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INTERNATIONAL FINANCIAL INSTITUTIONS, TRANSNATIONAL CORPORATIONS AND DUTIES OF STATES*

Smita Narula¹

The foundational paradigm of international human rights law is the accountability of sovereign States for ensuring the rights of individuals living within their jurisdiction. This paradigm is increasingly challenged by economic globalisation and the resulting fragmentation of traditional State sovereignty.² The unprecedented power exerted by a handful of States, international financial institutions (IFIs), and transnational corporations (TNCs) represents a significant shift in the international order. The power imbalances created by this shift make it increasingly difficult for weaker States to assert full control over policies that are central to their ability to fulfil their social and economic rights obligations.

There is a complex and variable web of influence between IFIs, TNCs and nation states. Although IFIs are not typical ‘State actors’

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² See generally: J. E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton & Company, 2003).

on the international scene, powerful nation States nevertheless retain a significant measure of control over their programs and policies.³ These States have a disproportionate influence within IFIs. They exercise a degree of control that is manifested in the organisations' lending patterns—which reflect economic and political interests of one or several large shareholders—and leadership, which is drawn from the United States (US) and the European Union (EU). IFIs frequently condition loans on reductions in national social spending, shrinking the role and capacity of government in poorer countries and making it increasingly difficult for weaker States to control their national policy agenda in order to fulfil economic, social and cultural (ESC) rights obligations.

IFI policies have actively promoted macroeconomic reforms in the global south, promoting free trade and facilitating the expansion of TNCs. The economic power of one TNC can often eclipse the economy of an entire country, leading to a differential in bargaining power that pushes weaker States to accept a TNC's demands to secure its investment. These terms and conditions are often more responsive to a TNC's shareholders and the need to increase profits than the rights of host communities. Without a strong State capable of protecting and fulfilling the ESC rights of the local population, there is a manifest risk of serious human rights violations.

International human rights norms, and particularly ESC rights, have a potentially important role to play in addressing this power imbalance. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴ States Parties are obligated to take steps to progressively achieve the full realisation of various ESC rights for those within their territory or under their jurisdiction. Implicit in this state-centric approach is the rationale that human rights are the by-products of relationships between governments

³ The Chapter will focus on the World Bank and the International Monetary Fund as exemplars of IFIs. Although it does not address the World Trade Organization, that institution also presents similar issues.

⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3.

and the individuals they govern, rather than relationships between global actors and individuals worldwide whose rights are affected by the conduct of those actors. In an age of economic globalisation, a variety of State and non-State actors threaten ESC rights, but not all actors are given equal consideration under international law.

The existing human rights legal framework is ill-equipped to deal with these actors and the effects of their policies abroad: it limits States' obligations to respecting, protecting, and fulfilling the rights of individuals⁵ in their territory or under their jurisdiction, and it does not adequately address the obligations of IFIs and TNCs. This Chapter proposes that these jurisdictional and state-centric constraints undermine effective implementation of ESC rights, and focuses on two doctrinal challenges that are critical to meeting the obligation to ensure ESC rights under international law: (1) conceptualising the extraterritorial application of States' human rights obligations vis-à-vis ESC rights; and (2) establishing means by which IFIs and TNCs may be held accountable via their relationship to powerful States. While this Chapter focuses on the manner in which obligations can be conceptualised and justified, the Chapter necessarily addresses the issue of jurisdiction even though this topic is taken up more fully in the next Part of the volume.

Section 1 of this Chapter begins with a brief discussion of the accountability gaps in international law that undermine effective implementation of ESC rights, particularly those relating to non-state actors. Section 2 then examines two arguments to reading extraterritorial obligations into the ICESCR, finding each approach problematic in its own right. Although the section largely focuses on the right to food as an exemplar, the logic and conclusions are

⁵ In his study on the right to adequate food as a human right, Asbjørn Eide developed a three-level typology of States' duties, which is now a widely used framework for analysing States' human rights obligations generally. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right* (7 July 1987), UN Doc. E/CN.4/Sub.2/1987/23 (submitted by Asbjørn Eide). These are: the duty to respect, the duty to protect, and the duty to facilitate or fulfil human rights. *Ibid.* paras. 112-14.

applicable to other economic, social and cultural rights. Section 2 proposes a middle ground in which the overly expansive ‘international cooperation’ approach is tempered by differentiating between the types of extraterritorial rights obligations that a State may incur. Specifically, it argues that focusing on the obligations to *respect* and *protect* ESC rights extraterritorially, over the obligation to fulfil, is a more fruitful approach.

The relationship between States and the IFIs and TNCs over which they exercise significant influence must also be part of the broader extraterritorial obligations conversation. Section 3 suggests three ways that IFIs and TNCs can be held indirectly accountable for the ESC rights violations to which they contribute. First, powerful IFI member States can be required to take into account their international human rights treaty obligations when participating in IFI decision-making. Second, the *decisive influence* and *due diligence* standards—as developed elsewhere in international human rights jurisprudence—may be applied to the relationship between TNCs and their States of incorporation to hold such ‘home States’ accountable for ESC rights violations committed by certain resident TNCs. Finally, home States can, and may be obliged to, regulate TNC activity by enacting domestic legislation with extraterritorial reach.

1. The State-centric and Jurisdictional Constraints of International Human Rights Law

International human rights law has traditionally focused on the actions of States. As is now increasingly well documented, however, ESC rights are threatened not only by States, but also by IFIs, TNCs and other global actors.⁶ In addition, many States may

⁶ See, e.g., U. Hausmann and R. Kunnemann, ‘Globalising economic and social human rights by strengthening extraterritorial State obligations: Germany’s extraterritorial human rights obligations – Introduction and six case studies’ (FIAN document G50e, 2006), available at <http://www.eed.de/fix/files/doc/eed_Germany%27s_extraterritorial_human_rights_06_eng.3.pdf>, accessed 31 July 2011. See also, M. Hoodbhoy and others, ‘Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya’, *Fordham International Law Journal*, Vol. 29, No. 1 (2005), pp. 1-126. (Report of a case study on US restrictions on development aid to Kenya and its impact on health and reproductive services.

affect ESC rights outside their own territory through occupation or armed conflict, or through their membership in IFIs, or their support for TNCs operating abroad. An effective approach to implementing ESC rights must close these accountability gaps. At the same time, it must be rooted in a doctrinal framework that can be reconciled with the more conservative articulations of State responsibility under international law.

An examination of one attempt to close these accountability gaps may highlight the obstacles to be overcome. A former UN Special Rapporteur on the right to food has argued that, while the primary obligation to realise this particular ESC right rests with national governments, governments also have ‘extranational obligations’ to respect, protect and facilitate the right to food.⁷ He asserts that the duty to respect extends to actions that have a negative impact on people in other countries.⁸ Accordingly, a country must refrain from imposing food-related sanctions or embargoes and must ensure that its trade policies and relations do not violate the right to food of people in other countries.⁹ Under the duty to protect, a ‘host’ State must protect individuals against the harmful activities of TNCs investing and operating in that State. The former Special Rapporteur adds that ‘home’ States also have a duty to prevent

The report analyses the question of whether and to what extent donor nations such as the United States are or should be held responsible for violations of international law that result from their policies, and concludes that though there exists some basis for establishing such responsibility significant gaps in current international law remain).

⁷ UNCHR, *The Right to Food – Report submitted by the Special Rapporteur* (Fifty-ninth session, 2003) UN Doc. E/CN.4/2003/54 paras. 26-27, 29 (prepared by Jean Ziegler) (Ziegler, UN Doc. E/CN.4/2003/54); FAO, *Submission of Jean Ziegler, Special Rapporteur on the right to food to the MARCH 2003 Meeting of the Intergovernmental Working Group (IGWG) for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, para. 18 (2003), available at <http://www.fao.org/righttofood/common/ecg/23811_en_un_rapp.i.pdf>, accessed 31 July 2011 (Submission of Jean Ziegler); UN GA, Third Committee (Social, Humanitarian, Cultural), “‘Anyone Dying From Hunger was Dying From Murder’”, Special Rapporteur Tells Third Committee, as Discussion on Human Rights Continues’ (Fifty-seventh session, 11 November 2002), UN Doc. 6A/SHC/3721..

⁸ Ziegler, UN Doc. E/CN.4/2003/54 (n. 7 above), para. 29.

⁹ Ibid.

violations by their companies and corporations operating abroad.¹⁰ The obligation to facilitate has also been interpreted to require States to build a social and international order in which the right to food can be fully realised.¹¹ In part this requires that States “take account of their ‘extranational obligations’ in their deliberations in multilateral organisations, including the IMF [International Monetary Fund], World Bank and the World Trade Organization (WTO).”¹²

The current Special Rapporteur on the right to food has arguably gone a step farther in finding extraterritorial duties, arguing based on the ICESCR that developed countries have positive obligations to provide aid to developing countries, and should at a minimum “make reasonable progress towards contributing to the full realization of human rights by supporting the efforts of governments in developing countries”.¹³ Donor States should also “not diminish pre-existing levels of aid calculated as ODA [Official Development Assistance] in percentage of GDP [Gross Domestic Product]”, and “[a]ny regression in the level of aid provided that is not fully justified should be treated, presumptively, as a violation of States’ obligations under international law.”¹⁴ Finally, the Rapporteur has also urged that the provision of aid should be non-discriminatory, based on an objective evaluation of other countries’ needs rather than the “political, strategic, commercial or historically rooted interests” of donor States.¹⁵

¹⁰ UNCHR, *Right to Food: UN Special Rapporteur’s Report to UNCHR: New Developments Offer Hope for the Right to Food* (Fifty-ninth Session, 2003) (UNCHR, ‘Right to Food’). This assertion has been reiterated by the current Special Rapporteur on the right to food, Olivier De Schutter. UNHRC, *Report of the Special Rapporteur on the right to food, Olivier De Schutter: Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge* (Thirteenth Session, 2008) UN Doc. A/HRC/13/33/Add.2, para. 3.

¹¹ Ziegler, UN Doc. E/CN.4/2003/54 (n. 7 above), para. 29.

¹² *Ibid.*

¹³ UNHRC, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter : the role of development cooperation and food aid in realizing the right to adequate food : moving from charity to obligation* (Tenth Session, 2009) UN Doc. A/HRC/10/5.

¹⁴ *Ibid.* para. 9.

¹⁵ *Ibid.* para. 10.

In essence, the Special Rapporteurs are asserting that States have extraterritorial obligations under the ICESCR, without which effective implementation of the treaty is necessarily undermined. Under the view that States' duties must arise wherever their actions have a human rights effect,¹⁶ such an approach is plausible. Under a justice and morality framework, it is even laudable.¹⁷ Ultimately, however, such normative guidance is at odds with more conservative articulations of international law in at least two respects.

First, as noted above, the State traditionally only bears responsibility for respecting, protecting and fulfilling the rights of those within its territory or under its jurisdiction. Jurisdiction has been narrowly interpreted in international law jurisprudence to apply only to situations where a State exercises 'effective control', yet the majority of extraterritorial violations of ESC rights under globalisation are committed outside these limited scenarios. How then can a State be obligated to ensure that its policy-setting in IFIs does not violate the ESC rights of people extra-territorially?

Second, non-State actors such as TNCs are not legal subjects of international human rights law. They must therefore be regulated via the State. Yet the indirect regulation of TNCs via States is fraught with problems. Economic arrangements between a TNC and its host State may restrict the host State's ability to regulate TNC activity in practical and legal terms. Moreover, under international law, the home State is generally not liable for the conduct of non-State actors unless the non-State actors are de facto agents of the State, or the non-State actors were acting "on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct".¹⁸ Invoking home-State

¹⁶ See, e.g., F. Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Holmes Beach: Intersentia, 2004), p. 187 (hereinafter Coomans, 'Some Remarks').

¹⁷ See generally: T. Pogge, *World Poverty and Human Rights*, 2nd edition (Cambridge: Polity Press, 2008).

¹⁸ Draft Articles on the Responsibility of States for Internationally Wrongful Acts (adopted November 2001) ILC, 53rd Session, in UNGA, 56th Sess., Supp.

accountability may also implicate the extraterritorial reach of the ICESCR beyond a State's jurisdiction.

Noting the textual ambiguity and expert disagreement on the subject of extraterritorial obligations,¹⁹ the Special Representative of the UN Secretary-General on business and human rights has asserted that States are currently under no legal obligation to regulate companies acting extraterritorially.²⁰ At the same time, however, he has urged that States are not *prevented* from regulating the extraterritorial activities of IFIs or businesses domiciled in their territory and/or jurisdiction, and that such regulation constitutes a good policy practice.²¹ Finally, the Special Representative has urged that the apparent tensions that arise from extraterritorial obligations may be addressed by disaggregating the obligations that are usually bundled together, and examining which may be reasonably implemented extraterritorially.²² The remainder

No. 10, ch. IV.E.2, art. 8, UN Doc. No. A/56/10 (2004), art. 8 (hereinafter Draft Articles).

¹⁹ UNHRC, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries* (Fourth session, 2007) A/HRC/4/35/Add.1 para. 92 (hereinafter Ruggie, 2007).

²⁰ UNHRC, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights'* (Eighth session, 7 April 2008) A/HRC/8/5, para. 19, available at <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>>, accessed 31 July 2011 (*Protect, Respect and Remedy*); UNHRC, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, (Eleventh session, 2009) A/HRC/11/13 para. 115; UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie* (Seventeenth session, 21 March 2011), UN Doc. A/HRC/17/31, available at <<http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>, accessed 31 July 2011 (*Guiding Principles*).

²¹ *Ibid.*

²² UNHRC, *Business and human rights: Further steps toward the operationalization of the "protect, respect and remedy" framework – Report of*

of this Chapter takes note of the unique difficulties of extraterritorial obligations and attempts to develop modified doctrinal bases to support a framework of ESC rights jurisprudence that could resolve the incompatibilities described above. It turns next to a discussion of the extraterritorial application of States Parties' ICESCR obligations.

2. Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights

Unlike other human rights treaties, the ICESCR contains no provision specifying the scope of application of States Parties' obligations. Two arguments addressing how extraterritorial obligations might be read into the ICESCR have developed in this textual vacuum. The first approach argues that the ICESCR can be applied extraterritorially when a State exercises jurisdiction through *effective control* over individuals or an area outside of its national territory. The second approach argues that, under the obligation of *international cooperation*, States Parties to the ICESCR must respect, protect and fulfil ESC rights extraterritorially regardless of whether jurisdiction is exercised abroad. As explored below, each approach is problematic in its own right. The doctrine of effective control is too restrictive. Situations in which States have been found to exercise effective control are primarily limited to occupation and the exercise of control over armed forces. The obligation of international cooperation suffers from the opposite problem; it is too expansive and ill-defined. Moreover, it does not provide the kind of guidance that a rule of law must provide to enable States to understand and fulfil their obligations.²³

the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (Fourteenth session, 2010), UN Doc. A/HRC/14/27, para. 49; see also John Ruggie, 'Keynote Presentation at EU Presidency Conference on the "Protect, Respect and Remedy" Framework', (2009) Stockholm, available at <<http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf>>, accessed 31 July 2011.

²³ But cf. P. Alston, 'Ships Passing in the Night: The Current State of Human Rights and Development Debate Seen Through the Lens of the Millennium', *Human Rights Quarterly*, Vol. 27 (2005), pp. 755-829, at 778 (arguing that an international duty of cooperation in the fulfillment of the Millennium

However, a modified version of this latter approach that focuses on the obligations to respect and protect human rights may be sufficiently cabined to afford some promise.

2.1 Extraterritorial application where jurisdiction is exercised through ‘effective control’

The first approach to reading extraterritorial obligations into the ICESCR borrows the jurisdictional doctrine of ‘effective control’ developed in the context of jurisprudence on civil and political rights, and applies it to ESC rights.

Although the ICESCR is silent on the matter, the scope of application of its obligations has been consistently interpreted in jurisdictional terms rather than territorial terms. In the context of the right to food, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has, for example, declared that “Every State is obliged to ensure for everyone *under its jurisdiction* access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”²⁴ More generally, the Maastricht Guidelines²⁵

Development Goals may eventually crystallise into customary international law); De Schutter, ‘Moving from charity to obligation’ (n. 13 above).

²⁴ Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food* (Twentieth session, 1999), UN Doc. E/C.12/1999/11, para. 14 (hereinafter CESCR, General Comment No. 12). The ESCR Committee has consistently used the jurisdiction standard in its comments on rights contained in the ICESCR. See *General Comment 4: The right to adequate housing* (Seventh session, 1992), UN Doc. E/1992/23, para. 13; CESCR, *General Comment 13: The right to education*, (Twenty-first session, 1999), UN Doc. E/C.12/1999/10, paras. 6(a), (b); CESCR, *General Comment 14: The right to the highest attainable standard of health* (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, paras. 12(b), 51 (hereinafter CESCR, General Comment No. 14); *General Comment 15: The Right to Water* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11 (hereinafter CESCR, General Comment No. 15) paras. 12(c), 31, 44(b), 53; *General Comment 8: The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc. E/C.12/1997/8, para. 10 (hereinafter CESCR, General Comment No. 8); *General Comment 9: The domestic application of the Covenant* (Nineteenth session, 1998), UN Doc. E/C.12/1998/24 para. 9.

²⁵ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (Twenty-fourth session, 2000), UN Doc. E/C.12/2000/13 (Maastricht

provide that State responsibility for violations of the ICESCR is in principle imputable to the State within whose jurisdiction they occur.²⁶ Notably, this interpretation accords with numerous human rights treaties that do contain a scope-of-application clause. For example, the International Covenant on Civil and Political Rights (ICCPR),²⁷ the American Convention on Human Rights²⁸ and the European Convention on Human Rights and Fundamental

Guidelines). The Maastricht Guidelines are an elaboration of the nature and scope of economic, social and cultural rights violations, responses, and remedies agreed upon by members of the International Commission of Jurists. Though not legally binding, the Guidelines are an influential source of guidance on the implementation of the ICESCR.

²⁶ Ibid. para. 16.

²⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (hereinafter ICCPR). Article 2(1) of the ICCPR provides that each State party must respect and ensure “all individuals within its territory and subject to its jurisdiction” the rights recognised in the ICCPR. However, the interpretation of the phrase “within its territory and subject to its jurisdiction” has been subject to debate. If territory and jurisdiction are read in conjunction then only people who are within the territory *and* subject to a State’s jurisdiction would be protected. The *travaux préparatoires* to the ICCPR, however, provide for a broader interpretation. See UN GA, *Annotations on the text of the draft International Covenants on Human Rights* (Tenth session, part 2, 1955), UN Doc. A/2929 (1955) (asserting that “a State should not be relieved of its obligations ... to persons who remained within its jurisdiction merely because they were not within its territory”). As a result, legal scholars have adopted the interpretation that the ICCPR requires States Parties to grant protection to individuals within their territory *or* under their jurisdiction, such that a State party must protect individuals within its jurisdiction, regardless of whether they are within its territory. See T. Meron, ‘Agora: The 1994 US Action in Haiti: Extraterritoriality of Human Rights Treaties’, *American Journal of International Law*, Vol. 89 (1995), pp. 78-82. See also Human Rights Committee (HRC), *General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Eightieth session, 2004), UN Doc. CCPR/C/74/CRP.4/Rev.6 (hereinafter HRC, General Comment No. 31); *Saldias de Lopez v Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 (1984) 88 (“it would be unconscionable to so interpret [this provision] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”).

²⁸ Article 1 of the American Convention on Human Rights calls on States Parties to “ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms” recognised in the Convention. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123.

Freedoms²⁹ all refer to a State's jurisdiction in defining the scope of the treaty's application.

In civil and political rights jurisprudence, it has been recognised that under certain factual circumstances a State can be found to have jurisdiction outside its territory where it exercises 'effective control'.³⁰ The basic doctrine is articulated in the 1996 case of *Loizidou v Turkey*, wherein the European Court of Human Rights (ECHR) held that "the concept of 'jurisdiction' ... is not restricted to the national territory of the Contracting States.... [T]he responsibility of a Contracting Party could also arise when ... it exercises *effective control* of an area outside its national territory."³¹ Occupation and the exercise of control over military or paramilitary forces are often cited as the clearest examples of a State exercising effective control abroad.³² More recently, the ECHR has characterised effective control in administrative rather than military terms: the Court concluded in *Bankovic v Belgium and others* (2001) that extraterritorial jurisdiction can apply when,

²⁹ The European Convention's Article 1 provides that the "High Contracting Parties shall secure to everyone within their jurisdiction" the Convention's rights and freedoms. European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.

³⁰ See HRC, General Comment No. 31 (n. 27 above), para. 10 ("a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party...."); HRC, *Comments of the Human Rights Committee: Republic of Bosnia-Herzegovina* (1992), UN Doc. CCPR/C/79/Add.14 (1992), para. 4 (confirming that Republic of Bosnia-Herzegovina is legally responsible for acts in territory over which it had factual and effective control).

³¹ *Loizidou v Turkey* (App. No. 15318/89), Judgment of 18 December 1996, (1996) 23 EHRR 513 para. 52 (emphasis added). The case involved a landowner in the Republic of Cyprus who claimed that she was denied her property rights by Turkish forces in the area. The Court supported her claim, stating that Turkey was responsible due to its exercise of "effective overall control over that part of the island." Ibid. para. 56.

³² See *Cyprus v Turkey* (App. No. 25781/94), Judgment of 10 May 2001, (2002) 35 EHRR 30 (holding Turkey responsible for acts of a local administration that survived only by virtue of Turkey's military support); see also UNHRC, UN GA, *Report of the Human Rights Committee* (Forty-sixth session, 1991) UN Doc. A/46/40, s. 652 (noting Iraq's "clear responsibility under international law for the observance of human rights during its occupation" of Kuwait after 2 August 1990).

through effective control of a territory, a State “exercises all or some of the public powers normally to be exercised by” the government of that territory.³³ The Inter-American Commission of Human Rights (IACHR) also uses State control as the decisive test for the extraterritorial application of the American Convention on Human Rights, although it applies a lower threshold, requiring only control over the individuals whose rights have been violated as opposed to control over the territory in question.³⁴

Although the doctrine of effective control has been developed almost exclusively in the context of civil and political rights, the interdependence, interrelatedness and indivisibility of civil and

³³ *Bankovic v Belgium and Others* (App. No. 52207/99) ECHR 2001. The case was brought against 17 NATO member States by the relatives of those killed during the NATO bombing of Radio-Television Serbia (RTS) headquarters during the Kosovo conflict. The applicants argued that the bombing of RTS violated art. 2 (right to life), art. 10 (freedom of expression) and art. 13 (right to an effective remedy) of the European Convention on Human Rights. The Court concluded that because NATO States did not exercise ‘effective control’ over the bombed territory, these States did not have jurisdiction over the applicants and their deceased relatives. Though the *Bankovic* decision addressed human rights obligations under a regional instrument (the European Convention on Human Rights), such that its findings may be limited to the Council of European Member States, the case is included here to illustrate the broader trend in other human rights treaties to extend jurisdiction beyond a State’s territory.

³⁴ See, e.g., *Coard et al. v United States*, Report No. 109/99, Case 10.951, 1999 para. 37 (“In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”); *Alejandre v Cuba*, Report No. 86/99, Case 11.589, 29 September 1999 (concluding that civilian aircraft pilots were under the jurisdiction of the Cuban Air Force agents who shot them down); Inter-American Commission on Human Rights, ‘Decision for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)’, *International Legal Materials* (12 March 2002), 41 ILM (2002) p. 532, American Society of International Law, at 532 (noting that the American Declaration of the Rights and Duties of Man creates a legal obligation for all member States “in respect of persons subject to their authority and control”). The case law of the Commission indicates that States may be considered to exercise ‘effective control’ over persons as a result of three distinct types of extraterritorial conduct: military occupation, military control, and detention. C. M. Cerna, ‘Out of Bounds: The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law’, Center for Human Rights and Global Justice Working Paper, No. 6 (2006), p. 5.

political rights and ESC rights³⁵ counsels that we apply the doctrine to ICESCR obligations as well. The right to food, for example, is interdependent with civil and political rights such as the right to life, the right to self-determination and the right to information. Without food, the right to life would be rendered meaningless.³⁶ Similarly, the right to self-determination, as defined by Articles 1 of the ICCPR and ICESCR,³⁷ is violated when a State permits “the exploitation of the country’s food-producing capacity in the exclusive interests of a small part of the population or of foreign (public or private) corporate interests while a large number of the State’s inhabitants are starving or malnourished.”³⁸ Additionally, failures to disclose information about food nutrition, production and safety are all direct violations of the right to information as articulated in Article 19 of the ICCPR.³⁹ This

³⁵ World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ (12 July 1993), UN Doc. A/CONF.157/23, para. 5. See generally C. Scott, ‘The Interdependence and Permeability of Human Right Norms: Towards a Partial Fusion of the International Covenants on Human Rights’, *Osgoode Hall Law Journal*, Vol. 27 (1989) p. 769; see also CHR Res 2001/30, *Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human right* (20 April 2001), UN Doc. E/CN.4/RES2001/30, para. 4(d) (Comm’n on Hum. Rts. reaffirming “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms ... promoting and protecting one category of rights should therefore never exempt or excuse States from the promotion and protection of other rights.”).

³⁶ See, e.g., *Kishen Pattanayak & Another v State of Orissa*, A.I.R. 1989 S.C. 677 [Supreme Court of India]; *People’s Union for Civil Liberties v Union of India & Ors.* (S.C. 2001), *Writ Petition (Civil) No. 196/2001* [Supreme Court of India], reprinted in *Right to Food* (Colin Gonsalves, ed., 2004) 48. But see P. Alston, ‘International Law and the Human Right to Food’ in P. Alston and K. Tomasevski (eds), *The Right to Food* (Martinus Nijhoff Publishers, 1984) pp. 9-68, at 24 (hereinafter Alston, ‘Right to food’) (summarising arguments against a broad conceptualisation of the right to life).

³⁷ ICCPR (n. 27 above), art. 1; ICESCR (n. 4 above), art. 1.

³⁸ Alston, ‘Right to food’ (n. 36 above), p. 23.

³⁹ The then-Special Rapporteur on the Right to Food noted that “[f]ood sovereignty demands the protection of consumer interests, including regulation for food safety that embodies the precautionary principle and the accurate labeling of food and animal feed products for information about content and origins.” UNCHR, ‘Right to Food’ para. 32; see also UNCHR, *The Right to*

symbiotic relationship between civil and political rights and ESC rights argues against differential treatment of the two sets of norms.

In the 2005 case of *DRC v Uganda*, the International Court of Justice (ICJ) arrived at a similar conclusion, implying a single extraterritorial application standard for all human rights treaties.⁴⁰ In stating that obligations under the ICCPR, ICESCR and the Convention on the Rights of the Child (CRC) apply to acts committed by a State in the exercise of its jurisdiction outside its own territory, the Court did not refer to a specific treaty but instead generalised that “international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.”⁴¹ The case concerned the conduct of Ugandan forces on Congolese territory, and the Democratic Republic of Congo’s ensuing allegations that Uganda stood in violation of both international human rights law and humanitarian law. The Court first considered whether Uganda was an occupying power in the territory where its troops were present, and then considered Uganda’s responsibility for violations committed outside occupied territory. In using the language “particularly in occupied territories”, the Court implied that “application to a state’s conduct in occupied territory is but one example of situations in which human rights treaties apply extraterritorially”.⁴² The Court found Uganda in violation of its obligations under a number of human rights treaties, including the ICCPR, the African Charter on Human and Peoples’ Rights, and the CRC.

Adequate Food and to be Free From Hunger: Updated Study on the Right to Food (Fifty-first session, 1999), UN Doc. E/CN.4/Sub.2/1999/12; Convention on the Rights of the Child, GA Res. 44/25, art. 24(e) (Sept. 2, 1990) (States Parties must take appropriate measures “[t]o ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition”).

⁴⁰ J. Cerone, ‘Out of Bounds: Considering the reach of international human rights’, Center for Human Rights and Global Justice Working Paper, No. 5 (2006), p. 10.

⁴¹ *Democratic Republic of Congo (DRC) v Uganda* [2005] ICJ Rep para. 216.

⁴² Cerone, ‘Out of bounds’ (n. 40 above), p. 6.

On the basis of the jurisdictional approach to the scope of ESC rights, the well-established use of the effective control doctrine in civil and political rights jurisprudence, the interdependence of civil and political rights and ESC rights, and the implications of the ICJ's *DRC v Uganda* judgment, a strong argument can be made in favour of applying the effective control doctrine to States Parties' obligations under the ICESCR. Ultimately, however, the utility of the doctrine is likely to be extremely limited. Though international human rights jurisprudence tells us that a State can exercise effective control where it exerts military or administrative control over territory or individuals outside its sovereign space, the majority of extraterritorial violations of economic, social and cultural rights under globalisation are committed outside these limited scenarios. For the effective control doctrine to be useful in this regard, we would have to broaden our interpretation of the doctrine itself. But if effective control is not defined exclusively in relation to the military or to the public powers normally performed by the State, then how should it be understood? 'Effective control' over what?

One solution, which might be called an 'effective economic control' standard, would include those situations in which States exercise effective economic control over economic policies or markets outside their territories. On the one hand, using an economic control standard to define the jurisdictional scope of the ICESCR does have some appeal; economic and social rights are by their very nature particularly vulnerable where domestic economic sovereignty is weak.⁴³ On the other hand, such a doctrine would

⁴³ The correlation between domestic economic sovereignty and civil and political rights is not as clear. Even States that yield some degree of economic control still retain a high level of sovereignty in the civil and political arena. Zambia, for example, adhered to strict structural adjustment programs even as the government continued to maintain a stronghold in the area of civil and political rights. Priscilla Jere-Mwiindilila, 'The effects of structural adjustment on women in Zambia', *Faith, Economics and Africa*, Vol. 44, No. 2 (1994), available at <<http://www.warc.ch/pc/rw942/02.html>>, accessed 31 July 2011; cf. US Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2004: Zambia* (2005), available at <<http://www.state.gov/g/drl/rls/hrrpt/2004/41633.htm>>, accessed 31 July 2011. A summary of IMF structural adjustment programs shows that States that adopted the programs gave up a certain degree of economic sovereignty. Yet the

represent a notable departure from current interpretations of jurisdiction under international law. At the very least, its proposal raises a number of provocative questions—chief among them being exactly what set of conditions could constitute effective economic control. While these questions are beyond the scope of this Chapter, their consideration may benefit future research, policy initiatives and ultimately jurisprudence on effective implementation of ESC rights.

2.2 Extraterritorial application under the obligation of ‘international cooperation’

The obligation of international cooperation is embodied in Article 2(1) of the ICESCR, which provides:

Each State Party to the present Covenant undertakes to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 11(1), articulating the right to adequate food, further provides that “States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”⁴⁴ Article 11(2) calls on States Parties to take measures, “individually

majority of the listed States routinely resist any foreign interference into their civil and political governance (e.g., Russia, Sudan). See Double Standards, *IMF Structural Adjustment Programs: The globalization of poverty* (20 March 2005). On the other hand, however, there is some evidence showing that even if governments remain strong, the civil and political rights of their subject populations can be diminished quite radically. See generally C. Ake, ‘The Democratisation of Disempowerment’, in Jochen Hippler (ed.), *The Democratisation of Disempowerment: The Problem of Democracy in the Third World* (London: Pluto Press, 1995).

⁴⁴ Ibid. art. 11(1).

and through international co-operation”,⁴⁵ to ensure the fundamental right to be free from hunger.

In its General Comment 12 on the right to adequate food, the ESCR Committee provides guidance on the interpretation of the obligation of international cooperation. The Committee notes that States “should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food”.⁴⁶ The Comment provides that “States Parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”⁴⁷ In international agreements, where relevant, States Parties should ensure that the right to adequate food is given due attention. States Parties should also “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries”.⁴⁸ Food should also never be used as an instrument of political and economic pressure. Finally, States Parties should “facilitate access to food” and “provide the necessary aid” in other countries when required.⁴⁹ The Committee notes that “international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.”⁵⁰ The Committee looks to the “spirit” of Article 56 of the Charter of the United Nations,⁵¹ specific provisions contained in articles 11, 21, and 23⁵² of the ICESCR, and the Rome Declaration of the World

⁴⁵ Ibid. art. 11(2).

⁴⁶ CESCR, General Comment No. 12 (n. 24 above) para. 36.

⁴⁷ Ibid.

⁴⁸ Ibid. para. 37.

⁴⁹ Ibid. para. 36.

⁵⁰ CESCR, *General Comment 3: The Nature of States Parties’ Obligations* (Fifth session, 1990), 14 UN Doc. HRI/GEN/1/Rev.1 para. 14 (hereinafter CESCR, General Comment No. 3).

⁵¹ Charter of the United Nations (24 October 1945), 1 UNTS XVI. arts. 55(a), 56.

⁵² ICESCR, art. 23 (stating that international action to achieve the rights included in the ICESCR includes conventions, recommendations, technical assistance, and regional meetings).

Food Summit⁵³ in reaching its conclusions.⁵⁴ The Committee has also spelled out similar obligations in general comments on the content of the right to health⁵⁵ and the right to water.⁵⁶

While the obligation of international cooperation, as interpreted by the ESCR Committee in its General Comments, focuses on the duties to respect, protect, and fulfil, the obligations are ill-defined. Taken to its extreme, states' international responsibilities can be interpreted as a general call for the transfer of resources and wealth from rich States to poor States.⁵⁷ The articulation of the obligation in a manner that includes a duty to fulfil social and economic rights

⁵³ The Rome Declaration on World Food Security and the World Food Summit Plan of Action were adopted at the end of the 1996 World Food Summit, which brought together nearly 10,000 participants from 185 countries and the European Community. See UN FAO, 'Rome Declaration on World Food Security' (13 November 1996), available at <<http://www.fao.org/wfs/final/rd-e.htm>>, accessed 31 July 2011. The Rome Declaration sets forth commitments that present the basis for achieving sustainable food security. Commitment Seven stresses that governments are required to involve "all elements of civil society," and the involvement of the international community and the UN is recommended. Ibid. paras. 56, 57.

⁵⁴ CESCR, General Comment No. 12 (n. 24 above), paras. 36, 37. See also CESCR, General Comment No. 3 (n. 50 above), para. 13 (stating that international obligations should be seen in connection with arts. 1(3), 55 and 56 of the UN Charter).

⁵⁵ CESCR, General Comment No. 14 (n. 24 above), paras. 39, 45 ("States Parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means...." and "...it is particularly incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' which enable developing countries to fulfil their core and other obligations...").

⁵⁶ CESCR, General Comment No. 15, (n. 24 above), paras. 31, 34, 38 ("States Parties have to respect the enjoyment of the right in other countries. International cooperation requires States Parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries," and, "[d]epending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required.").

⁵⁷ See, e.g., United Nations Development Programme, *Human Development Report 2003*, Ch. 8 (Sakiko Fukunda-Parr, ed., 2003), available at <<http://hdr.undp.org/reports/global/2003>>, accessed 31 July 2011; De Schutter, 'Moving from charity to obligation', (n. 13 above).

in other countries may meet with a great deal of political resistance by States that do not wish to cast their aid-giving in legal obligation terms.⁵⁸ An unqualified obligation of international cooperation also raises the possibility that territorial States will effectively be relieved of their core human rights obligations, shifting the responsibility for human rights fulfilment to the international community without the necessary accountability, authority or control, while simultaneously undercutting the democratic legitimacy of the territorial States.⁵⁹

The need to restrict the nature of obligations incurred under the obligation of international cooperation also brings us back to the question of State control. Whether over a person or over territory, the extent of State control is not simply a jurisprudential test that is varyingly applied by international bodies and courts, but also a proxy for determining whether the actions of the State can be or have been brought to bear on individuals to the detriment or realisation of human rights. The duty to fulfil ESC rights requires affirmative measures, and therefore that the full apparatus of the State is available to enact those measures. As noted by Cerone, “In situations of extraterritorial conduct ... the full apparatus of the State is not readily available; nor is the level of control as great as that exercised by a State within its own territory.”⁶⁰ Cerone concludes that “it may be that negative obligations apply whenever a State acts extraterritorially ... but that the degree of positive obligations will be dependent upon the type and degree of control

⁵⁸ See, e.g., statements by US representatives on economic, social and cultural rights generally, and on the right to food in particular: “The progressive realization of economic, social and cultural rights will not be achieved through shifting blame from a country’s government to the international community...” Remarks by Marc Leland, Public Delegate to the 60th UN Comm’n on Hum. Rts. (29 March 2004); “The attainment of [the right to adequate food as a component of the right to an adequate standard of living] is a goal or aspiration to be realized progressively—it does not give rise to international obligations or domestic legal entitlements, nor does it diminish the responsibilities of national governments toward their citizens.” Explanation of Vote on the resolution on the Right to Food by Jeffrey de Laurentis (16 April 2004).

⁵⁹ This concern may be mitigated through a more nuanced, conditioned formulation of the international obligation. See, e.g., Alston, ‘Ships passing night’ (n. 23 above); A. Sen, ‘Rights and Agency’, *Philosophy & Public Affairs*, Vol. 11 (1982), pp. 3-39.

⁶⁰ Cerone, ‘Out of bounds’ (n. 40 above), p. 24.

(or power or authority) exercised by the State. This is not inconsistent with these institutions' general jurisprudence on positive obligations."⁶¹

A more fruitful approach therefore would emphasise the obligations to respect and protect ESC rights extraterritorially and would focus on the vehicles through which many extraterritorial violations occur—namely, international financial institutions and transnational corporations. Ensuring that States Parties' obligations extend to their relationships with these actors may be the most effective means of establishing extraterritorial application of the ICESCR in theory and in practice. Such relationships also implicate issues of jurisdiction and control, given that a State's duty to protect may be triggered in its interactions with TNCs in its jurisdiction that operate extraterritorially. Similarly, powerful States exercise a degree of influence or control over IFIs, which may trigger their duty to respect ESC rights when fashioning international financial agreements in other countries. The next section of this Chapter considers these relationships and how international jurisprudence may inform States' extraterritorial obligations vis-à-vis their interactions with these global actors.

3. International Financial Institutions and Transnational Corporations: Accountability via the State

The last half-century of economic globalisation has been characterised by the expansion of transnational corporations, an increased role for international financial institutions, and a proliferation of multilateral agreements and arrangements. International financial institutions, such as the International Monetary Fund (IMF), have actively promoted macroeconomic reforms in the global south that have facilitated the expansion of TNCs and the promotion of free trade. The IMF has also

⁶¹ Ibid. p. 36. For more on the tripartite obligations to respect, project, and fulfil and their application to extraterritorial obligations, see R. Kunnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Holmes Beach: Intersentia, 2004), pp. 201-231.

conditioned loans to developing countries on reductions in social spending and re-tooling production to service international markets, sometimes at great costs to social welfare and domestic markets.⁶² These processes make it increasingly difficult for weaker States to assert full control over many of the aspects of policy-making that are central to their ability to fulfil their ESC rights obligations.

The direct relationship between IFIs, TNCs and international human rights obligations is nuanced and currently in flux. Although TNCs have not traditionally been viewed as directly bound by international human rights law, support has recently emerged for the “Protect, Respect, Remedy” framework,⁶³ a set of obligations which, if fully embraced, would impose some international human rights obligations directly on businesses. Proposed by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, the framework states that corporations and other business enterprises must, as a baseline expectation, *respect* human rights.⁶⁴ Accompanying Guiding Principles offer a set of practical recommendations explaining how the “Protect, Respect, Remedy” framework can and should be applied.⁶⁵ This responsibility to respect means that businesses should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁶⁶ Businesses should also “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.⁶⁷ To meet these requirements, businesses must exercise

⁶² B. Lyon, ‘Discourse in Development: A Post-Colonial “Agenda” for the United Nations Committee on Economic, Social and Cultural Rights’, *American Journal of Gender, Social Policy and Law*, Vol. 10, No. 3 (2002), pp. 535-579, at 556.

⁶³ See generally *Protect, Respect and Remedy* (n. 20 above) (presenting the new framework to the Human Rights Council).

⁶⁴ See *Protect, Respect and Remedy* (n. 20 above), paras. 9, 54-55.

⁶⁵ The Guiding Principles were, endorsed by the U.N. Human Rights Council in June 2011, See generally *Guiding Principles* (n. 20 above).

⁶⁶ *Ibid.*, para. 6, Annex para. 11.

⁶⁷ *Ibid.* Annex para. 13.

due diligence to “become aware of, prevent and address adverse human rights impacts”.⁶⁸ Although it cannot yet be said that this framework reflects existing international law, if these norms do crystallise into binding legal standards they will arguably have far-reaching implications for TNCs’ direct legal obligations under international law.

Turning to IFIs, international organisations such as IFIs are subjects of international law, and as such are arguably directly bound by customary international law,⁶⁹ or perhaps may unilaterally accede to international human rights treaties.⁷⁰

⁶⁸ *Protect, Respect and Remedy* (n. 20 above), para. 56. In order to perform adequate due diligence, companies should: adopt human rights policies, which must be integrated throughout the company; conduct human rights impact assessments of their proposed plans “to address and avoid potential negative human rights impacts on an ongoing basis”; track human rights compliance performance; and facilitate “initiatives [that] can promote [the] sharing of information, improvement of tools, and standardization of metrics” on a global scale.” Ibid. paras. 60-64. Furthermore, “[f]or the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of human rights [i.e. the Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies.” Ibid., para. 58. Furthermore, according to the guiding principles that are awaiting approval by the Human Rights Council, “[a]ddressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.” *Guiding Principles* (see n. 20 above), Annex para. 11; see also *ibid.*, Annex paras. 13, 17. Businesses’ obligations extend both to the effects of direct activities as well as, sometimes, to the conduct of actors over whom the business has leverage. *Ibid.*, paras. 68, 72 (noting that the responsibility to exercise leverage is not engaged in all circumstances but rather “depends on the potential and actual human rights impacts resulting from a company’s business activities and the relationships connected to those activities.”). Additionally, corporations cannot act in complicity with third parties, whether State or non-State actors, who are committing human rights violations. *Ibid.*, para. 73.

⁶⁹ See generally F. MacKay, ‘Universal Rights or a Universe unto Itself? Indigenous Peoples’ Human Rights and World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples’ *American University International Law Review*, Vol. 17, No. 3 (2002), pp. 527-624, at 560; S.I. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Taylor & Francis, 2001), p. 134 (hereinafter Skogly, *World bank monetary fund*) (asserting that the World Bank has an international personality); D. Bradlow,

Regardless of the extent to which IFIs and TNCs are currently or may in the future be bound directly by international human rights obligations, these entities' relationships to powerful States provide an indirect and promising route through which they can be held accountable. Though IFIs and TNCs are the twin engines of economic globalisation, powerful States remain the central drivers. International financial institutions (such as the World Bank and the IMF) are essentially multi-State actors; they are comprised of member States. Member State decisions often dictate economic policies in weaker countries. Powerful States also provide their TNCs with significant financial and political backing that may allow TNCs to control resources and markets in countries in which they operate or where their products are sold. These controls may heighten the potential for, and broaden the scope of, violations of ESC rights.

This section asserts that States Parties to the ICESCR are obligated to ensure that ESC rights are respected and protected in IFI agreements. It further proposes that home States must exercise due diligence in regulating the activities of TNCs where it can be shown that the home State exercises decisive influence over the ability of TNCs to operate in an unregulated manner abroad. The 'due diligence' and 'decisive influence' standards have been shaped and defined by international law jurisprudence. While case

'The World Bank, the IMF, and Human Rights' *Transnational Law & Contemporary Problems*, Vol. 6 (1996), p. 51 (stating that the World Bank is a subject of international law because it is an international organisation and, therefore, cannot violate customary international law); B. Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Oxford University Press, 1999), pp. 323-342, at 325 (stating that the Bank may have legal obligations of consultation deriving from the Bank's constitutive documents and legal relations with its member States).

⁷⁰ See M. Darrow and L. Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', *American Journal of International Law*, Vol. 103 (2009), pp. 446-501, at 463, n. 71 (hereinafter Darrow and Arbour, 'Pillar glass') (noting that the European Community has taken the position that it may adhere to the European Convention on Human Rights, but that "[i]t remains to be seen whether the practice following the Union's accession to the Convention might furnish legal and empirical grounds for revisiting this question in the UN context.").

law has not applied these standards to the relationship between home States and TNCs, this section proposes that they may be useful in defining the obligations of home States vis-à-vis their TNCs.

3.1 Holding international financial institutions accountable via the State

As noted above, both the World Bank and the IMF are essentially multi-State actors, and many of their member States have ratified the ICESCR. As international financial institutions, however, the World Bank and IMF also have separate legal personalities. As such, it has been argued that individual member States do not automatically incur international responsibility for ESC rights violations except and to the extent that the violations committed by IFIs were foreseeable.⁷¹ At the same time, member States that have ratified the ICESCR do not leave their human rights obligations at the door when entering these corridors of power;⁷² they may use their influence to ensure that the actions of the IFIs to which they belong do not violate their own human rights obligations. This section considers how such obligations could better inform member States' participation in, and influence over, IFI decision-making.

The Maastricht Guidelines provide that States Parties' duty to protect extends to their "participation in international organizations, where they act collectively".⁷³ They provide that States should "use their influence to ensure that violations do not

⁷¹ See, e.g., C. Ryngaert, 'Contribution to ESF Exploratory Workshop on Transnational Human Rights Obligations in the Field of Economic, Social and Cultural Rights' (2008) Working Paper, pp. 2, 15 (hereinafter Ryngaert, 'Contribution exploratory workshop') (arguing that "member State responsibility is only engaged to the extent that the human rights violations committed by the international organization were foreseeable" and adding that "deciding otherwise would largely negate the separate international legal personality" of IFIs).

⁷² CESCR, General Comment No. 8 (n. 24 above), paras. 11-14 (describing the human rights obligations of a party or parties responsible for the imposition of sanctions, be they a State, a group of States, the international community or an international or regional organisation)

⁷³ Maastricht Guidelines (n. 25 above), para. 19.

result from the programmes and policies of the organizations of which they are members”.⁷⁴ Such an approach is consonant with the ESCR Committee’s views on State responsibility, which condition States’ obligations to fulfil certain rights on domestic and international capacity.⁷⁵ The Guidelines also call upon international organisations, including IFIs, to “correct their policies so that they do not result in deprivation of economic, social and cultural rights”,⁷⁶ and to take these rights into account when policies and programs are “implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights”.⁷⁷

The Guidelines and the ESCR Committee’s approach to State responsibility raise a key question that must be answered in order to assign States extraterritorial obligations to respect ESC rights: do member States exert sufficient influence within IFIs such that they can use their influence to ensure that violations do not result from IFI programs and policies? For the purpose of this analysis we will focus on the IMF and to a lesser extent the World Bank.

The relative influence of IFI member States

Both the World Bank and the IMF are composed of and driven by signatory States. The World Bank is made up of 187 member countries, which are jointly responsible for how the institution is financed and how its money is spent.⁷⁸ The IMF is also made up of

⁷⁴ Ibid.

⁷⁵ CESCR, ‘General Comment 3’ (n. 54 above) paras. 9, 13 (noting that the obligation to progressively realize the rights in the Covenant is a “necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights” and that “the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.”).

⁷⁶ Maastricht Guidelines (n. 25 above), para. 19.

⁷⁷ Ibid.

⁷⁸ Both the World Bank and the IMF came out of the Bretton Woods Agreement of 1944. To become part of the World Bank, countries must first be admitted to the IMF. R.Faini and E. Grilli, ‘Who Runs the IFIs?’ (hereinafter Faini & Grilli, ‘Who runs IFIs?’ Centro Studi Luca D’Aglia, Development Studies Working

the same 187 member countries, which are jointly responsible for the IMF's functions.⁷⁹ Still, some member countries have much more influence than others.

The disproportionate influence of rich States within IFIs is borne out by empirical research analysing the pattern of lending of both the World Bank and the IMF as a function of the interests of their large shareholders. In a discussion paper titled 'Who Runs the IFIs?', the Centre for Economic Policy Research concludes that the lending pattern of both institutions "is influenced by the commercial and the financial interests of the US and, to a lesser extent, of the EU".⁸⁰ Many lending decisions are political in nature, responding to the national interests of one or several large shareholders "who can mass enough support from the others to carry them through or to block them".⁸¹ An informal power sharing agreement between Europe and the United States also determines the nationality of the heads of the two institutions. The Managing Director of the IMF is always a European, while the President of the World Bank is always an American.⁸² Maintaining a certain national in these influential positions "is in itself an indicator of influence".⁸³ In particular, the research highlights the influence, through the top management of both institutions, of the United States (the largest shareholder), the United Kingdom, France and, more recently, Germany. The Executive Directors of each of these countries are particularly influential inside the two Boards. In addition, the United States Treasury has "been able to exert a relatively stronger day to day monitoring and 'control' over both organizations because of its locational advantage".⁸⁴ The substantial influence of powerful States within the IMF suggests that they are capable of influencing the organisation to act in

Papers, No. 191 (2004), available at www.dagliano.unimi.it/media/WP2004_191.pdf, accessed 31 July 2011.

⁷⁹ Ibid.

⁸⁰ Faini and Grilli, 'Who runs IFIs?' (n. 78 above), at Abstract. The researchers add that Japan's role is "smaller and more regional, being largely confined to decisions concerning Asia." Ibid. p. 17.

⁸¹ Ibid. p 4.

⁸² Ibid. p. 5; Stiglitz, *Globalization discontents* (n. 2 above), p. 19.

⁸³ Ibid.

⁸⁴ Faini and Grilli, 'Who runs IFIs?' (n. 78 above), p. 8.

accordance with international law, as suggested by the Maastricht Guidelines.

The human rights obligations of IFI member States

Commentators have argued that institutions such as the World Bank and the IMF have international personalities and, as such, have rights and duties under customary international law that are separate from and in addition to the duties of their member States.⁸⁵ There is also some support for the proposition that international organisations may unilaterally accede to, and as a result be bound by, international human rights treaties.⁸⁶ Regardless of the extents to which customary international law or international treaty law directly apply, IFIs can still be reached indirectly through the human rights obligations of member States.

As described above, IFIs are the sum of their parts, and the parts consist of member States, some with more influence than others. All European Union countries have ratified the ICESCR and are obligated to comply with its provisions.⁸⁷ Japan, which plays an influential role in lending to Asian countries, has also ratified the ICESCR.⁸⁸ Indeed, member States that have ratified the ICESCR account for nearly three-quarters of the IMF's voting power.⁸⁹ Notably absent from this list is the United States, which has not ratified the ICESCR. It has, however, signed the Covenant.⁹⁰ On a

⁸⁵ See generally MacKay, 'Universal rights universe?' (n. 69 above), p. 560; Skogly, *World bank monetary fund* (n. 69 above), p. 134; Bradlow, 'Bank, IMF, human rights' (n. 69 above), p. 51; Kingsbury, 'Operational international institutions' (n. 69 above), pp. 323, 325.

⁸⁶ Darrow and Arbour, 'Pillar glass' (n. 70 above), p. 463, n. 71.

⁸⁷ For example, the United Kingdom ratified the ICESCR on 20 August 1976; Germany ratified the ICESCR on 3 January 1976; France ratified the ICESCR on 4 February 1982. *Status of ratification of the Principal International Human Rights Treaties* 11, available at <<http://www2.ohchr.org/english/bodies/docs/status.pdf>> at 5, 11.

⁸⁸ Japan ratified the ICESCR on 21 September 1979. *Ibid.* p. 6.

⁸⁹ R. Hennessy, 'Defining States' International Legal Obligations to Cooperate for the Achievement of Human Development: One Aspect of Operationalising a Human Rights-Based Approach to Development' in M. Scheinin & M. Suksi (eds.), *Human Rights in Development Yearbook 2002* (Martinus Nijhoff Publishers 2005), pp. 71, 93.

⁹⁰ The United States signed the ICESCR on 5 October 1977. *Ibid.* p. 11.

technical reading, it must therefore still refrain from taking actions that would go against the object and purpose of the treaty.⁹¹ The US and other non-ratifying States must also abide by whatever ESC rights are reflected in customary international law.⁹² In sum, when the World Bank or the IMF disregards or violates human rights, it is acting at the behest of member States that are themselves bound by international human rights obligations. To the extent that these nations direct IFIs to engage in human rights violations, or fail to adequately supervise the actions that are being taken on their behalf, the human rights violations committed by IFIs also reflect the failure of these member States to abide by their international human rights obligations. The World Bank's former Senior Counsel agrees, insofar as he states that the Bank must account for its members' treaty obligations:

Because governments are the owners of the institutions like the World Bank, and are bound to comply with the treaties they have ratified, multilateral financial institutions must be careful to ensure that if these treaties are implicated in their projects, the treaties are appropriately taken into account in project design and finance.⁹³

⁹¹ See Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980), UN Doc. A/Conf.39/27, 1155 UNTS 331. For such a doctrine to be controlling in the context of the United States' participation in IFIs, it would have to be shown that international cooperation is central to the object and purpose of the ICESCR. As noted above, the critical role of international cooperation has repeatedly been affirmed by the ESCR Committee in its interpretation of States Parties' obligations under the ICESCR. Moreover, under economic globalisation, effective implementation of the ICESCR is greatly undermined without some degree of international cooperation. Still, concrete conclusions in this regard are likely premature.

⁹² Under the so-called "persistent objector rule" a persistent objection to the establishment of a norm while it is becoming law may, however, exempt the objector from such a norm. Jonathan I. Charney, 'Universal International Law' *American Journal of International Law*, Vol. 87, No. 4 (1993), pp. 529-551, at 538. Norms that have achieved *jus cogens* status are exempt from the persistent objector rule, and bind all states regardless of objections made. *Ibid.* pp. 538-39.

⁹³ C.E. Di Leva, 'International Environmental Law and Development', *Georgetown International Environmental Law Review*, Vol. 10, No. 2 (1998), pp. 501-550, at 501-502. Note also that certain World Bank operational policies explicitly require the Bank to take account and avoid violation of member States' environmental treaty commitments. World Bank, OP 4.01 (January 1999), para. 3, available at

The notion that States can be held responsible for implementing international agreements that violate their international human rights obligations is not new to international law. As early as 1958, the European Commission of Human Rights observed that if a State party to the European Convention on Human Rights concludes an international agreement that disables it from performing its functions under the Convention, it will be answerable for any resultant breach of its human rights obligations.⁹⁴ In *X & X v FRG* the Commission held that “if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty”.⁹⁵ In other words, absent the invocation of *jus cogens* norms, Security Council resolutions or other international laws with some form of hierarchical primacy, earlier human rights treaty obligations must prevail over inconsistent agreements entered into at a later stage.

This jurisprudence mirrors the normative guidance on States Parties’ obligations under the ICESCR. Where a State Party enters an agreement with an IFI that undermines its ability to respect, protect and fulfil ESC rights, it will be held responsible for breaches of its obligations.⁹⁶ The thornier question is raised by the as-of-yet unsettled issue of member State responsibility, which

<<http://siteresources.worldbank.org/INTFORESTS/Resources/OP401.pdf>>, accessed 31 July 2011 (stating that the required environmental impact assessment takes into account the “obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements” and that the World Bank “does not finance project activities that would contravene such country obligations, as identified during the EA [Environmental Assessment]”). There is, however, no similar written policy directing the Bank to consider international human rights treaties.

⁹⁴ *X & X v F.R.G.*, 1958 Y.B. Eur. Conv. on H.R. 300 (European Commission on Human Rights).

⁹⁵ *Ibid.*

⁹⁶ Such an interpretation is consistent with the Maastricht Guidelines, which provide that violations under the ICESCR can occur when a State fails to “take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.” Maastricht Guidelines (n. 25 above), 15(j).

would provide that IMF member States must ensure that ICESCR rights continue to be secured when they act as a collective to shape the economic policies of weaker States. If we define the obligation of international cooperation to mean that States Parties must respect and protect ESC rights extraterritorially, then such an obligation could be applied to a State's participation in IFIs.

3.2 Holding transnational corporations accountable via the State

The liberalisation of trade and the privatisation and deregulation of economies have substantially reduced some States' influence over the daily economic lives of their citizens. The so-called "decline of the nation State" is accompanied by the rise of another powerful actor—the TNC.⁹⁷ Imposing ESC rights obligations on TNCs presents a significant and unmet challenge. As explored above, human rights law organises itself around the relationship between a State and the individuals under the State's jurisdiction. As such, it does not provide a viable mechanism for holding TNCs directly accountable. International legal accountability for TNCs remains in flux.⁹⁸ While legal regulation of domestic corporate activity affecting human rights is becoming commonplace,⁹⁹ by and large these laws do not apply to the extraterritorial operations of TNCs.¹⁰⁰ Private-sector initiatives aimed at creating mechanisms of corporate accountability remain limited in scope and are self-

⁹⁷ M.T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC' in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999), p. 553.

⁹⁸ See *Protect, Respect and Remedy* (n. 20 above). For a comprehensive framework proposal for imposing international obligations on TNCs, see D. Kinley and J. Tadaki, 'From Talk to Walk: The Emergency of Human Rights Responsibilities for Corporations at International Law', *Virginia Journal of International Law*, Vol. 44 (2004), pp. 931-1024 (hereinafter Kinley and Tadaki, 'Talk walk').

⁹⁹ See generally D. Kinley, 'Human Rights as Legally Binding or Merely Relevant?' in S. Bottomley and D. Kinley (eds.), *Commercial Law and Human Rights* (Ashgate Publishing, 2002), p. 25 (legal regulation of corporate activity affecting human rights can be found in areas such as criminal law, and in anti-discrimination, health, work safety, environmental protection, and labour rights laws).

¹⁰⁰ Kinley and Tadaki, 'Talk walk' (n. 98 above), pp. 937-939.

regulating.¹⁰¹ Although a framework is emerging that would place some responsibility to prevent international human rights violations directly on corporations and other business entities,¹⁰² many steps remain before such obligations could be considered legally binding. To the extent that international human rights law holds a State responsible for the actions of TNCs, such responsibility normally attaches to the host State. Economic arrangements between the host State and the TNC may, however, restrict the ability of the host State to regulate the TNC in practical and legal terms. Meanwhile, the responsibility of home States—that provide extensive political and financial support to TNCs that may violate ESC rights abroad—remains largely unaddressed. This section proposes home-State accountability where the home State exercises *decisive influence* over the ability of TNCs to operate in an unregulated manner abroad.

Indirect accountability: the role of the State

Given the current inadequacy of mechanisms to hold TNCs directly accountable, the focus on indirect accountability—that is, the accountability of the State for TNC actions—must be sharpened. International human rights law obligates States to regulate the behaviour of non-State actors, whether individuals or corporations. The duty to *protect* requires States Parties to protect

¹⁰¹ On a regional level, both the European Union (EU) and the Organization of American States (OAS) have taken steps toward regulating the conduct of TNCs, although they too are inadequate in ensuring the full range of ESC rights. The EU has developed a Code of Conduct, which is directed at States and focuses exclusively on arms exports. See MB Baker, 'Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise', *Wisconsin International Law Journal*, Vol. 20, No. 1 (2001) 89, pp. 126-29 (hereinafter Baker, 'Tightening the Toothless Vise'); see also Federation of American Scientists, 'Arms Transfers Codes of Conduct' at <<http://www.fas.org/asmp/campaigns/codecon.html>>, accessed 31 July 2011. The OAS created the Inter-American Convention Against Corruption, which criminalises acts of bribery. Inter-American Convention Against Corruption, Third plen. Session (29 March 1996) available at <<http://www.oas.org/juridico/English/Treaties/b-58.html>>, accessed 31 July 2011. However, the Convention is narrow in scope and is not self-executing, and even ratifying countries have not taken any steps towards its implementation. See Baker, 'Tightening the Toothless Vise', pp. 128-29

¹⁰² *Protect, Respect and Remedy* (n. 20 above)

individuals against the harmful activities of TNCs investing and operating in the State ('host-State obligations').

To the extent that international human rights adjudicatory bodies have considered State accountability for the actions of TNCs, they have limited their consideration to host-State accountability. In the Ogoniland case, the African Commission on Human and Peoples' Rights found that the Nigerian government had failed to regulate the harmful activities of oil companies against the Ogoni people.¹⁰³ Commenting specifically on the right to food, the Commission held that there was a violation because Nigeria had, *inter alia*, "allowed private oil companies¹⁰⁴ to destroy food sources".¹⁰⁵ While the Ogoniland case held a State liable for failing to regulate corporate activity, its findings were limited to the host State (in this case Nigeria).¹⁰⁶

Ruggie's work under the "Protect, Respect and Remedy" framework reinforces these obligations, drawing on existing legal obligations to highlight States' duties to protect against human rights abuses by businesses through appropriate policies, regulation and adjudication. While the primary focus appears to be on host States,¹⁰⁷ the framework does encourage partnerships between transnationals' home and host States as a way to assist host States that lack the technical or financial resources to effectively regulate and monitor companies.¹⁰⁸ The extent to which such cooperation is legally required, or simply desirable, however, is unclear. The Framework also emphasises States' existing legal duties to provide

¹⁰³ *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2001), available at <<http://cesr.org/nigeria>> (hereinafter *SERAC v Nigeria*).

¹⁰⁴ The corporation in the case was a joint venture between the Nigerian National Petroleum Corporation (a majority partner with a 55 percent stake) and Shell Petroleum Development Corporation. Shell operated the consortium.

¹⁰⁵ *SERAC v Nigeria* (n. 103 above) para. 66.

¹⁰⁶ The Commission reaffirmed that: "The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation." *SERAC v Nigeria*.

¹⁰⁷ *Protect, Respect and Remedy* (n. 20 above), paras. 33-42.

¹⁰⁸ *Ibid.* para. 45.

access to remedies when such violations occur, through investigation, prosecution, punishment and redress.¹⁰⁹

There are many sound reasons to expect the host State to regulate TNC activity. The host State has primary responsibility for the protection of human rights in its territory or under its jurisdiction; the host State negotiates the terms under which TNCs can operate in the country; and the host State's administrative and judicial machinery can provide a regulatory framework. Economic arrangements between a TNC and the State may, however, restrict the host State's ability to perform its duties.¹¹⁰

One example is the "stability" clause that is common to agreements between foreign investors and the host State, which provides that the State will not impose further regulations on the investor that could diminish the profitability of the investment.¹¹¹ In addition, the wealth of the TNCs may serve as a bargaining chip capable of shaping the State's economic and political stance vis-à-vis the TNC.¹¹² According to the United Nations Conference on Trade and Development, approximately one-third of the world's top 100 economies are corporations.¹¹³ According to other

¹⁰⁹ Ibid. paras. 82-92, 96-99; UNHRC, *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie* (Eleventh session, 2009), UN Doc. A/HRC/11/13/Add.1.

¹¹⁰ See, e.g., Amnesty International, *Contracting out of Human Rights: The Chad-Cameroon Pipeline Project* 7 (2005), available at <<http://www.amnesty.org/en/library/asset/POL34/012/2005/en/76f5b921-d4bf-11dd-8a23-d58a49c0d652/pol340122005en.pdf>>, accessed 31 July 2011 (stating that State-investor "project agreements could encourage the governments of Chad and Cameroon to ignore their human rights obligations").

¹¹¹ See O. De Schutter, 'Transnational Corporations as Instruments of Human Development' in P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005), pp. 414-416 (hereinafter De Schutter, 'Transnational corporations').

¹¹² M. Baker, 'Tightening the Toothless Vise' (n. 101 above), pp. 89-142, at 95-96; see also Su-Ping Lu, Note, 'Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law', *Columbia Journal of Transnational Law*, Vol. 38 (2000), pp. 603-629, at 605-606.

¹¹³ UN Conference on Trade and Development, 'Are Transnationals Bigger than Countries?' (8 December 2002), UN Doc. TAD/INF/PR/47, available at

estimates, the top twenty-five TNCs may be richer than approximately 170 nations.¹¹⁴ As Mark Baker points out, many small, underdeveloped nations with low GDPs are unable to cope with the power of TNCs.¹¹⁵ The attraction of capital investment from a TNC to a poor nation may be so great that “it could be argued that political leaders in poor nations would be abusing their discretion if they did not allow their nation to be infiltrated by [a TNC]”.¹¹⁶ Exacerbating the problem is the fact that, in many instances, developing States’ governments and their ruling elites actually benefit from TNCs’ unregulated behaviour to the detriment of the countries’ poorer populations.¹¹⁷ Privileges accorded to TNCs are also often the result of government corruption and acceptance of bribes by government officials.¹¹⁸ Moreover, TNCs are not motivated by the same interests as the State. Their fiduciary duty to their shareholders in many cases puts profit-seeking ahead of the interests of the local communities in which they operate.

This Chapter does not dismiss the ability or obligation of host States to honour their commitments under the ICESCR. Moreover, international law on this point is quite clear. What remains unclear is the responsibility of the home State. While home States often negotiate advantageous frameworks and provide other essential

<<http://www.unctad.org/Templates/Webflyer.asp?docID=2426&intItemID=1528&lang=1>>, accessed 31 July 2011.

¹¹⁴ Baker, ‘Tightening toothless vise’ (n. 101 above), p. 94.

¹¹⁵ Ibid.

¹¹⁶ Ibid. pp. 95-96.

¹¹⁷ According to one study, “foreign investment dependence benefits the elite segments of the income-earning population over the poorer eighty percent.” L. Beer and T. Boswell, ‘The Resilience of Dependency Effects in Explaining Income Inequality in the Global Economy: A Cross-National Analysis, 1975–1995’, *Journal of World Systems Research*, Vol. 8 (2002), pp. 30-144, at 52, available at <<http://jwsr.ucr.edu/archive/vol8/number1/pdf/jwsr-v8n1-beerboswell.pdf>>, accessed 31 July 2011.

¹¹⁸ Stiglitz, *Globalization discontents* (n. 2 above), pp. 71-72; see also Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at <<http://www.hrw.org/reports/1999/enron/>>, accessed 31 July 2011.

services critical to the operation of TNCs abroad, they are not held responsible for the consequences.¹¹⁹

3.3 Home-State accountability

Economic globalisation increasingly blurs the line between State and non-State actors. In particular, the relationship between home States and TNCs has become significantly more interdependent. Home States actively provide financial and political support to TNCs, without which the TNCs would be unable to operate abroad. If the obligation of international cooperation includes the duty to protect individuals from the extraterritorial activities of TNCs, then such accountability must be rooted in a doctrinal framework that supports imputing a TNC's actions in the host State to the home State on jurisdictional grounds.

Generally, States are not liable for the conduct of non-State actors unless those actors are de facto agents of the State, or unless they act “on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct.”¹²⁰ At the same time, human rights jurisprudence developed by the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v*

¹¹⁹ For example, in 1998, the US administration and members of Congress pursued fast-track authorisation for trade agreements that would remove labour rights standards from bilateral treaty negotiations. *Human Rights Watch, World Report 1998: United States—Human Rights Development*, available at <http://www.hrw.org/legacy/worldreport/Back.htm#P0_0>, accessed 31 July 2011. But see provisions of the Caribbean Basin Initiative (CBI), 19 U.S.C. § 2702(c)(8) (2004), which is one of the programs granting favorable terms of trade for developing nations, requiring that one of the discretionary criteria which the President must take into account in designating a country as eligible for CBI is the degree to which workers in such a country are afforded reasonable workplace conditions and enjoy the right to organise and bargain collectively; and the Generalized System of Preferences (GSP), 19 U.S.C. § 2462 (2004), which requires the recipients to respect “internationally recognized worker rights” in order to receive the benefits, defining internationally recognised worker rights as: “(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health,” Trade Act of 1974, § 502(a)(4) (codified as amended at 19 U.S.C. §2467(a)(4) (2004)).

¹²⁰ Draft Articles (n. 18 above), art. 8.

*Honduras*¹²¹ suggests a more expansive standard: States must exercise *due diligence* in protecting individuals from abuses committed by unknown or non-State actors, regardless of their relationship to those actors.¹²² A merging of these standards, hinted at in the Maastricht Guidelines, may provide a means of bridging this gap. The Maastricht Guidelines provide that the obligation to protect includes

the State's responsibility to ensure that private entities or individuals, including transnational corporations *over which they exercise jurisdiction*, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise *due diligence* in controlling the behavior of such non-state actors.¹²³

This section will consider two questions raised by a State's positive obligation to protect. First, how do we determine whether a home State exercises jurisdiction over a TNC operating abroad? Second, once a State's jurisdiction over a particular TNC has been established, what is the scope of obligations imposed by a due diligence standard? To date, there is little international law jurisprudence on the issue of home-State accountability for TNC actions that take place abroad.¹²⁴ Jurisprudence on State

¹²¹ See *infra* Section 3.3, 'The due-diligence standard', for a discussion of the case.

¹²² There may of course be other doctrinal or disciplinary frameworks outside of international human rights law that would be useful in examining the responsibility of States vis-à-vis TNCs. In environmental law, for example, the principle of due diligence has been used to stand for "the obligation of a State to use its best endeavors [to ensure] that its territory is not used to damage other territories." W. Lang, 'UN-Principles and International Environmental Law', *Max Planck United Nations Yearbook*, Vol. 3 (1998) p. 160.

¹²³ Maastricht Guidelines (n. 25 above), Guideline 18 (emphases added).

¹²⁴ The U.N. Committee on the Elimination of Racial Discrimination has implied that a country may violate the Convention on the Elimination of all Forms of Racial Discrimination by failing to regulate companies that violate indigenous rights abroad. They do not, however, provide any clear analysis or conclusions on the issue. Committee on the Elimination of Racial Discrimination. *Consideration of Reports Submitted by State Parties Under Article 9 of the*

jurisdiction over non-State actors in other international human rights contexts may offer some guidance and suggest a paradigm that may be applied to the relationship between home States and TNCs.

The effective or overall control standard

State liability for non-State actors has been largely restricted to acts of de facto State agents. However, the category of ‘agents’ is gradually broadening. Apart from strict agency relationships, international law holds States accountable for actions of non-State parties over which the State exercises jurisdiction.¹²⁵ A series of cases have attempted to answer the question of when a State can be said to exercise jurisdiction over non-State actors. The answer ultimately rests on the degree of control that a State exerts over the activities of the non-State actors in question.

In the seminal case of *Nicaragua v United States*, the ICJ held that that the acts of contras (counterrevolutionary fighters) could not be attributed to the United States on the reasoning that US

participation ... in the financing, organizing, training, supplying and equipping of the contras, the selection of ... targets, and the planning of the whole of the operation, is still insufficient in itself ... for the purpose of attributing to the United States the acts committed by the contras....¹²⁶

The Court said that in order to hold the United States responsible,

Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination (Canada), (2007) UN Doc. CERD/C/CAN/CO/18, para. 17, available at

<<http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.18.doc>>.

¹²⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits)*, Judgment of 27 June 1986, 1986 ICJ Reports 14, para. 115.

¹²⁶ *Ibid.* paras. 92-96.

it would have to be proved that the United States had “effective control” of the contras.¹²⁷

The ‘effective control’ test in *Nicaragua* should not be confused with the language of ‘effective control’ cited by the European Court of Human Rights and the Human Rights Committee in defining State jurisdiction for the purposes of the conventions they monitor. The *Nicaragua* test deals with responsibilities that flow from a State’s control over non-State agents while the latter deals with responsibilities that flow from a State having control over a specific piece of territory. The two do not always coincide. For example, a State could be held responsible for having effective control over mercenaries operating abroad even where the State lacks effective control over the territory in which the mercenaries operate.

More recently, in *Prosecutor v Dusko Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the ‘effective control’ test in favour of the ‘overall control’ test.¹²⁸ In addressing the issue of what measure of State control international law requires for organised military groups, the ICTY looked to the UN Security Council resolutions and debates surrounding, *inter alia*, South African raids into Zambia to destroy bases of the SWAPO in 1976, Israeli raids into Lebanon in June 1982, the South African raid into Lesotho in December 1982, and the decision in the *Nicaragua* case.¹²⁹ The Tribunal concluded:

[I]t would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State.... [I]t must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating

¹²⁷ Ibid. Gibney, Tomasevski, and Vedsted-Hansen criticise the ICJ’s decision in *Nicaragua* as having set the bar too high and treating ‘control’ as an either/or proposition, failing to take into account the continuum that exists in practice. M. Gibney and others, ‘Transnational State Responsibility for Violations of Human Rights’, *Harvard Human Rights Journal*, Vol. 12 (1999), pp. 267-295, at 286.

¹²⁸ *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, Judgment, para. 120 (15 July 1999).

¹²⁹ Ibid. para. 130.

or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.¹³⁰

The *Tadic* case must be distinguished from *Nicaragua* on multiple grounds. Unlike *Nicaragua*, the non-State actor in *Tadic* was an organised armed force. The issue before the ICTY in *Tadic* was whether the conflict in question could be characterised as an international armed conflict, such that the application of certain international humanitarian norms was justified.¹³¹ Moreover, *Nicaragua* dealt with the issue of State responsibility while *Tadic* dealt with individual responsibility. It could therefore be argued that the *Tadic* decision is confined to its facts.¹³² Regardless, under either standard, States can easily sidestep any responsibility for the acts of TNCs by claiming that they do not exercise such a high degree of control.¹³³ Although TNCs receive substantial support and backing from their home States, to suggest that they are under the State's effective or overall control would be to ignore the substantial autonomy TNCs enjoy in the conduct of day-to-day affairs, both at home and abroad.

¹³⁰ Ibid. paras. 130-31.

¹³¹ Ibid. para. 103.

¹³² In adopting the *Draft Articles*, the International Law Commission did not interpret *Tadic* as meriting a departure from the standard articulated in *Nicaragua*. *Draft Articles* (n. 18 above), art. 104. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 2007, paras. 404-06, available at <www.icj-cij.org>.

¹³³ Gibney and others, 'Transnational State responsibility' (n. 127 above), p. 287 (arguing that the "effective control" test in *Nicaragua* is prone to evasion by States that deny control over the TNC in question).

The 'decisive influence' standard

A 2004 European Court of Human Rights case suggests that the standard is loosening.¹³⁴ In *Ilaşcu and others v Moldova and Russia*, the Court found that Russia was responsible for harm caused to the applicants by the authorities in the breakaway region of the “Moldavian Republic of Transdniestria” (MRT).¹³⁵ It reasoned that MRT forces were under the “effective control, *or at the very least decisive influence*” of Russia, adding that the forces survived “by virtue of the military, economic, financial and political support given to [them] by the Russian Federation”.¹³⁶ It is important to note that, in holding Russia accountable, the Court did not require that Russia in any way direct or enforce the particular operation in question,¹³⁷ nor did it require even that Russia coordinate or help MRT “in the general planning of its military activity,” as had the ICTY in *Tadic*.¹³⁸ Despite explicitly acknowledging that “effective control” was not necessarily met, the Court nonetheless rebuked Russia for not acting to prevent foreseeable abuse, and found “a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants’ fate”.¹³⁹ More important than *operational* influence was *existential* influence, and the fact that, but for Russian support, the MRT would not have been capable of maintaining a military force.

¹³⁴ See also D. Jinks, ‘State Responsibility for the Acts of Private Armed Groups’, *Chicago Journal of International Law*, Vol. 4 (2003), pp. 83-96, at 84-85. Jinks argued that the United States’ actions in Afghanistan post-September 11, 2001 subtly loosened the effective control standard because the US invasion of Afghanistan was justified on the grounds that the Taliban “supported and harbored” al-Qaeda. *Ibid.* The Security Council’s support of the invasion signaled a relaxing of international law standards on State responsibility. *Ibid.*

¹³⁵ *Ilaşcu v Moldova and Russia* (App. No. 48787/99), Judgment of 8 July 2004, para. 318 (hereinafter *Ilaşcu*). Although the case deals specifically with the issue of jurisdiction, it is nonetheless informative on the question of State responsibility. The Moldavian Republic of Transdniestria is a region of Moldova which proclaimed its independence in 1991 but is not recognised by the international community.

¹³⁶ *Ibid.* para. 392 (emphasis added).

¹³⁷ *Nicaragua v United States* (n. 125 above), para. 115.

¹³⁸ *Prosecutor v Dusko Tadic* (n. 128 above) paras. 130-31.

¹³⁹ *Ilaşcu v Moldova and Russia* (n. 135 above), para. 393.

Three years later, this principle was reaffirmed in the 2007 *Genocide* judgment concerning the Srebrenica massacre of July 1995. The ICJ concluded unequivocally that the then-Federal Republic of Yugoslavia (FRY) did *not* have effective control over the “operations in the course of which [the] massacres ... were perpetrated.”¹⁴⁰ Yet the Court held that the FRY’s international responsibility was nevertheless triggered by its “undeniable influence” over the army of the Republika Srpska (VRS), as demonstrated by “the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other”.¹⁴¹

This distinction between ‘control’ and ‘influence’ is critical because the relationship between powerful States and TNCs is more akin to the circumstances of *Ilascu* or the *Genocide* case than to those of *Nicaragua* or *Tadic*. For the most part, home States have no involvement (not even ‘general’) in the strategy and operations of their TNCs. Home-State support for TNCs comes in a variety of other forms, however, and may be decisive with regard to the ability of the TNC to operate abroad. For example, home States negotiate bilateral and multilateral investment treaties that define the framework of legal rights of TNCs.¹⁴² Government export credit agencies offer overseas investment insurance to cover political risks, and in some cases commercial risks borne by TNCs.¹⁴³ Regional and national development finance institutions

¹⁴⁰ *Bosnia and Herzegovina v Serbia and Montenegro* (n. 132 above), para. 399.

¹⁴¹ *Ibid.*, paras. 428-38.

¹⁴² Bilateral and multilateral investment agreements can play a significant role in framing the legal rights of foreign investors and can impede the ability of the host State to regulate TNC activity with respect to human rights. See De Schutter, ‘Transnational corporations’ (n. 111 above), pp. 435-437 (arguing that bilateral investment treaties are the “main tool” in “organizing the legal framework of foreign direct investment in the way most favourable to the interests of the foreign investors”). For a detailed discussion on the absence of social responsibility clauses in multilateral investments, see B. Penfold, ‘Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities’, International Labor Office, Working Paper No. 95 (2005), available at <http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/publication/wcms_101040.pdf>, accessed 31 July 2011 (hereinafter Penfold, ‘Labour and Employment Issues’).

¹⁴³ Penfold, ‘Labour and Employment Issues’ (n. 142 above), pp.10-14.

offer private-sector financing.¹⁴⁴ Politically, home States often play a role in the negotiation, rewriting or enforcement of contracts that are heavily tilted in TNCs' favour.¹⁴⁵ Home States have, for example, pushed developing countries to live up to "vastly unfair" contracts, even when those contracts were signed by corrupt host-State officials who are no longer in power.¹⁴⁶ The negotiating power of the TNC was, in these cases, fortified by the muscle power of the home State.¹⁴⁷

In scenarios like these, the 'decisive influence' standard offers a doctrinal model for the argument that home States should be held responsible for the extraterritorial actions of those TNCs that survive only by virtue of the home State's economic, financial and political support.¹⁴⁸ Furthermore, should an impending human

¹⁴⁴ Ibid. pp. vii, 23-24 (discussing the significant role of development finance institutions in funding foreign direct investment).

¹⁴⁵ Stiglitz (n. 2 above), p. 71. ("In Argentina, the French government reportedly weighed in pushing for a rewriting of the terms of concessions for a water utility (Aguas Argentinas), after the French parent company (Suez Lyonnaise) that had signed the agreements found them less profitable than it had thought.")

¹⁴⁶ Ibid. See also A. Shemberg, 'Stabilization Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights' (May 27, 2009), available at <<http://www.business-humanrights.org/media/documents/stabilization-clauses-and-human-rights-27-may-2009.pdf>>, accessed 31 July 2011 (detailing the extent to which 'stabilization clauses', which investment treaties and international contract provisions unduly constrain the host Government's ability to pass new laws or regulations that in the public interest and even necessary for compliance with international human rights obligations).

¹⁴⁷ Ibid. (describing cases in which the US government, following the overthrow of Mohammed Suharto in 1998 and Nawaz Sharif in 1999, put pressure on the new Indonesian and Pakistani governments to live up to agreements signed by their corrupt predecessors).

¹⁴⁸ The Draft Articles note that in theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government. Draft Articles (n. 18 above), art. 80. However, the Draft Articles caution that "in international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the state as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of public authority." Ibid. Accordingly, the Draft Articles note that the general rule is that "only conduct attributed to the state at the international level is that of its organs of

rights abuse on the part of such a TNC become foreseeable, application of the model of *Ilascu* would obligate home States to attempt to prevent that abuse from materialising and to help remedy abuses that have already taken place. The next section discusses the standard of due diligence to which a home State in such a circumstance would be held.

The due diligence standard

The principle that States must exercise due diligence in protecting individuals from abuses committed by unknown or non-State actors is reiterated throughout human rights jurisprudence.¹⁴⁹ In *Velásquez Rodríguez v Honduras*, a case concerning the disappearance of Manfredo Velásquez, the Inter-American Court of Human Rights stated that

An 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, 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 [American Convention on Human Rights].¹⁵⁰

In the case of *Herrera Rubio v Colombia*, the Human Rights Committee, without referring to due diligence explicitly,

government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the state.” Ibid.

¹⁴⁹ See, e.g., the *Tellini* case of 1923, reprinted in League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924). The *Tellini* case involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. See also Draft Articles (n. 18 above), art. 81.

¹⁵⁰ *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1989, Series C No. 4, 28 ILM 291, para. 172. The Court’s articulation of a State’s duty to protect (interpreted in this case as a duty to effectively investigate disappearances) concerned violations that took place within the national territory of the State (where it presumptively exercises effective control). Arguably, a similar standard of due diligence would apply where it can be shown that a State’s international human rights obligations extend beyond its physical territory, as discussed above.

interpreted Colombia's positive obligations under the ICCPR as imposing a similarly indirect accountability.¹⁵¹ The case was an individual complaint submitted by Mr. Herrera Rubio to the Human Rights Committee pursuant to Article 5, paragraph 4, of the first Optional Protocol to the ICCPR. The applicant claimed that he was tortured and that his parents were tortured and killed by individuals in military uniforms, identified as members of the "counterguerrilla[s]".¹⁵² The Committee held that, irrespective of whether the paramilitaries were State agents, Colombia is under an obligation, in accordance with the provisions of Article 2 of the ICCPR, to take "effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future".¹⁵³

More recently, the due diligence principle was articulated in the *Genocide* case.¹⁵⁴ While acknowledging that Serbian authorities may never have been aware that genocide was imminent, the Court nonetheless held Serbia to have violated the obligation to prevent genocide by virtue of its authorities' influence over the principal (non-State) perpetrators, combined with these authorities' presumptive awareness of the "serious risk" that genocide would occur.¹⁵⁵ The Court discussed due diligence in the context of a framework for assessing a State's obligations vis-à-vis extraterritorial non-State actors:

In this area the notion of 'due diligence' ... is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the [perpetrators]. This capacity itself depends, among other

¹⁵¹ *Herrera Rubio v Colombia* (161/1983), 2 November 1987, UN GAOR, 43rd Sess, Supp. 40, 190 [11] (1988), available at <<http://www1.umn.edu/humanrts/undocs/newscans/161-1983.html>>, accessed 31 July 2011.

¹⁵² *Ibid.* para. 1.5.

¹⁵³ *Ibid.* para. 12.

¹⁵⁴ Ryngaert, 'Contribution exploratory workshop' (n. 71 above), p. 8. See below for further discussion of the case.

¹⁵⁵ *Bosnia and Herzegovina v Serbia and Montenegro* (n. 132 above), para. 436.

things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.¹⁵⁶

What do these cases tell us about what is required of a State under a due-diligence standard? In *Velásquez*, the Inter-American Court of Human Rights held Honduras responsible for its lack of due diligence in preventing the violation or responding to it as required. In *Herrera*, the Human Rights Committee ruled that Colombia must take effective measures to remedy the violations suffered by the complainant, must investigate the violations, and must take steps to ensure that similar violations do not occur in the future. And finally, in the *Genocide* case, the ICJ held that the Serbian government must affirmatively act to prevent non-State actors whom it is capable of influencing from carrying out foreseeable human rights violations. Read together, the cases suggest at the very least that States are obligated to make a good-faith effort to prevent foreseeable violations by non-State actors over whom they are able to exert some degree of authority.

Such a reading is consistent with the Maastricht Guidelines which, as noted above, provide that States are responsible for violations of ESC rights that result from their failure to exercise due diligence in controlling the behaviour of non-State actors, including corporations. Under the obligation of international cooperation discussed above, the regulation of corporations is thus one aspect of a State Party's obligation to protect.

In order to satisfy the due-diligence obligation, home States could regulate corporate activity through the enactment of domestic legislation with extraterritorial reach.¹⁵⁷ Subjecting TNCs to their

¹⁵⁶ Ibid. para. 430. See also *Mahmut Kaya v Turkey*, 2000-III, ECHR 129, para. 87 (holding that the Turkish government's failure to take reasonable measures to prevent the realisation of a real and immediate grave risk constituted a violation of Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms even though the source of the risk may have been non-State actors).

¹⁵⁷ States have, however, historically resisted opening their courts for adjudication of violations committed outside their territory. See, e.g., M. Gibney

home States' jurisdiction raises a number of complex legal questions. Would home-State jurisdiction infringe on the national sovereignty of the host State? Under what circumstances could parent companies be held liable for the actions of their subsidiaries abroad? Can plaintiffs overcome the defence that home-State courts are *forum non conveniens* for claims against TNCs operating abroad? These questions will require sufficient airing

and R.D. Emerick, 'The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards', *Temple International and Comparative Law Journal*, Vol. 10 (1996), pp. 123-146, at 123-124 (hereinafter Gibney and Emerick, 'Extraterritorial application') (discussing judicial presumption against extraterritoriality of US labour laws). Nevertheless, such an interpretation of a State's obligations under the ICESCR resonates with other international treaties. See, for example, the United Nations Convention Against Transnational Organized Crime and the Convention Against Torture as examples of agreements mandating State actions with extraterritorial reach. UN GA, Convention Against Transnational Organized Crime (Fifty-fifth session, 2001) Supp. No. 49, UN Doc. A/45/49 arts. 5, 6, 15, 18, 30(1), G.A. Res. 25; UN GA, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Thirty-ninth session, 1984) GA Res 39/46, Supp. No. 51, UN Doc. A/Res/39/46 art. 5, [CAT] (requiring the establishment of jurisdiction over certain offences, even if committed outside the State's territory). In addition, in the context of child trafficking, the Convention on the Rights of the Child's Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography provides that a State must exercise extraterritorial jurisdiction in order to criminalise the acts of its nationals or residents when they abuse children in another country. UN GA, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (Fifty-fourth session, 2000) GA Res. 54/263, UN Doc. A/RES/54/263, art. 4. Similarly, a resolution on the sexual exploitation of children, adopted by the Council of Europe encouraged member States "to include in their criminal legislation the principle of extraterritorial prosecution and conviction for offences." 'Resolution on the Sexual Exploitation of Children' Eur. Parl. Doc. (RES 1099), para. 12 (1996), available at <<http://assembly.coe.int/Documents/AdoptedText/TA96/ERES1099.HTM>>, accessed 31 July 2011. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is of particular interest in that it encourages extraterritorial application of domestic laws to regulate business conduct. OECD, 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (17 December 1997), OECD Doc. DAF/IME/BR(97)20, 37 ILM 1 (1998), available at <http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html>, accessed 31 July 2011.

and review for domestic legislation to be effective.¹⁵⁸ Creating a regulatory framework may also have costs for the host State. Prescriptions for reining in TNC behaviour in host countries regularly come up against the caution that such regulations should not act as a disincentive for the very foreign direct investment that is needed to support economic growth.¹⁵⁹ Though foreign direct investment may help alleviate poverty, it does so more effectively if grounded in positive corporate conduct. Providing a uniformly enforced regulatory framework may actually encourage foreign investment in developing countries by levelling the business playing field for ethical corporations.¹⁶⁰ Some western companies have begun to recognise the merits of operating under enforceable standards that apply to all their competitors, rather than voluntary standards that only really affect companies with prominent public profiles.¹⁶¹ Involving the home State in both normative and practical terms in such regulations could provide an effective means of protecting ESC rights where accountability gaps exist.

4. Conclusion

Given the fundamental nature of a number of economic, social and cultural rights, and their relationship to the economic environment, even subtle changes in the global economic order can have profound and often devastating effects on one's ability to enjoy the full range of human rights. As noted in Section 1, accountability

¹⁵⁸ For more on the regulation of TNC extraterritorial activity by home States, see Gibney and Emerick, 'Extraterritorial application' (n. 157 above), pp.123-24 (1996); S. Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?', *Melbourne Journal of International Law*, Vol. 5 (2004), pp. 37-65; T. Morimoto, 'Growing industrialization and our damaged planet: The extraterritorial application of developed countries' domestic environmental laws to transnational corporations abroad', *Utrecht Law Review*, Vol. 1 (2005), pp. 134-159; Anne-Marie Slaughter and David T. Zaring, 'Extraterritoriality In A Globalized World' available at SSRN: <<http://ssrn.com/abstract=39380>>, accessed 31 July 2011.

¹⁵⁹ J. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (United States: Penguin, 2005), p. 356 (stating that a number of studies confirm that countries with higher levels of foreign direct investment positively correlate with high economic growth and higher GNP per capita).

¹⁶⁰ K. Roth, 'Rules on Corporate Ethics Could Help, Not Hinder, Multinationals', *Financial Times (UK)* (21 June 2005), p. 19.

¹⁶¹ *Ibid.*

gaps in international law undermine effective implementation of ESC rights and allow powerful global actors, whose actions have extraterritorial reach, to escape extraterritorial obligations. Yet normative guidance on the obligation of States to uphold ESC rights extraterritorially conflicts with the more conservative articulations of States' obligations under international law.

Unlike other human rights treaties, the ICESCR contains no provision specifying its jurisdictional scope of action. Section 2 looked at two approaches to reading extraterritorial obligations into the ICESCR. The first approach transplants the jurisdictional doctrine of 'effective control'—developed in the context of jurisprudence on civil and political rights—to economic, social and cultural rights. The second approach looks at the language of 'international cooperation' contained in the ICESCR and in instruments such as the UN Charter as triggering extraterritorial obligations regardless of whether jurisdiction is exercised abroad. Section 2 argued that each approach was problematic in its own right: the 'effective control' approach is too restrictive and does not take account of the myriad ways in which States affect ESC rights extraterritorially. By contrast, the obligation of international cooperation is too expansive and ill-defined, lacking in normative guidance and feasibility.

Section 2 concluded that that nature of obligations incurred under the duty of international cooperation must pay heed to issues of control that circumscribe a State's ability to take affirmative measures to fulfil ESC rights abroad. It emphasised the obligations to respect and protect ESC rights extraterritorially and called attention to the relationship between States and the agents through which many extraterritorial violations occur—namely, international financial institutions and transnational corporations. Such relationships additionally implicate issues of jurisdiction and control given that a State's duty to protect may be triggered in its interaction with TNCs under its jurisdiction that operate extraterritorially. Similarly, powerful States exercise a degree of influence or control over IFIs, which may trigger their duty to respect ESC rights when fashioning international financial agreements in other countries.

Section 3 argued that IFIs such as the World Bank and the IMF are essentially *multi-State* actors. They are comprised of member

States, many of which are States Parties to the ICESCR. Member States can be required to take into account their international human rights treaty obligations when participating in IFIs. Given significant weaknesses in mechanisms to hold TNCs directly accountable, or indirectly accountable via the host State, Section 3 additionally argued that TNCs can be held indirectly accountable via the home State by adapting the due-diligence and decisive-influence standards to the relationship between home States and TNCs. It further proposed that home States regulate corporate activity through the enactment of domestic legislation with extraterritorial reach.

Despite the historic de-prioritisation of economic, social and cultural rights, they have recently come to the forefront of human rights and development discourse. As articulations and interpretations of—and commitments to—ESC rights become more commonplace, the ability to enforce these commitments or to reconcile them with global processes and global actors remains relatively weak. It is essential that we close these accountability gaps. Though by no means exhaustive, the doctrinal changes proposed in this Chapter are first and necessary steps.