. at 24.} regarding social, economic, and
cultural rights as well as civil and political rights.\footnote{Id.}

State compliance with human rights obligations specifically in connection with the
positive obligations that economic, social, and cultural rights entail, can thus be
monitored and assessed in the light of the following principles: first, governments are
obligated to take steps toward the progressive realization of these rights; second, they
have an immediate obligation to guarantee a minimum threshold for these rights; and
third, they have an immediate obligation to protect these rights without discrimination.\footnote{See ICESCR, supra note 10, art. 2 (1); General Comment 3, supra note 18; HUMAN RIGHTS INSTITUTE, supra note 24, at 23. See also supra Part II.A.}

Scholars like Radu Mares while acknowledging the international duty of States to
\textit{protect} human rights,\footnote{RADU MARES, THE DYNAMICS OF CORPORATE SOCIAL RESPONSIBILITIES 5 (Martinus Nijhoff ed., 2008) (The Raoul Wallenberg Institute Human Rights Library series, vol. 33).} note that is necessary to draw a distinction between \textit{host [S]tates} (i.e. countries where corporate TNCs’ subsidiaries and suppliers operate)\footnote{Id. at 5.} and \textit{home}}
[S]tates (i.e. countries where the controlling entity has its headquarters)\(^{69}\), identifying the former with developing countries and the latter with developed States. He accepts that “[s]tates can be assigned responsibility for the failure to prevent corporate abuses or for failure to offer redress following abuses”\(^{70}\) and that, consequently, “liability of corporations could be pursued indirectly by first activating the positive obligations of [S]tates to regulate private actors within their jurisdictions.”\(^{71}\) However, while host States have a duty to regulate the activities of private actors to protect human rights from abuses within their jurisdiction,\(^{72}\) home States on the contrary “are currently not under an international legal obligation to regulate controlling entities operating within their jurisdiction and hold them liable for human rights abuses overseas.”\(^{73}\)

In Ruggie’s view, although “the general nature of the duty to protect is well understood by human rights experts within governments and beyond”\(^{74}\) this level of internalization is not present regarding “the diverse array of policy domains through which States may fulfil this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad.”\(^{75}\) Ruggie deems as necessary that governments place this issue high on their agendas; it should be “viewed as an urgent policy priority for governments - necessitated by the escalating exposure of people and communities to corporate-related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their

\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id.
\(^{73}\) Id.
\(^{74}\) Ruggie, Protect, Respect and Remedy, supra note 3, at 9, para. 27.
\(^{75}\) Id.
Furthermore, although he regards “[f]urther refinements of the legal understanding of the State duty to protect by authoritative bodies at national and international levels” as “highly desirable,” he remarks that “even within existing legal principles, the policy dimensions of the duty to protect require increased attention and more imaginative approaches from States.”

Regarding the means that States have available to fulfill their duty to protect, it should be noted that they are not necessarily resource-dependent in a strictly economic sense. For the most part, States are expected to adopt and enforce domestic law provisions that facilitate effective prevention and precaution. In selecting the most appropriate means for each circumstance related to TNC behavior in their respective jurisdictions, States may choose from a wide range of measures and mechanisms, including the design of specific regulatory frameworks for certain industries, offering incentives to promote compliance with social and economic rights standards through a system of rewards (e.g., assigning preferred status to public contractors and providers who meet those standards, granting tax exemptions to socially responsible corporations, etc.), offering technical assistance, and performing monitoring and enforcement activities.

Additionally, notwithstanding the ongoing debate regarding the obligations derived from the American Convention on Human Rights (ACHR) in connection with the social and economic rights recognized therein, the general “duty to ensure” — functionally

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76 Id.
77 Ruggie, Protect, Respect and Remedy, supra note 3, at 8, para. 21.
78 Id.
79 Id.
81 Id. art. 1.
equivalent to the duty to protect—is understood, in the words of the Inter-American Court of Human Rights, as entailing the duty to “organize the entire state apparatus to ensure the full and free exercise of human rights”\(^{82}\) and that “[a]s a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”\(^{83}\)

**B. The increasing willingness of human rights bodies to hold States responsible for actions of non-state actors.**

Both human rights courts, the Inter-American Court of Human Rights and the European Court of Human Rights, have been increasingly willing to hold States responsible for violations of human rights as a consequence of non-state activities. As have the Inter-American Commission of Human Rights and the African Commission on Human and Peoples’ Rights. But before referring briefly to illustrative case-law of the three regional systems of protection of human rights, I would like to point out that this is not an isolated phenomenon. Indeed, diverse human rights bodies at the universal level have built “on the traditional ‘due diligence’ requirement under customary international law”\(^{84}\) and “interpreted obligations to ‘ensure’ as state obligations to take measures to prevent non-state violations of human rights.”\(^{85}\) For instance, regarding specific social


\(^{83}\) Id.

\(^{84}\) Reinisch, *supra* note 55, at 79.

\(^{85}\) Id.
and economic rights, the CESCR has made clear that “[v]iolations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States” and that “[a]s part of their obligations to protect people’s resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food” (emphasis added). Also, in the general comment on the right to the highest attainable standard of health the CESCR addressed in detail the content of the duty to protect in connection with this right.

1. The Inter-American system of human rights.

Within the Inter-American system of protection of human rights, the Inter-American Court of Human Rights issued a landmark decision (also its first ever final judgment) in the case Velásquez-Rodríguez on forced disappearances holding that “any violation of rights recognized by the Convention [ACHR] carried out by an act of public authority or by persons who use their position of authority is imputable to the State” but that “this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State

87 Id. para. 27.
might be found responsible for an infringement of those rights.”

The Court went on by asserting that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State” (emphasis added); and this is “not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention” (emphasis added).

More recently, in the Mapiripán Massacre judgment, the Court reaffirmed this position by emphasizing that “international responsibility may also be generated by acts of private individuals not attributable in principle to the State” and that States “have erga omnes obligations to respect protective provisions and to ensure the effectiveness of the rights set forth therein under any circumstances and regarding all persons.”

Moreover, the Court pointed out that States “may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfill these erga omnes obligations” (emphasis added). Additionally, the Court referred to many other adjudicatory cases in which it had previously determined the existence of state responsibility in connection with the actions of third parties as well as to provisional measures that it had ordered “to protect members of groups or communities from acts and

90 Id.
91 Id.
92 Id.
95 Id. para. 111.
96 Id.
97 Id.
98 Id. para. 112.
threats caused by . . . and by private individuals”\textsuperscript{99} and to its advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants*\textsuperscript{100} in which the Court pointed out that “the obligation to respect human rights between individuals should be taken into consideration”\textsuperscript{101} explaining that “the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (erga omnes)”\textsuperscript{102} and that “fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.”\textsuperscript{103}

The Inter-American Commission of Human Rights has similarly established State responsibility in several cases of violations committed by third parties. Among the cases that are worth noting for involving social and economic rights is the case of the *Yanomami* people in Brazil.\textsuperscript{104} One of the issues addressed in this case was the serious harm caused by private mining activities to a community of indigenous people, in large part because of the lack of prior and adequate protection for their safety and health. The Commission found that there had been a violation of the right to the preservation of health and to well-being under the American Declaration of the Rights and Duties of Man.\textsuperscript{105} Also, the Commission examined the human rights situation in the Oriente region in Ecuador for several years, \textsuperscript{106} “in response to claims that oil exploitation activities in the region were contaminating the water, air and soil, thereby causing the people of the

\textsuperscript{99} \textit{Id.}
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
region to become sick and to have a greatly increased risk of serious illness”\textsuperscript{107} and particularly address the negative impact of certain “development activities”\textsuperscript{108} ending its report with several recommendations to the government that are consistent with the content of the obligation to protect and ensure described in the preceding paragraphs.

Summarizing, the Inter-American system has been consistently indicating that international responsibility may arise from acts of third parties, i.e. from acts of individuals, groups of individuals, and corporations that are not attributable to the State, due to the failure of governments to fulfill their positive obligations under international human rights law. Of course, it is also settled doctrine of the Inter-American system, that positive obligations should not be interpreted in ways that impose impossible or disproportionate burdens on the States. Governments cannot be held responsible for every situation of risk\textsuperscript{109} that arises within their jurisdictions as long as they are in full compliance with their due diligence duties.

2. The European system of human rights.

The European Court of Human Rights, although seemingly less prolific in addressing this issue, has clearly adopted a similar approach regarding the responsibility of the States for actions of third parties that affect the enjoyment of recognized human rights.

In \textit{Costello-Roberts},\textsuperscript{110} a case concerning corporal punishment by schoolteachers in a privately run school in the United Kingdom, the Court “agree[d] with the applicant that

\textsuperscript{107} Id. executive summary.
\textsuperscript{108} Id. ch. VIII.
the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals,” although it decided to reverse the previous decision of the Commission for not finding sufficient grounds to establish that there had been a violation of the right of the child to respect for his private and family life guaranteed by the European Convention on Human Rights and Fundamental Freedoms (ECHR). However, it is relevant to the subject matter of this Essay that the Court held in this case that “the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention [ECHR] if it proves to be incompatible with [any of its provisions].”

In another case, in which the applicants alleged that the local authority had failed to protect them from inhuman and degrading treatment, the Court held that the substantive right at issue, taken in conjunction with the obligation of the States to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR, “requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.” In other words, the Court asserted that the States have the obligation to ensure that there are adequate prevention measures.

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111 Id. para. 27 (also referring to its previous decision in Van der Mussele v. Belgium).
115 See id. art. 1.
In Matthews, the Gibraltar voting case, the Court innovated by overturning well settled case-law that so far had not allowed claims against member States of an international organization (in this case the European Community), either individually or collectively, for human rights violations incurred by the organization itself. This new reasoning that seeks to incentivize States to regulate the activities of non-state actors to whom they have transferred some of their tasks, in August Reinisch’ view, applies to all non-state actors, including TNCs.


There have also been important precedents within the African system of protection of human rights regarding the interpretation of the duty to protect in the sense of attributing international responsibility to States for failing to safeguard persons under their jurisdiction from the damaging actions of private actors, including TNCs.

Particularly remarkable is the case against Nigeria regarding its practices on oil extraction in Ogoniland which, among other rights, concerned violations of several social and economic rights contained in the African Charter on Human and Peoples’ Rights (ACHPR), —namely the right to health, the right to economic, social and

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118 Reinisch, supra note 55, at 81.
119 Id. at 81–82.
cultural development, the right to housing or shelter, and the right to food (the last two understood as implicit in the ACHPR)—perpetrated by both public and private actors. Both the government of Nigeria and Shell Petroleum Development Corporation had been involved in an oil consortium whose operations caused serious environmental degradation and resulted in serious harm to the Ogoni People.

Applying the three-level categorization mentioned above, the African Commission on Human and Peoples’ Rights stated that “[a]t a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies” (emphasis added). Regarding the content of this duty to protect, the Commission hold that it “requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences” and that it “generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.” Additionally, the Commission noted that this obligation “is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights” and that “[t]he State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.”

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122 ACHPR, supra note 121, art. 16.
123 Id. art. 22.
124 See supra Part III.A.
126 Id.
127 Id.
128 Id.
129 Id.
It is also worth noting that among the measures ordered by the Commission “to ensure protection of the environment, health and livelihood of the people of Ogoniland”\(^\text{130}\) the Nigerian government was requested to “ensure that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry”\(^\text{131}\) and to “[p]rovid[e] information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.”\(^\text{132}\)

Additionally, in that 2001 decision, the Commission took the opportunity to stress the “uniqueness of the African situation”\(^\text{133}\) and stated that “collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa”\(^\text{134}\) and made clear that “there is no right in the African Charter that cannot be made effective.”\(^\text{135}\)

### C. The problem of extraterritoriality. Limits of international human rights law.

I have already hinted above\(^\text{136}\) that of the most serious challenges that the human rights regime is currently facing —particularly regarding the implementation of social and economic rights in a globalized world— might be to find efficient ways to overcome

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\(^{131}\) Id.

\(^{132}\) Id.


\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) See supra Part III.A.
the difficulties posed by its still state-centered territorial base and the resulting problems of jurisdiction.

As Sarah Joseph remarked “[i]nternational human rights law has not yet evolved so as to hold [s]tates responsible for the actions of their non-government citizens, including corporate nationals, abroad.”137 Consequently, “[h]ome [s]tates are not currently liable in international human rights law for failing to prevent, punish, or otherwise regulate the delinquencies of their TNCs’ overseas operations.”138 However, in Mares’ view, developed countries (home States) could eventually enter into a multilateral agreement and accept an “oversight responsibility for the failings of parent companies incorporated in their jurisdictions . . . that contribute to human rights abuses overseas” 139 and potentially be held accountable before international monitoring bodies.140 Also recognizing the increasing relevance of the impact of economic globalization on the traditional concept of state responsibility for human rights violations, Olivier de Schutter favors the expansion of state responsibility “in specific fields, such as with respect to certain acts committed by corporations abroad” imposing the obligation to home State of “control[ling] the activities abroad of the corporations which are incorporated under their jurisdiction . . . without prejudice of the sovereign rights of the territorial [host] [S]tate.”141

Personally, I think that Mares’ and de Schutter’s position succeeds on the one hand in acknowledging the uneven influence and impact of TNCs in the North-South context and,

138 Id. at 12.
139 MARES, supra note 67, at 5.
140 Id.
on the other hand, in recognizing the importance of developing a notion of state responsibility for the actions of TNCs that imposes duties to the home States such as to regulate the controlling companies in ways that prevents them from escaping the jurisdiction of host States that are usually burdened and conditioned by the need to attract foreign investments. Additionally, I notice a notorious imbalance in the arguments of those who favor further international legalization in areas such as trade and investment while opposing the mere idea of the extraterritorial regulation of corporations with regard to human rights.

Nevertheless, as Ruggie notes, there is no agreement among experts “on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory.”\(^\text{142}\) However, he points out that “[t]here is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists, and the actions of the home State meet an overall reasonableness test.”\(^\text{143}\) An essential element of this reasonableness evaluation is the assessment of the extent in which the principle of non-intervention in the internal affairs of other States might be threatened.\(^\text{144}\) Although Ruggie admits that from this perspective “[t]he entire human rights regime may be seen to challenge the classical view of non-intervention”\(^\text{145}\) the issue here, as he sees it, revolves around “what is considered coercive.”\(^\text{146}\) In fact, he notes that “there is increasing encouragement at the international

\(^{142}\) Ruggie, Protect, Respect and Remedy, supra note 3, at 7, para. 19.
\(^{143}\) Id.
\(^{144}\) Id.
\(^{145}\) Id.
\(^{146}\) Id. at 7, para. 19, n.13.
level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.\textsuperscript{147}

To sum up, not only the possibility, but also the desirability of the expansion of the duty to protect of the States to reach the overseas operations of the TNCs based within their territorial jurisdictions seem limited by the need to allow sufficient respect for state sovereignty consistent with the dignity of the individuals residing in the affected countries. It is likely that such a process will take place gradually but inevitably. It is also likely that it has already started from the point that it is currently an item on the international agenda. The question remains how voluntary or how coercive it will be for each State to assume or to share responsibility for TNC behavior.

\textsuperscript{147} Id. at 7, para. 19.
IV. CORPORATE RESPONSIBILITY AND
SOCIAL AND ECONOMIC RIGHTS

A. Whether TNCs have legal international obligations. Corporate accountability.

It is worth noting that both, the UDHR\textsuperscript{148} and the ICESCR,\textsuperscript{149} even though embedded in the state-centered tradition and focused mainly on the duties of the States,\textsuperscript{150} still refer to “any . . . group or person”\textsuperscript{151} as having duties. No group or person has any right to engage in activities that would result in the violation of the rights recognized in these instruments.\textsuperscript{152} More specifically, as Louis Henkin emphasized in his key note address on the fiftieth anniversary of the UDHR,\textsuperscript{153} the UDHR “may also address multinational companies.”\textsuperscript{154} He added that

\begin{quote}
\textquote{[t]his is true even though the companies never heard of the Universal Declaration at the time it was drafted. The Universal Declaration is not addressed only to governments. It is “a common standard for all peoples and all nations.” It means that “every individual and every organ of society shall strive —by progressive measures . . . to secure their universal and effective recognition and observance among the people of member [S]tates.” Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.}\textsuperscript{155}
\end{quote}

\begin{footnotes}
\footnotetext{148}{UDHR, \textit{supra} note 8.}
\footnotetext{149}{ICESCR, \textit{supra} note 10.}
\footnotetext{150}{See David Weissbrodt & Muria Kruger, \textit{Human Rights Responsibilities of Businesses as Non-State Actors}, in \textit{NON-STATE ACTORS AND HUMAN RIGHTS, supra} note 55, at 315, 332.}
\footnotetext{151}{See ICESCR, \textit{supra} note 10, art. 5 and UDHR, \textit{supra} note 8, art. 30.}
\footnotetext{152}{\textit{Id.}}
\footnotetext{154}{\textit{Id.} at 24.}
\footnotetext{155}{\textit{Id.} at 24–25.}
\end{footnotes}
If the UDHR offers a starting point of worldwide reach for the liability of TNCs under international human rights law, the ICESCR reaffirms the ground for this to happen particularly when involving operations in States that ratified this treaty. Additionally, some of the general comments issued by the CESCR reinforce this possibility. For example regarding the right to adequate food, the CESCR held that “[w]hile only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society —individuals . . . as well as the private business sector— have responsibilities in the realization of the right to adequate food” and that “[t]he private business sector —national and transnational— should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.” Also, the general comment on the right to the highest attainable standard of health contains a similar provision.

Returning to Ruggie’s framework in which “[t]he corporate responsibility to respect human rights is the second principle” he finds it mostly recognized in different soft law international instruments such as those developed under the auspices of the Organization for Economic Cooperation and Development (OECD) and the International Labour

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156 See generally Henkin, supra note 153. See also JOSEPH, supra note 58, at 8.
157 General Comment 12, supra note 86.
158 Id. para. 20.
159 Id.
160 General Comment 14, supra note 88, para. 42.
161 Ruggie, Protect, Respect and Remedy, supra note 3, at 8, para. 23.
162 Org. for Econ. Co-operation and Dev. [OECD], Guidelines for Multinational Enterprises, DAFFE/IME/WPG(2000)15/ FINAL (Oct. 31, 2001) [hereinafter OECD Guidelines]. See id. foreword at 2 (“The OECD Guidelines for Multinational Enterprises contain non-binding recommendations by governments to multinational enterprises operating in or from the 33 adhering countries—the OECD members as well as Argentina, Brazil and Chile. They are complemented by implementation procedures whereby adhering governments agree to promote observance of the Guidelines. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises.”). See also id. para. 23 at
This is because TNCs are not generally regarded as subject of international law and, consequently, they cannot enter into international treaties and be bound by them. Neither do they fall within the jurisdiction of the human rights bodies that refer exclusively to the international responsibility of States.

From this perspective, David Kinley & Sarah Joseph wrote in 2002 that “[t]he protection of human rights is not traditionally considered a responsibility of corporations” adding that “[t]he domestic laws of many [S]tates fail to impose adequate human rights duties on corporations” and “it is unlikely that there are any direct duties imposed by international law [to them].” Later, in 2004, Joseph noted that “[e]xceptionally, some duties are imposed directly on non-governmental bodies in international law” illustratively mentioned that “non-governmental bodies are prohibited under customary international law and under certain treaties from committing universal crimes, such as piracy, genocide, war crimes, and crimes against humanity” but still remarked that “[t]he extent of the liability of non-governmental bodies under customary international law is highly uncertain.” In her view, one symptom of the state-centered focus of public international law is that “[i]n international human rights law, only the
State is generally charged with duties to secure human rights for individuals within jurisdiction.”\(^{169}\) However she acknowledged that in spite of that limitation, “international human rights law has made some progress towards imposing human rights duties in the non-government sphere.”\(^{170}\)

Additionally, as Reinisch notes—discussing the possibility of enforcing human rights compliance by non-state actors even when they are not strictly bound by human rights obligations—\(^{171}\) “consumers and investors are free to choose where to buy or to invest”\(^{172}\) and “[t]hey may rely on moral or ethical choices when making their business decisions.”\(^{173}\) Consequently, the question of the legal responsibility of TNCs becomes less relevant as other “non-legal means” of holding them accountable, such as consumer boycotts and socially responsible investments, are set to work.\(^{174}\) Reinisch’ fear, which to some extent appears justified to me, is that the blurring of the distinction between legally binding obligations and moral standards and the consequent findings of TNC “liability”—as a result of either legal or alleged moral obligation indistinctly—are incompatible with the rule of law and might eventually have a detrimental effect on the obligatory character of human rights law.\(^{175}\)

Certainly, there has been a growing trend towards exploring and implementing avenues to ensure TNCs’ compliance with certain international standards of social responsibility. While some experts are in favor of developing and improving voluntary mechanisms of performance rather than imposing human rights duties directly on TNCs,
others are advocating for an expansive binding normative framework that would include corporate human rights responsibility. Thus, the various initiatives can roughly be divided into two groups: those that fall in the category of voluntary self-regulation—including the corporate social responsibility (CSR) approach—and those originated in multilateral international efforts to regulate particular industries or TNCs in general. Below, I will address some of the most significant initiatives in each category.

**B. The voluntary approach: self-regulation by TNCs and cooperative schemes.**

There have been many different initiatives on behalf of TNCs to institutionalize their commitment to good practices through a variety of non-binding arrangements. Some TNCs started developing guidelines in the form of unilateral codes of conduct that included statements of policy referring, for instance, to the rights of workers or of citizens in more or less detail. Whether a marketing strategy or an expression of true commitment, the truth is that the interest in the matter continued to grow in the corporate sector. Subsequently, some degree of cooperation across business and industries contributed to the efforts to standardize their codes of conduct and build partnerships with other sectors of society. At the regional level, the Europeans can fairly be regarded as pioneers in the matter.

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177 *Id.* at 183.
1. Corporate social responsibility.

Attempting to depart from the state-centered tradition in the context of the relationship between business and human rights, some scholars such as Mares emphasize the apparent inadequacy of the law-oriented approaches that focus purely on deterrence—and are also formalistic in nature—and advocate instead for a CSR approach—also known as *corporate citizenship*. From this perspective, they stress “the incentives and effects of corporate voluntarism.”¹⁷⁹ Although they do not hold a potential deterrent regulatory framework as undesirable— in fact, they regard CSR and law as complementary—, they notice the weaknesses of the current legal framework for corporate accountability and are pessimistic about the political willingness to strengthen it.¹⁸² In their view, given the lack of determination of governments, a new protective regime is emerging in the hands of a few but influential TNCs, namely the “CSR regime.”¹⁸³ By “CSR regime,” they refer to the “positive” regulatory effects and the process of institutionalization of CSR dynamics triggered by leading businesses.¹⁸⁴ According to their claim, this decentralized communication-based system of corporate accountability presents a new protective mechanism that complements the state system of safeguarding human rights, operating on the basis of a double interaction between private and public actors and of *corporate voluntarism* and the law.¹⁸⁵

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¹⁷⁸ E.g., see generally MARES, supra note 67.
¹⁷⁹ Id. at 321.
¹⁸⁰ Id. at 322.
¹⁸¹ Id. at 331.
¹⁸² Id. at 321–22.
¹⁸³ Id. at 322.
¹⁸⁴ Id. at 322–23.
¹⁸⁵ Id. at 330–31.
Mares’ review of the evolution of CSR in the last decade covers “multistakeholder standards and guidelines facilitating social impact assessments, management systems for implementing CSR, reporting and auditing CSR performance, and collaboration between business, civil society groups and governmental agencies (tri-sector partnerships).” In his view, particularly, in the absence of legally binding rules, the development of credible standards and benchmarks to measure due diligence and corporate performance facilitates the comparative assessments by stakeholders. General CSR guidelines allow “[p]ublic interest organizations [to] assess corporate commitment to CSR . . . by looking at their implementation through management systems.”

2. The Global Compact.

The United Nations Global Compact (GC), an initiative that former Secretary-General Kofi Annan began in 1999, is so far the most high-profile initiative at the international level with the purpose of advancing CSR. It was conceived as a “strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.” Although it raised significant criticism, it served

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186 Id. at 323.
187 Id. at 326.
188 Id. at 115.
190 Id.
191 The GC was accused of “blue washing,” i.e., of lending the name of the U.N. to companies that would use it for public relations while not showing a sincere commitment to improving their compliance with CSR standards. For a comprehensive critique see, e.g., Surya Deva, Global Compact: A Critique of the U.N.’s “Public-Private” Partnership for Promoting Corporate Citizenship, 34 Syracuse J. Int’l L. & Com. 107 (2006) (arguing that the GC has several deficits, including its substantial failure in doing “quality control”).
to place the cooperation of the U.N. with corporations and civil society groups on the international agenda, subsequently leading to important developments that reaffirmed the importance of CSR and the emerging public-private partnership such as the 2002 World Summit on Sustainable Development in Johannesburg.\footnote{See \textit{MARES}, \textit{supra} note 67, at 169‒173 (discussing not only the achievements, but also the controversy surrounding the GC initiative).}

More recently, in 2006, the International Organization for Standardization (ISO)\footnote{See Int’l Org. for Standardization [ISO], http://www.iso.org.} and the GC Office have taken steps to enhance their cooperation on the development of the future ISO 26000 standard. This strictly voluntary standard, expected to be released in 2010, is meant to provide guidance on social responsibility to both public and private sectors.\footnote{Id.} Because it will not include requirements it will be issued as a guidance document rather than a certification standard — i.e. it is not intended for third-party certification.\footnote{Id.} According to ISO, this standard “is intended to add value to, and not replace, existing inter-governmental agreements with relevance to social responsibility, such as the [UDHR], and those adopted by the [ILO].”\footnote{Id.} Between the approaches of “strict legislation at one end”\footnote{Id.} and “complete freedom at the other,”\footnote{Id.} it should provide “a golden middle way that promotes respect and responsibility’”\footnote{Id.} and that can be used by “organizations of all sizes, in countries at every stage of development.”\footnote{Id.}
3. The European case.

Despite the more optimistic views summarized in the preceding paragraphs, Wouters and Chanet present a less encouraging evaluation of the efforts started by the European Commission (EC) to enable a European framework for CSR. In their view, the dominance of business made the European Union (EU) abandon the original expectations and forced it to adopt a purely voluntary approach that ended up failing since it is incapable to ensure human rights compliance by all corporations.

According to them, the EC Green Paper on the promotion of a European framework for CSR—that marked the “real starting point” of the EU CSR policy in 2001—while “seen as something voluntary,” clearly evidenced that the EC “envisage[d] an active role for public authorities.”

The EC Green Paper specifically acknowledged CSR’s “strong human rights dimension, particularly in relation to international operations and global supply chains” as “recognised in international instruments such as the [ILO Declaration] and the [OECD Guidelines].” On the one hand, it referred to the challenges that companies have to face regarding the questions of “how to identify where their areas of responsibility lie as distinct from those of governments, how to monitor whether their business partners are complying with their core values, and how to approach and operate in countries where

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202 Id.
204 Id. para. 27.
205 Id.
206 Id.
207 Id. para. 52 at 13.
208 Id.
human rights violations are widespread."²⁰⁹ On the other hand, it addressed the role that the EU should play by recognizing that “[the EU] itself has an obligation in the framework of its Co-operation policy to ensure the respect of labour standards, environmental protection and human rights.”²¹⁰ Moreover, the EU “is confronted with the challenge of ensuring a full coherence between its development policy, its trade policy and its strategy for the development of the private sector in the developing countries notably through the promotion of European investments.”²¹¹

On the issue of the increasing adoption by the corporations of voluntary codes of conduct “covering working conditions, human rights and environmental aspects, in particular those of their subcontractors and suppliers,”²¹² the EC noted that these codes resulted from the growing “pressure from NGOs and consumer groups,”²¹³ and from the willingness of the companies “to improve their corporate image and reduce the risk of negative consumer reaction”²¹⁴ among other reasons. However, in the view of the EC, such codes of conduct “are not an alternative to national, [EU] and international laws and binding rules,”²¹⁵ because “binding rules ensure minimum standards applicable to all, while codes of conduct and other voluntary initiatives can only complement these and promote higher standards for those who subscribe to them.”²¹⁶

Along these lines, Wouters and Chanet argue that a mixed or hybrid regulatory framework that would integrate both, the voluntary and the regulatory approach, would be more successful than the purely voluntary CSR approach that the EC ended up

²⁰⁹ Id.
²¹⁰ Id.
²¹¹ Id.
²¹² Id. para. 54 at 13–14.
²¹³ Id.
²¹⁴ Id.
²¹⁵ Id.
²¹⁶ Id.
adopting. They note that precisely this type of combined model is the one that the European Parliament has been consistently supporting. In their view, such a hybrid framework would use the logics of business to achieve corporate social responsibility through the promise of profit maximization, but joined with regulations dealing with serious cases of human rights abuses as well as effective procedures for the corresponding civil and criminal redress. As to the present time, they regret that, “international law still focuses too much on protecting the rights of corporations (especially through international rules on trade and the protection of [foreign direct investment] and lags far behind in regulating their responsibilities.”

In their view, “[i]n Europe today, the [ECHR] is seen more as an instrument that provides rights for corporations rather than one that lays down obligations for them, unless they are vested with state powers and/or are controlled by the [S]tate.”

C. Various attempts at the international level to regulate the responsibility of TNCs regarding human rights, in particular, social and economic rights.

As noted above, States have recently adopted international soft law instruments supportive of CSR. These contribute with the establishment of principles and more detailed specifications about human rights that business are expected to observe throughout their operations. Being the most prominent examples the OECD

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217 Wouters & Chanet, supra note 201, para. 3.
218 Id.
219 See supra Part VI.A.
Guidelines, the ILO Declaration, and the U.N. Norms, the latter instrument has the distinctive characteristic of having been conceived as binding.222

1. The U.N. Norms. Binding international codes of conduct.

The U.N. Norms, as the “first non-voluntary initiative accepted at the international level” are regarded by some more enthusiastically than others as a “landmark step in holding business accountable for their human rights abuses.” In their Preamble it was recognized that “even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, [TNCs] and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the [UDHR].” This instrument attempted to consolidate a wide range of human rights norms and make them specifically applicable to TNCs and other businesses. In particular, it provided that TNCs “and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization,” emphasizing among other rights “the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, [and] education” and adding that these

220 Id.
221 Id.
222 Weissbrodt & Kruger, supra note 150, at 338–39.
223 U.N. Norms, supra note 3.
224 Weissbrodt & Kruger, supra note 150, at 315.
225 Id.
226 U.N. Norms, supra note 3 pmbl.
227 See id. para. 21.
228 Id. para. 12.
international actors “shall refrain from actions which obstruct or impede the realization of those rights” (emphasis added). 229

However, the drafting of the U.N. Norms was not free from intense discussions of the type of whether its list of rights was too long or too short. For example, Ruggie identified many problematic aspects of the incorporation of the companies in the debate about the role that they must play in human rights implementation, such as their reluctance to accept the complete catalogue of rights for which they would bear responsibility and attempting to edit it at will. 230 Consequently, Ruggie opted for a different approach in his report. Rather than following the trend of the Norms and recommending that specific human rights obligations should be imposed on the corporations in connection with a limited list of rights, he focused on addressing the particular responsibilities of corporations in relation to all rights. 231

Regarding other apparent deficiencies of the U.N. Norms, Sahni argues that they should have acknowledged “a specific right to life,” 232 addressed the potential “civil and criminal liability of TNC senior officers,” 233 and stated that “stakeholders have standing.” 234

Nevertheless, binding international codes of conduct seem to have clear advantages. Supporters like Sahni, who is in favor of drafting one on the basis of the GC, U.N. Norms, and other proposals, 235 contend that “a multilateral treaty directed at TNCs in

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229 Id. para. 12.
230 See Ruggie, Protect, Respect and Remedy, supra note 3, at 14, para. 51.
231 Id.
233 See id.
234 See id.
235 Id. at 306–07.
TNCs AND THE EFFECTIVE IMPLEMENTATION OF SOCIAL AND ECONOMIC RIGHTS: CURRENT AND PROSPECTIVE AVENUES

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home and host [S]tates,” (the U.N. Norms being the “closest such instrument”) would solve the problem of “[h]ost [S]tates [that] depend upon their own initiative to implement protective measures against TNCs.”

Joseph too observes that, “[c]urrently, fear of competitive disadvantage is surely constraining the efforts of some companies to respect human rights standards” and is of the view that setting uniform international principles would be advantageous because it “would help to eliminate competitive advantages gained by unscrupulous TNCs over their more ethical competitors.” Additionally, “TNCs would . . . benefit from greater clarity and consistency in their global responsibilities.” Weissbrodt and Kruger even suggest the possibility of reinforcing the implementation of the existing Norms through the U.N. human rights treaty bodies that could use them to create additional reporting requirements for the States.


Another potential avenue to regulate the responsibility of corporations for violations of social and economic rights —yet still indirectly, by pressuring the States— is the international “quasi-regulation” through frameworks and schemes of policy conditionalities adopted by international organizations and institutions such as the World

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236 Id. at 360.
237 See id.
238 Id. at 307.
239 See JOSEPH, supra note 58 at 154.
240 Id.
241 Id. See also Sean D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, 43 COLUM. J. TRANSNAT’L L. 389 (2005) (contrasting voluntary with binding codes and suggesting that TNCs may best served in the long-term by making voluntary codes “more meaningful and effective.”).
242 Weissbrodt & Kruger, supra note 150, at 344.
Trade Organization (WTO), the World Bank (WB) and the International Monetary Fund (IMF).

The WTO is currently considered a “fully functioning and effective system of international trade”\(^{243}\) with proto-constitutional attributes. Because of its success as an intergovernmental organization, “some commentators have advocated adding still more international law issues within its purview—including environmental protection, labor standards, and human rights—notwithstanding the fact that each of these subjects is already governed by its own set of treaties and institutions.”\(^{244}\) Nevertheless, there are strong objections to these expansionist views. Some scholars have “warned against these incorporation efforts [] contending that dyeing these legal issues with a tincture of trade would leave an indelible stain.”\(^{245}\) Furthermore, “many WTO members themselves have protested the linkage to non-trade issues, arguing that it would give unfair economic advantages to some nations (mainly wealthy industrialized ones) at the expense of others (mainly poorer developing countries).”\(^{246}\) Additionally, the WTO’s innovative dispute resolution process is not free form criticism. There are significant “barriers,” namely the political barrier, the problem of obtaining the necessary information, the exorbitant litigation costs, and the enforcement (or post-litigation follow-up) difficulties,\(^{247}\) that prevent this new trade dispute mechanism from offering a fairer adjudication of disputes.


\(^{245}\) Id. at 204–05.

\(^{246}\) Id. at 205.

In my view, these barriers could only be removed or at least substantially alleviated by centralizing the enforceability of WTO rules. In fact, all the solutions proposed to “level the playing field”\textsuperscript{248} and safeguard the interests of smaller or weaker members seem to have in common: a more active WTO that is capable of collective action. But still, in my view, one major obstacle for incorporating the protection of social and economic rights in the WTO system is that the WTO ultimately presents a retaliatory model. The main reason why all governments, including the great powers, have a strong incentive to comply with WTO rules is the ultimate threat of authorized retaliation in the form of trade sanctions. But, as many scholars already noted, addressing noncompliance through retaliation can be both ineffective and inequitable. Furthermore, because of the very nature of this type of sanction, one could not plausibly think of retaliation as a valid or desirable way of imposing sanctions to a State that has committed a human rights violation. Additionally, because WTO sanctions are applied prospectively, the sole possibility of paying for violations of human rights law would offer unacceptable incentives for States to commit violations in certain cases by applying a “cost-benefit” analysis that—for the most part—would be incompatible with basic human rights principles. In any case, the success of the WTO seems not capable of reaching the realms that escape a potential retaliatory system of sanctions. As Mathews noted, “the WTO is struggling to find a method of handling environmental disputes in the global commons, outside all States’ boundaries.”\textsuperscript{249} Enforcement of social and economic rights cannot reasonably be conceived under a scheme of bilateral retaliation.

\textsuperscript{248} Id. at 6 (suggesting that it would be possible to accomplish this through WTO’s assistance to the parties in pre-litigation work, or generating and circulating information among the members).

\textsuperscript{249} Mathews, \textit{supra} note 33, at 62.
Regarding the practice of the WB and the IMF of attaching policy conditionalities to their loans, several objections have been raised —most of them focus on the use of conditionalities to encourage trade liberalization and privatizations in developing countries while paying inadequate regard to their potentially adverse social and economic effects on the general population. Despite the implementation of some reforms in the lending practices, the said objections remain current.

Similarly, it is currently contested whether international sanctions on trade and investment, either multilateral or unilateral, have the ultimate effect of “punishing the innocent.”

Also, the reservations expressed above regarding the risk of incurring an improper invasion of the sovereignty of the weaker States apply to all these quasi-regulatory practices.

3. Imposing direct international obligations on TNCs.

Finally, the possibility of imposing direct international obligations on TNCs concerning social and economic and rights does not seem plausible, at least for the time being. As Kinley and Joseph observed “[t]he direct legal human rights duties of MNCs in international law are particularly opaque, despite the existence of numerous relevant

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251 See also supra Part III.C.

252 But see Ruggie, Protect, Respect and Remedy, supra note 3, at 7, para. 20 (referring to “the expanding web of potential corporate liability for international crimes, reflecting international standards but imposed through national courts . . . in some jurisdictions innovations in regulation and adjudication are moving toward greater recognition of the complex organizational forms characteristic of modern business enterprises.”).
international documents. Most international law documents regarding corporate human rights duties are not strictly legally binding, though it is possible that some ‘soft law’ provisions have hardened into legal obligation.\(^{253}\)

Eventually, as the concern for this matter continues to grow, the prospects of the creation of an international tort or civil court —to deal with the liability of TNCs for violations of human rights and grant reparations to their victims— could improve. A less desirable alternative would be to address this issue partially, by expanding the jurisdiction of the International Criminal Court (ICC).

As Doug Cassel noted on the possibility of holding corporations criminally liable under international law, “[c]orporations cannot generally be prosecuted before international criminal courts, and current international law does not generally impose criminal responsibility on corporations.”\(^{254}\) Although the “Nuremberg Charter did permit the International Military Tribunal to declare “groups or organizations” criminal . . . the Tribunal could do so only at the trial of an “individual.””\(^{255}\) The purpose of “declaring an organization criminal was not to punish the organization, but rather to permit individual members to be put on trial for belonging to the organization, without the need in each case to retry its “criminal nature.”” Subsequently, all the statutes of the new international criminal courts specified jurisdiction only over natural persons.\(^{256}\)

Nevertheless, the direct accountability of individual corporate officers under international criminal law for their complicity in a violation of social and economic rights that converges with one of the most serious human rights abuses cannot be completely

\(^{253}\) Kinley & Joseph, supra note 42, at 9.


\(^{255}\) Id.

\(^{256}\) See, e.g., Rome Statute, supra note 49, art. 25.
discounted, as long as it falls within the scope of the jurisdiction of the ICC (e.g., in the hypothetical case of the complicity of a corporate officer in causing a famine as part of a genocidal scheme).

In fact, “[c]orporate executives have long been held criminally liable for committing violations of human rights norms that do not require State action” and “[i]nternational criminal liability for aiding and abetting is also well-established.”

D. Domestic remedies and transnational litigation.

There are notable points of convergence of the international and domestic legal orders regarding the matter of TNCs and human rights abuses. For starters, domestic jurisdictions may offer a variety of remedies for violations of human rights that are currently not available at the international level, either universal or regional, and are unlikely to be available in the future. Furthermore, for petitions before international human rights bodies—including courts—to be admissible, the prior exhaustion of all domestic remedies is generally required.

Indeed, regarding the third principle of Ruggie’s framework, access to remedy, although he encourages the parallel development of adequate complementary non-state mechanisms, it is clear that the States—both host States and home States—are expected to play a predominant role in providing remedies for

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257 Id.
258 Cassel, supra note 254, at 304, 306 et seq.
259 Id.
260 See, e.g., ECHR, supra note 112, art. 35.1; ACHR, supra note 80, art.46.1.a.
261 Ruggie, Protect, Respect and Remedy, supra note 3, at 9, para. 26.
262 See id. at 22, 24–25, paras. 86, 93–95.
violations of social and economic rights by TNCs.\textsuperscript{263} In addition to addressing the judicial mechanisms\textsuperscript{264} he refers to the non-judicial mechanisms\textsuperscript{265} that the States should deploy as well as to the criteria that these mechanisms should meet so that the current system of grievance and redress can be strengthened. Because I intend to concentrate this Essay on particular international legal aspects concerning TNCs and social and economic human rights abuses, in the following paragraphs I am only going to address briefly the most salient aspects regarding the convergence of the international and domestic legal orders regarding this matter.

Undoubtedly, the bulk of the obligations to investigate, punish, and redress human rights abuses falls to the States. But for some States the load is heavier than for others: material resources as well as political will and commitment to social and economic justice are unevenly distributed. As Sahni observes, litigating in domestic courts is not a panacea since “. . . local courts over\textit{all} have limited capacity”\textsuperscript{266} and in many countries the “[c]onstitutional provisions do not ensure full protection against human rights violations by TNCs.”\textsuperscript{267} Referring mainly to the rights to “life, health and a healthy environment”\textsuperscript{268} she indicates that domestic courts “require a further aid”\textsuperscript{269} to safeguard these rights and argues that “[a] binding instrument regulating [S]tates and TNCs against human rights violations would favour constitutional interpretation for intra-and inter-generational equity and sustainable development.”\textsuperscript{270} Consequently, depending on the particularities of

\textsuperscript{263}See id. at 22 et.seq., paras. 82–85, 88–92, 96–99.
\textsuperscript{264}See id. at 23, paras. 88–91.
\textsuperscript{265}See id. at 23, 25–26, paras. 92, 96–99.
\textsuperscript{267}Id.
\textsuperscript{268}Id.
\textsuperscript{269}Id.
\textsuperscript{270}Id.
the case, some human rights practitioners may find in transnational litigation a fruitful or simply a more efficient alternative than litigating in the State where the violation has occurred.

Of course, they still have to face “extensive obstacles.” For example, Ruggie mentions the fact that “[in common law countries, the court may dismiss the case based on forum non conveniens grounds —essentially, that there is a more appropriate forum for it.” Also, in addition to the problem of establishing jurisdiction, the question of determining the applicable law comes into play. As Joseph notes, “the extraterritorial application of a State’s law to regulate actions which occur in another State can be very controversial.” Although she does not refer to the desirability of transnational human rights litigation, but focuses instead on analyzing the phenomenon, she does not seem to regard transnational human rights litigation against corporations as the ideal solution to the problems arising from TNC activity and points out that “there have not yet been any relevant merits decisions.” Additionally, she warns that “such litigation is time-consuming, and there is no guarantee of eventual success.”

Nevertheless, Joseph observes that “the salient cases have one common theme: TNCs are accused of breaching internationally recognized human rights in developing nations” and admits that “[i]n the absence of strong international human rights law enforcement, domestic litigation in developed nations provides a powerful avenue for

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271 Ruggie, Protect, Respect and Remedy, supra note 3, at 23, para. 89.  
272 See id. at 23, para. 89.  
273 See JOSEPH, supra note 58, at 12.  
274 See id. at 13.  
275 Id. at 153.  
276 Id.  
277 Id.
human rights vindication.”\(^{278}\) According to Ralph G. Steinhardt, “domestic litigation offers one imperfect but legitimate mode for maintaining the general impetus towards corporate responsibility in the human rights field”\(^{279}\) but he suspects that “the proliferation of such cases will justify a global standard that is so grounded in international law as to offer corporations a measure of protection from overly aggressive or idiosyncratic approaches to human rights.”\(^{280}\) Similarly, Joseph argues that “[u]ltimately, a preferable approach might be for all nations to agree on international minimum human rights standards for TNCs, which could be incorporated into national legislation and enforced by domestic courts”\(^{281}\) and recalls that “[p]roposed lists of international corporate human rights duties do exist, the most advanced being the [U.N.] Norms”\(^{282}\)


Increasingly, the Alien Torts Claims Act (ATCA) in the United States\(^{283}\) is gaining relevance as human rights practitioners regard this federal statute as an opportunity to succeed with their claims in challenging the overseas operations of TNCs. The ATCA “asserts universal jurisdiction by creating a private cause of action for international law

\(^{278}\) Id.
\(^{280}\) Id.
\(^{281}\) See JOSEPH, *supra* note 58, at 153.
\(^{282}\) Id. at 153‒154.
\(^{283}\) 28 U.S.C. § 1350 [hereinafter ATCA].
As Ruggie reports, “foreign plaintiffs are using [it] to sue even non-United States companies for harm suffered abroad,” adding that “[m]ore than 40 cases have been brought against companies under this statute since 1993, when the first was filed.” Also, Sarah H. Cleveland had observed earlier that in the “suits under the [ATCA — for example, the Unocal case], nongovernmental organizations (NGOs) and other members of civil society are searching for a venue in which they can enforce established international norms.” On her part, Sahni concludes that the ATCA “is a vital route for domestic courts to impose universal jurisdiction for international law violations — and, in particular, for home [S]tates to assert TNC liability—” after analyzing the potential applicability and effectiveness of the ATCA in the United States to redress certain human rights violations, specifically those causing personal injury and death. In Sahni’s view, “the ATCA is a statutory model for other [S]tates to adopt.”

According to her, legislation following this model may potentially increase the accountability of TNCs and their officers to employees and communities. Other scholars like Joseph seem more skeptical about the potential positive effects of

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284 Sahni, supra note 232, at 311.
285 Ruggie, Protect, Respect and Remedy, supra note 3, at 23, para. 90.
286 Id. at 23, n.52.
287 Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), reh’g en banc granted, 395 F.3d 978 (9th Cir. 2003), vacated, appeal dismissed per stipulation, 403 F.3d 708 (9th Cir. 2005).
289 Sahni, supra note 232, at 342.
290 See id., ch. 7, at 311–42 (discussing “TNC Liability for Human Rights Violations Under The Alien Tort Claims Act”).
291 Id. at 311.
292 Id. at 337.
293 See Joseph, supra note 58, ch. 2, at 21–63 (discussing “The Alien Tort Claims Act”).
transnational human rights litigation and identify many disadvantages,\textsuperscript{294} although they predict that it is “unlikely to disappear.”\textsuperscript{295}

Some scholars like George P. Fletcher are particularly enthusiastic about the potential of the ATCA to deal with human rights abuses involving actions of TNCs abroad.\textsuperscript{296} As he emphasizes, the most remarkable advantage of the approach of tort law—as opposed to criminal law—in the field of corporate liability for human rights abuses appears to be grounded in the plausibility of exercising universal jurisdiction to redress corporate complicity in human rights abuses committed by governments.\textsuperscript{297} Indeed, he argues that “the primary targets of litigation should be the suppliers and other facilitators of the human rights violations”\textsuperscript{298} given that the focus of tort law is on “ensuring that the plaintiff is fully compensated for his or her injuries”\textsuperscript{299}—not on punishing the offenders as in criminal law—\textsuperscript{300} and that the required threshold of complicity is easier to be met under tort law than applying strictly criminal law institutions.\textsuperscript{301}

According to Fletcher, “the ATCA of the future” is precisely represented by cases such as \textit{Arab Bank}\textsuperscript{302} and \textit{Khulumani}\textsuperscript{303} which concern corporate liability for facilitating

\textsuperscript{294} \textit{Id.} at 148‒51.
\textsuperscript{295} \textit{Id.} at 151.
\textsuperscript{296} \textit{See} \textsc{George P. Fletcher}, \textsc{Tort Liability for Human Rights Abuses} (Hart ed., 2008).
\textsuperscript{297} \textit{See} \textsc{Fletcher, supra} note 296, at 164‒71.
\textsuperscript{298} \textit{Id.} at 161.
\textsuperscript{299} \textit{Id.} at 165.
\textsuperscript{300} \textit{Id.}
\textsuperscript{301} \textit{See} \textsc{Fletcher, supra} note 296, at 165‒68.
\textsuperscript{302} \textit{Almog v. Arab Bank}, 471 F.Supp.2d 257 (E.D.N.Y. 2007).
\textsuperscript{303} \textit{Khulumani v. Barclay Nat’l Bank}, 504 F.3d 254 (2d Cir. 2007) (actions were brought under ATCA on behalf of individuals for injuries derived from the practice of apartheid in South Africa, alleging violations of international law by TNCs operating in South Africa). \textit{But see id.} at 326 (“[b]ecause the only sources of customary international law that suggest some movement toward the recognition of corporate liability postdate the collapse of the apartheid regime, and because the established norm during the apartheid era was that corporations were not responsible legally for violations of norms proscribing crimes against humanity, the complaints are subject to dismissal on this ground alone.”).
human rights abuses.\textsuperscript{304} Similarly, Cassel notes that “[t]he principal concern of major corporations about liability for aiding and abetting at present is the risk of being held liable in U.S. courts under [ATCA] litigation.”\textsuperscript{305} In fact, Joseph observed that most of the cases brought against TNCs under ATCA “have concerned alleged corporate complicity in human rights abuses committed by governments.”\textsuperscript{306} However, it is important to point out that “[a] corporation will . . . be held liable as an accomplice if it directly assists a government in perpetrating a relevant human rights violation.”\textsuperscript{307} On the contrary, if a corporation merely benefits from a human rights abuse committed by a State, that fact does not seem likely to generate liability under ATCA since the benefit alone does not create a “causal link to foreseeable abuse.”\textsuperscript{308} In Ruggie’s words “[t]he corporate responsibility to respect human rights includes avoiding complicity” \textsuperscript{309} and “[c]omplicity refers to indirect involvement by companies in human rights abuses — where the actual harm is committed by another party, including governments and non-State actors.”\textsuperscript{310} Corporations, thus, should employ due diligence to avoid incurring in such complicity.\textsuperscript{311} To be sure, the precise “standard for testing the complicity of corporations in violating international legal norms”\textsuperscript{312} under tort law is the “common knowledge that corporate activity will have the effect of facilitation of the criminal activity”\textsuperscript{313} as expressed in \textit{Arab Bank}\textsuperscript{314} that discarded specific intent to cause damage as

\textsuperscript{304} FLETCHER, supra note 296, at 175.
\textsuperscript{305} Cassel, supra note 254, at 325.
\textsuperscript{306} JOSEPH, supra note 58, at 50.
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Ruggie, Protect, Respect and Remedy, supra note 3, at 20, para. 73.
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} FLETCHER, supra note 296, at 168.
\textsuperscript{313} Id.
\textsuperscript{314} Almog v. Arab Bank, 471 F.Supp.2d 257 (E.D.N.Y. 2007); FLETCHER, supra note 29, at 168.
a requirement. In that case, the federal court held that the “complaints adequately allege[d] Arab Bank’s knowledge that its assistance would facilitate the terrorist organizations in accomplishing the underlying violations of the law of nations and that its provision of banking and administrative services substantially assisted the perpetration of those violations.”

Another important advantage of suing under ATCA derives from the strong incentives that the common law systems of tort usually offers for lawyers — unlike the Continental European systems— namely punitive damages and the possibility of working on the contingency fee system.

Additionally, despite Ralph G. Steinhardt’s observation that some of the cases filed under ATCA against prominent TNCs “for their alleged complicity in human rights violations around the world” have been dismissed by the U.S. federal courts on “forum non conveniens, jurisdictional, political, or factual grounds,” he nevertheless emphasized that “none [of those cases] has been dismissed on the ground that private companies are in principle immune from liability under international law.” For example, in Abdullahi v. Pfizer the U.S. district court for the Southern District of New York dismissed a class action brought under ATCA on behalf of Nigerian citizens who were injured as a result of an experimental antibiotic administered by the pharmaceutical company Pfizer. In that case, the plaintiffs argued that the corporation had violated multiple international human rights provisions, including the prohibition of torture and

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316 See Fletcher, supra note 296, at 58–65.
318 Id.
319 Id.
cruel, inhuman, or degrading treatment or punishment, particularly, of non-consensual medical or scientific experimentation contained in the ICCPR.\footnote{ICCPR, supra note 9, art. 7.} Although the court ultimately dismissed the complaint for failure to state a claim under ATCA —finding that “none of the sources of international law on which [p]laintiffs advance[d] provide[d] a proper predicate for jurisdiction under the [ATCA]”—\footnote{Abdullahi v. Pfizer, ___F.Supp.2d at 14. Regarding the ICCPR, the court held in a way consistent with the controlling doctrine of the U.S. Supreme Court that this Covenant, although ratified by the United States and internationally binding the U.S. government, does not itself create obligations enforceable in federal courts. According to this doctrine, the ICCPR’s substantive provisions are not to be regarded as self-executing and, therefore, they cannot establish the relevant and applicable rule of international law that ATCA requires.} and on \textit{forum non conveniens} grounds, holding that “Nigeria is an available alternative forum for this litigation,”\footnote{Id. at 18.} it did so by setting conditions for the dismissal in order to facilitate the filing by the plaintiffs of a new suit before the Nigerian Courts.\footnote{Id.}

Originally, the ATCA was conceived to grant federal jurisdiction to serious international crimes —e.g. the crimes of torture and genocide—, that were committed on foreign soil even by foreigners, provided they are served on U.S. territory. In its modern use, it can be regarded generally as an “instrument for correcting human rights abuses”\footnote{See FLETCHER, supra note 296, at 20.} and as a resort to challenge TNCs’ wide range of abuses across the world. Precisely, despite the standards set by the Supreme Court in \textit{Sosa}\footnote{See Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).} which apparently closed “the door”\footnote{See Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); FLETCHER, supra note 295, at 157.} to over extensive human rights claims given that it is required for international law norms to be considered under the ATCA that they be “specific, universal, and obligatory,”\footnote{See Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); FLETCHER, supra note 295, at 157, 175, 177.} the more optimistic human rights activists and experts believe that it is
possible to verify a growing trend toward the expansive interpretation of the wrongdoings that may fall under the ATCA.

However, even those who defend the advantages of suing for damages under ATCA are mostly concerned with human rights violations that involve international crimes or other breaches generally considered the most serious violations of human rights, but do not address violations of social and economic rights. Some do not even consider these rights as much more than a result of “wishful thinking” and regard the provisions of the UDHR on social and economic rights, e.g. on the right to work and the right to education, as “worthy goals but hardly the basis for a body of law designed to correct case by case the injustices of the world.” They are exponents of the traditional position that has difficulties in viewing social and economic rights as sufficiently precise and as directly enforceable in the courts. In fact, a vast majority of the American legal scholars and litigators seem to share this standpoint. Not surprisingly, a recent report indicates that “[t]he United States, widely recognized as the wealthiest country in the world in aggregate terms, is also a country of economic and social extremes” and that “recognition and protection of economic and social rights in the U.S. is uneven and far from adequate. With the exception of the right to property, economic and social rights are largely absent from the U.S. Constitution.” In any case, defining the scope of human rights violations that may fall under the ATCA still remains a subject of debate.

2. The European model: civil liability in European Union law.

329 See FLETCHER, supra note 296, at 2.
330 Id.
331 See HUMAN RIGHTS INSTITUTE, supra note 24, intro.
332 Id.
Another approach that is comparable to the American approach under the ATCA is the use of civil liability proceedings in Europe to obtain redress from corporations that perpetrated or facilitated human rights abuses.\textsuperscript{333} Indeed, the “use of the competence of the European courts to deal with civil cases against corporations on the basis of their being domiciled in the EU has been referred to as a ‘European ‘Foreign Tort’ Claims Act,’ making reference to the [ATCA] of the United States”\textsuperscript{334} or simply as an “European ATCA.”\textsuperscript{335} As Jan Wouters and Leen Chanet explain, the European Parliament “has referred to corporate accountability as one means of ensuring that corporations respect human rights and has addressed the issue of foreign civil liability for European corporations in a number of resolutions.”\textsuperscript{336} Under European conflict of laws regulations “the courts of EU Member States are competent to adjudicate civil proceedings against corporations based in the EU for acts which have taken place outside the EU even if the damage occurred outside the EU and the victim is not domiciled in the EU.”\textsuperscript{337}

Such foreign direct liability cases were made possible by the application of “Council Regulation 44/2001, better known as the ‘Brussels I Regulation,’ concerning the allocation of jurisdiction in civil and commercial matters in the EU.”\textsuperscript{338} Under that regulation, which establishes the domicile of the defendant as a general rule for allocating

\textsuperscript{333} See generally Wouters & Chanet, supra note 201; Olivier de Schutter, The Accountability of Multinationals for Human Rights Violations in European Law, in NON-STATE ACTORS AND HUMAN RIGHTS, supra note 55, at 227, 262‒282.

\textsuperscript{334} Wouters & Chanet, supra note 201, para. 83.

\textsuperscript{335} Olivier De Schutter, The Accountability of Multinationals for Human Rights Violations in European Law, in NON-STATE ACTORS AND HUMAN RIGHTS, supra note 55, at 227, 262.

\textsuperscript{336} Wouters & Chanet, supra note 201, para. 79.

\textsuperscript{337} Id. para. 80.

\textsuperscript{338} Id.
jurisdiction, “persons domiciled in a non-Member State, i.e. the most likely victims of abuses by multinationals overseas, may sue a company before the courts in the Member State where the company is domiciled.”339 Additionally, “if a dispute arises out of the operations of a branch, agency or establishment of a company domiciled in the EU, the parent company may also be sued in the courts of the State where that branch, agency, or establishment is located.”340 Because plaintiffs are allowed to choose whether to sue in the State of the parent company or in the State of its branch “even if [the acts in question] have effects outside the [S]tate where the branch is situated”341 they are granted an advantageous choice of forum since “civil procedures are different in all Member States, with class-actions for human rights violations, for instance, being exclusive to the UK.”342 According to De Schutter, the use of this jurisdiction rule “in the context of human rights litigation, for violations committed abroad, especially in developing countries where European [TNCs] operate, has been explicitly envisaged by the European Parliament.”343

Despite the notorious similarities, a comparative analysis of the European mechanism and the ATCA shows significant differences. First, unlike the ATCA, “the Brussels I Regulation does not require the plaintiff to be an alien”344 given that “[t]he domicile of the defendant in the EU is sufficient in order to establish jurisdiction and neither the domicile nor the nationality of the plaintiff is relevant in this respect.”345 Second, while the ATCA “can only be invoked in case of an alleged violation of the ‘law of

339 Id. para. 81.
340 Id. para. 82.
341 Id.
342 Id.
344 Wouters & Chanet, supra note 201, para. 83.
345 Id.
nations," the European law “may be relied upon in all civil proceedings against corporations domiciled in the EU [since] the instituting of proceedings against a company domiciled in the EU on the basis of the Brussels I Regulation does not per se determine the law applicable to the conflict.” Third, and most importantly, the doctrine of forum non conveniens, “often an important procedural hurdle to ATCA foreign direct liability cases, will not bar adjudication under the Brussels I Regulation” because “the general principle that defendants may be sued in the courts of the State of their domicile is a mandatory rule wherefrom no derogation is permitted” and, thus, courts in Europe are not allowed to decline jurisdiction, not even when the competing forum would be in a non-Member State. The European Court of Justice has confirmed the non-application of the doctrine of forum non conveniens in the recent case of Andrew Owusu v. N.B. Jackson stressing that the Brussels I Regulation imposes a mandatory rule that admits no exceptions and that this is so, for several reasons, such as the need to guarantee the principle of legal certainty, to avoid undermining the legal protection of persons established in the Community (since defendants are considered to be better placed to conduct their defense before the courts of their domicile) and the problems that the forum non convenience doctrine would pose for claimants to obtain justice, in addition to the problem that it would generate because of the fact that only a limited number of European States recognizes that doctrine and, thus, its application would undermine the uniform application of the jurisdictional rules in the EU and its objective of

346 Id.
347 Id.
348 Wouters & Chanet, supra note 201, para. 84.
349 Id.
350 Id.
harmonization.\textsuperscript{352}

To conclude, some may argue that the European system is either more generous than the ATCA system or “at least potentially as generous.”\textsuperscript{353} American scholars could respond that the institution of punitive damages in the common law systems of tort law presents a huge advantage that does not exist in the civil liability system of Continental Europe.\textsuperscript{354} In any case, both transnational litigation mechanisms offer viable alternatives to criminal law, whether international or domestic, by opening the possibility of exercising universal jurisdiction in providing remedies for the redress of victims of human rights abuses perpetrated or facilitated by TNCs. However, for the reasons explained above and specifically regarding social and economic rights, the European model of civil liability appears to be more open to claims for violations of fundamental rights other than for gross abuses of civil and political rights.

\textsuperscript{352} Wouters & Chanet, supra note 201, paras. 86–90.
\textsuperscript{353} De Schutter, \textit{Imposing Human Rights Norms}, supra note 141, at 267.
\textsuperscript{354} See, \textit{e.g.}, FLETCHER, supra note 296, at 58.
V. CONCLUSION

In the context of globalization and shifting power structures, States are forced to share their power with other actors and to limit their traditional expectations regarding the extent of their sovereignty. This poses significant challenges to the international human rights regime, particularly if regarded from the state-centered perspective that is typical of public international law. However, as the classic concepts of public international law—such as the notion of sovereignty—continue to evolve, so do some of its fields such as international human rights law and international criminal law, in part differentiating themselves from the classic law of the treaties for including individuals as bearers of international rights and duties. While States are still essential protagonists in international relations and necessary subjects of international law, the world economy, politics, and legal framework are moving in the direction of a multi-centered approach in which they have to interact with other actors if they want to survive. On the other hand, States need to fulfill their essential role of responding to the internal demands and providing for the well-being of their population.

As evidenced by the analysis in this Essay, the state duty to protect is essential to the human rights regime. Undoubtedly, States will continue to bear most of the responsibility for taking progressive steps in order to achieve the full realization of social and economic rights within their jurisdiction. In my view, this duty may and should be progressively expanded to cover the protection of every human being, everywhere. For example, through the further development of multilateral engagements in the human rights arena granting enhanced powers to the international human rights bodies, not only to advance
the process of codification of human rights law or for adjudicating disputes and monitoring state compliance, but also to provide assistance when needed. I argue that States have a duty to protect that has a multilateral dimension. In my view, not only should States increasingly engage in multilateral prevention efforts, but also they should use the tools they have available to correct abuses even if they happen outside their borders.

Just like the idea of universal jurisdiction evolved in connection with a limited number of serious human rights abuses, I think that we should hope for this trend to continue evolving, expanding on the catalogue of rights and duties and on the recognition of right-bearers and duty-holders. Eventually, an international court could merge the realms of civil extra-contractual liability and common law tort jurisdiction and offer adequate redress to the victims of abuses perpetrated by transnational non-state actors, mainly TNCs. In fact, international legal obligations are slowly emerging regarding corporate responsibility for human rights violations as the current normative framework gains in precision, as States undertake a more protective approach, and as new institutions are created at the national, regional, or international level.

On the other hand, the very process of the universalization of human rights law might be regarded as undermining the sovereignty of the States. Even if that is the case, I believe that territorial jurisdictions lose every possible virtue when borders only contribute to the subjugation of entire communities, to the indiscriminate exploitation and exhaustion of their natural resources, and to recreate a type of serfdom relationship that does not even guarantee the survival of the victims. One does not need to think of the extreme cases of human rights violations associated with the operation of TNCs, to
appreciate the need for enhanced regulatory frameworks and for more effective mechanisms of monitoring compliance and enforcing basic human rights standards worldwide. Unfortunately, there is still significant resistance to view social and economic rights, other than property rights, as essential rights that have to be protected everywhere and for every human being.

Nevertheless, there has been considerable progress in the field. Nowadays a significant number of States—from the new democracies, to the “old” Europe, and even the United States under the current administration— are incorporating social and economic rights issues on their agendas. But even if governments are willing to provide for the progressive realization of the social and economic rights of individuals within their jurisdictions they might be unable to do so. TNCs mobilize capital and other resources in ways that are sometimes overwhelming for small economy States. Certainly, States cannot be left alone to meet the current challenges. In my view, international cooperation and multilateral action are essential for the effective implementation of a comprehensive framework in which to insert the relations between individual States and TNCs to grant adequate respect and protection for social and economic rights worldwide.

The multilateral implementation of binding uniform codes of conduct and international standards for certification would surely contribute to develop a culture of compliance by TNCs and to better educate consumers about their rights. Of course, civil society should play an important part in every stage of the process up to the monitoring of compliance. All strategies, including the promotion of socially responsible investments have their merits.
Fortunately, the concept of human rights and its implications, both in theory and practice, continues to evolve to offer every human being the hope for a future in which everybody, everywhere, is guaranteed an *adequate standard of living*. This evolving concept is not only one of a humanist inspiration, but also humane.

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