

Chapter 1

Introduction: Economic Globalization and Human Rights

One of the most profound challenges that we face as a community of nations is to understand better the emerging socio-economic forces and forms of globalization, to shape them to serve our needs and to respond effectively to their deleterious consequences.¹

The effects of globalization are resonating around the world. Developments in technology, communications and transportation have facilitated a rapid increase in transnational political, economic and social exchanges. This has affected international relations and relations between states and multinational corporations.² Economic globalization is associated with economic interdependence, deregulation and a dominance of a liberalized marketplace. Globalization is touted as the basis of rapid development. But economic globalization has only strengthened international networks of trade and investment³ creating highly interdependent regions.⁴

Since the end of the Cold War, the international political economy has experienced fundamental changes.⁵ Cold War alliances once dominated the world economy as well as development policy. Thus markets were subjugated to political and economic security. Liberal values were not prioritized. Since then, competition between states has significantly increased. Developing states have been brought into, and now actively participate in, this competitive market-orientated international system.

Economic globalization now dominates international relations.⁶ Development strategy consists of liberal trading regimes with a reduced role for the state. International relations now involve states, the market, multinational corporations

1 Annan, K. (1998), *Partnerships for a Global Community: Annual Report on the Work of the Organization, 1998* (UN Sales No. E.99.I.3, New York).

2 Steiner, H. and Alston, P. (2000), *International Human Rights Law in Context* (2nd edn, Oxford University Press), 940.

3 Koenig-Archibugi, M. (2003), 'Introduction: Globalization and the Challenge of Governance', in Held, D. and Koenig-Archibugi, M. (eds), *Taming Globalization: Frontiers of Governance* (Cambridge: Polity Press), 2.

4 Rugman, A. (2001), *The End of Globalisation* (New York: American Management Association, AMACOM), 3-4.

5 See Gilpin R. (1987), *The Political Economy of International Relations* (Princeton University Press).

6 Gilpin, R. (2001), *Global Political Economy: Understanding the International Economic Order* (Princeton University Press), 18.

and international organizations.⁷ This globalization may make the task of fulfilling non-market goals at the national level more difficult. Specifically, the realization of the right to development, based on principles of economic self determination and global solidarity, may be impeded.⁸

International investment is a prominent component of economic globalization. Investment's focus on profit-maximization and competitiveness can contradict the fulfillment of human rights entitlements.⁹ In a resolution on the question of the impact of globalization and its effect on human rights, the United Nations General Assembly recognizes that: 'while globalization offers great opportunities, the fact that its benefits are very unevenly shared and its costs unevenly distributed represents an aspect of the process that affects the full enjoyment of all human rights, in particular in developing countries'.¹⁰

Economic globalization has increased the number and influence of multinational corporations, nearly all of which are based in G7 states.¹¹ Of the top 500, only 29 are from low income states.¹² Companies incorporated in the United States dominate the important industrial, financial and service industries.¹³ Of the world's 100 largest economic entities, 51 are now corporations and 49 are countries.¹⁴ It is estimated that in 1970, there were 7,000 corporations. In 1993 there were 37,000 corporations, and by 2003, 64,000 with 870,000 foreign subsidiaries.¹⁵ The largest 500 corporations control 70 per cent of global trade and are the primary international investors. As a result of this expansion, corporate interests dominate economic globalization and influence the policy of individual states.¹⁶

The investment operations of corporations, the regulatory role of the state, and the right to development are the subject of this book. What began as research into the inadequacy of human rights law pertaining to economic globalization became

7 *Ibid.*

8 Declaration on the Right to Development (4 Dec 1986), UNGA Res. 41/128, annex 41, Supp. No. 53 at 186, UN Doc. A/41/53 (DRD).

9 The United Nations General Assembly has called globalization 'not merely an economic process but [one that] has social, political, environmental, cultural and legal dimensions which have an impact on the full enjoyment of all human rights'. See UNGA, 'Globalization and its Impact on the Full Enjoyment of All Human Rights' (14 Dec 2000), UN Doc. A/RES/55/102 para.2; see also UNGA, 'Globalization and its Impact on the Full Enjoyment of All Human Rights' (17 Dec 1999), UN Doc. A/RES/54/165, para.2.

10 UNGA, 'Globalization and its impact on the full enjoyment of all human rights' (16 Dec 2005), UN Doc. A/RES/60/152, para.5.

11 See United Nations Conference on Trade and Development (1994), *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (New York).

12 Monbiot, G. (2003), *The Age of Consent: A Manifesto for a New World Order* (London: Flamingo), 195.

13 Goldstein, J. (2003), *International Relations* (5th edn, New York: Longman), 367.

14 Anderson, S. and Cavanagh, J., 'Top 200: The Rise of Corporate Global Power' (Institute for Policy Studies, published online 4 Dec 2000) <<http://www.corpwatch.org/article.php?id=377>>, accessed 10 March 2008.

15 'A Taxing Battle', *The Economist* (31 January 2004), 66.

16 Buckman, G. (2005), *Global Trade: Past Mistakes, Future Choices* (Zed Books), 95.

a study on the unwillingness of states to fulfill their human rights obligations both domestically and internationally. After all, as Olivier de Schutter observes:

... what may appear in a static analysis as a disempowerment of the states confronted with a new form of sovereignty competing with theirs is, it should be remembered, the result of the emergence of a global marketplace which is initially the creation of the states. Less than ever should we exculpate states from their alleged inability to tame the new leviathans.¹⁷

Economic globalization can produce the capital needed to provide for human rights. Human rights law can help to contain the detrimental social effects of globalization. Human rights can balance market forces within a just international political framework.¹⁸ The ability and willingness of states to discharge their human rights obligations is crucial to this system. The United Nations General Assembly emphasizes that: ‘While globalization, by its impact on, inter alia, the role of the state, may affect human rights, the promotion and protection of all human rights is first and foremost the responsibility of the state.’¹⁹ It is put forward here that the Declaration on the Right to Development sets out a national and global framework of responsibility for states to do so.

Globalization entrenches trade liberalization and market expansion. The establishment of the World Trade Organization through the Uruguay Round of the General Agreement on Tariffs and Trade solidified this regime.²⁰ The Uruguay round created a legal framework for liberalization in trade-related aspects of intellectual property²¹ and trade in services.²² This increased the enforcement powers of the regime through the establishment of a sophisticated dispute settlement process.²³ Centralized international planning and decision making, for example via the United Nations, is no longer possible in the economic sphere.

The issue of trade and human rights has become a central concern.²⁴ Recent human rights discourse has been devoted to the study of multinational corporations and their direct effect on human rights.²⁵ Yet, the foundation of globalization – the state’s

17 De Schutter, O. (2005), ‘The Accountability of Multinationals for Human Rights Violations in European Law’, in Alston, P. (ed.), *Non-State Actors and Human Rights* (Oxford University Press), 314.

18 Koenig-Archibugi, M., *supra* n. 3, 1.

19 UNGA, ‘Globalization and its impact on the full enjoyment of all human rights’ (16 Dec 2005), UN Doc. A/RES/60/152, para.1.

20 Marrakech Agreement Establishing the World Trade Organization (15 April 1994), LT/UR/A/2.

21 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), LT/UR/A-1C/IP/1.

22 General Agreement on Trade in Services (15 April 1994), LT/UR/A-1B/S/1.

23 Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994), LT/UR/A-2/DS/U/1.

24 Orford, A. (2003), ‘Globalization and the Right to Development’, in Alston P. (ed.), *Peoples’ Rights* (Oxford University Press), 166-67.

25 See Addo, M. (ed.) (1999), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International); Kamminga, M. and Zia-

political, legal and economic facilitation of foreign investment by corporations has not been subjected to analysis in human rights terms. The human rights must now be achieved in a global economy that prioritizes investment protection.

Market based economic theory presupposes perfect competition and the free functioning of international markets. However, investment is conducted under oligopolistic conditions in imperfect markets that afford the investor, often a developed world corporation, unique opportunities for the exploitation of global resources. Corporations are encouraged to utilize market imperfections and influence political relations with host-states.²⁶ The promotion of their interests pushes corporations to extend control over foreign economies and influence the regime governing competition.²⁷ Thus, the protection afforded corporations by investment treaties is central to the relationship between states. Even political alliances depend on the treatment of corporations.²⁸

The negative effects of corporations on human rights in development can be divided into two categories. First, the corporation may directly violate human rights by itself or in conjunction with another actor. This typically involves civil and political rights, such as the right to personal security. For example, a corporation may hire state security forces to protect its facilities that engage in torture as occurred in Myanmar in association with Unocal Corp.²⁹ Also, a corporation may directly violate rights by prohibiting collective bargaining or discriminating against minorities. The second category concerns indirect effects. This involves the corporation's influence on host governments. Corporations can undermine the state's ability to fulfill human rights law. They use their influence to encourage governments to adopt policies of liberalization, deregulation and privatization that ignore human rights consequences.

This second effect concerns mostly economic, social and cultural rights, which are vital in developing states. Corporations are the engines of economic growth upon which states depend for the provision of the right to development. Increasingly, corporations are more economically powerful and influential than the developing host-states from which they extract their profits. These states seem unable, without

Zarifi, S. (eds) (2000), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International); Stephens, B. (2002), 'Stefan A. Riesenfeld Symposium 2001: The Amoralism of Profit: Transnational Corporations and Human Rights', *Berkeley Journal of International Law* 20, 45.

26 See Korten, R. (1995), *When Corporations Rule the World* (West Hartford, CT: Kumarian Press).

27 See Vernon, R. (1971), *Sovereignty at Bay* (New York: Basic Books).

28 Gilpin, R., *supra* n. 6, 18.

29 e.g. *Doe I v. Unocal Cor.*, 963 F. Sup880 (C.D. Cal. 1997); *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997); *Doe I v. Unocal Cor.*, 67 F. Sup2d 1140 (C.D. Cal. 1999); *Doe I v. Unocal Cor.*, 110 F. Sup2d 1294 (C.D. Cal. 2000); *Doe I v. Unocal Cor.*, 27 F. Sup2d 1174 (C.D. Cal. 1998), *affidavit* 248 F.3d 915 (9th Cir. 2001); see also: International Labour Organization, 'Forced labour in Myanmar (Burma), Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention (2 July 1998), 1930 (No. 29) Parts III.8, V.14 (3); UNGA, 'Situation of Human Rights in Myanmar' (16 Dec 1995), UN Doc. A/RES/50/194 1995.

international cooperation, to fulfill the human rights obligations required to complete the right to development process. International cooperation to curb the negative influence of corporations is not forthcoming as the global economy depends on the expansion of investment.

The human rights regime has been criticized for its state-centric approach that seems out of place in a global economy with diverse powerful actors. State-centrism seems to insulate human rights discourse from vital challenges posed by non-state actors. The traditional approach reinforces the state as the central actor around which everything else revolves.³⁰ Is the state still the sovereign decision maker that human rights law was designed to regulate?

The questions surrounding international cooperation and the right to development cannot be examined without addressing the role of corporations and the regulation of their investment activities. Corporations are important actors within the process of economic globalization.³¹ It is assumed that these non-state actors have reduced ties to their home-states and have become powerful political entities in themselves. This leads to the assumption that they dictate international economic and political affairs. The role and significance of the corporation in domestic and international affairs is a much-debated topic within the field of international political economy.

The multinational corporation is incorporated in a particular state but owns and controls subsidiaries through foreign investment in other states. The purpose of foreign direct investment is to achieve partial or complete control over marketing, production, or other facilities in the services, manufacturing or commodities sectors of another state. Purchasing existing businesses or the construction of new ones, accompanied by mergers, takeovers and alliances with corporations of other states, is all included in foreign direct investment. It is therefore part of an overall corporate strategy to achieve a permanent position within host economies.³² When this occurs, the home-state's economy benefits.

The corporation has transformed the global economy and some states have lost influence as corporations have become global in nature.³³ This is considered a movement towards a global economy where there will be no national products or economies.³⁴ Global development strategy reflects this; the corporation is now the

30 Alston, P. (2005), 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Alston, P. (ed.), *supra* n. 17, 3.

31 See Stopford, J., Henley, J. and Strange, S. (1991), *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge University Press).

32 Despite the frequent reference to the political and economic might of corporations and the foreign investment system this is not a new regime. In the past, the merchant adventurers such as the Dutch East India Company and the Massachusetts Bay Company were far more powerful. These forerunners to the modern corporations commanded their own fleets and armies, conducted foreign policy and controlled territory. See Gilpin, R., *supra* n. 6, 278.

33 For an example of such theory see Ohmae, K. (1990), *The Borderless World: Power and Strategy in the Interlinked Economy* (New York: Harper Business).

34 See generally, Reich, R. (1991), *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (New York: Knopf).

most important source of capital and technology, having replaced foreign aid in this regard.³⁵

But the activities of the corporation still require the consent of states. Consider the following: first, the corporation remains physically headquartered in the home-state; second, empirical studies have shown that corporations still depend on their state of incorporation for sales;³⁶ third, corporations generally reflects the managerial culture of their home-states; and finally, the corporation is viewed in the host-state as an instrument of the home-state.³⁷ International political economy discourse still considers the corporation as ‘a creature of its home economy’.³⁸ Perhaps most importantly, they rely on their home-states to bilaterally facilitate investment protection for their activities.

The global expansion of corporations has been promoted by states. States have granted corporations rights through trade agreements, bilateral investment treaties and domestic liberalization.³⁹ The development of a neoliberal economy and the subsequent reduction of the state have led many observers to predict a shift to a market-driven international economy.⁴⁰ Obviously, such a shift would have profound implications for the implementation of an international development policy and human rights law. The state becomes less and less relevant as it encourages a global capitalist market of unrestricted trade, finance and investment.⁴¹

Although corporations provide valuable investment and capital to states, they depend upon host-states to provide protection and rule of law, well-regulated markets and a stable political environment. It is important to remember that the states themselves construct market imperfections in order to encourage investment.⁴² States adopt concessionary policies to attract capital. Tax breaks and favourable investment conditions for foreign firms are common market manipulations of this type.⁴³ The creation of regional trade blocs and investment treaties reflect the interests of their

35 Gilpin, R., *supra* n. 6, 279.

36 Gestrin, M., Knight, A. and Rugman, A. (2001), *The Templeton Global Performance Index* (Oxford University Press).

37 Saul, J. (2005), *The Collapse of Globalism and the Reinvention of the World* (Penguin), 83.

38 Gilpin, R., *supra* n. 6, 278.

39 See Ruggie, J. (22 Feb 2006), ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, UN Doc. E/CN.4/2006/97 para.12.

40 See Strange, S. (1996), *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press); Camilleri, J. and Falk, J. (1992), *The End of Sovereignty? The Politics of A Shrinking and Fragmenting World* (Aldershot, UK: Edward Elgar); Van Creveld, M. (1999), *The Rise and Decline of the State* (Cambridge University Press); Ohmae, K. (1995), *The End of the Nation State* (New York: Free Press); Schmidt, V. (1995), ‘The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State’ *Daedalus* 75.

41 Strange, S., *supra* n. 40, 9.

42 Gilpin, R., *supra* n. 6, 279.

43 See Krugman, P. and Obstfeld, M. (1994) *International Economics: Theory and Practice* (3rd edn, New York: Harper Collins), 162.

dominant member states.⁴⁴ Production and service industries remain nationally based as profit flows back to home-states.⁴⁵

States make the rules for the global economy. Corporations carry out the transactions within these rules. Multinational corporations are merely companies based in one state with branches and subsidiaries and/or investments in other states.⁴⁶ They operate on a large scale and simultaneously in many states, in pursuit of profits within the rules of the global economy. They have the potential to support foreign governments that violate human rights law as well as press for important change in those regimes.⁴⁷ The relations between states and corporations within the system of foreign investment are of utmost importance to achieving the human right to development.

This book begins to scrutinize investment treaties in light of the right to development. Arbitration under these treaties between developing states and corporations can have a direct impact on human rights. Therefore, it is vital that they are monitored and subjected to human rights-based criticism. New negotiating efforts by states to create more of these investment rules (whether they be bilateral, or regional and multilateral instruments such as the negotiations on the Free Trade Area of the Americas or the actions of the World Trade Organization) must be subjected to scrutiny and analyzed through human rights discourse. If left isolated, the international investment regime may be discredited, lose legitimacy and be subject to political backlash. Worse yet, it may evolve into a system which permanently prevents the realization of the right to development.

Activists, academics and development practitioners in many fields are striving to ascertain how global economic integration influences the human rights project.⁴⁸ This book is an interdisciplinary examination of the politics and economics of globalization and their impact on the right to development. Economic globalization and the rise of corporate power has created rapid economic growth but has simultaneously fostered extreme inequality and underdevelopment that can undermine human rights. The international community has failed to regulate economic globalization according to human rights norms. Instead, states have cooperated on a bilateral and regional level to create investment agreements. Globalization based on foreign investment is thus put forward by states as an international developmental system. This system is incongruent with the full realization of human rights, the right to development and the spirit of international cooperation put forward by the Charter of the United Nations and the Universal Declaration of Human Rights.⁴⁹

44 Gilpin, R., *supra* n. 6, 297.

45 Sally, R. (1994), 'Multinational Enterprises, Political Economy and Institutional Theory: Domestic Embeddedness in the Context of Internationalization', *Review of International Political Economy* 1.1, 161-92.

46 Goldstein, J., *supra* n. 13, 367.

47 See Goldstein, J., *supra* n. 13, 13; Anghie, A. (1999), 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-century International Law', *Harvard International Law Journal* 40, 37.

48 See De Feyter, K. (2005), *Human Rights: Social Justice in the Age of the Market* (Zed Books), 2.

49 Universal Declaration of Human Rights (10 Dec 1948), UNGA Res 217A (III), UN Doc. A/810 at 71 (UDHR).

The rules of international investment caught civil society's attention during the negotiations on the Organization for Economic Cooperation and Development's Multilateral Agreement on Investment in the mid-to-late 1990s. Although the agreement was halted, partly due to rising public concern about the implications of the multilateral agreement on investment upon domestic sovereignty and issues related to human rights, similar investment rules were written into a host of other bilateral and regional treaties. Prominent amongst those is the North American Free Trade Agreement that is a model for hundreds of other agreements.⁵⁰ These agreements have an immediate impact on national economies and international relations as they can restrict state policy.⁵¹

Global economic concepts are often oversimplified and generalized under the term 'global trade'. International investment is a prominent component of globalization and an example of cooperation between states. The interaction of the investment regime with human rights is an unformed area of law. The impact of foreign investment on human rights has been neglected due to the fact that it is conducted by corporations. Foreign investment is not governed by an international institution or an international treaty, such as the World Trade Organization, for example, leaving it to states to deal with bilaterally.

Foreign direct investment consists of a long-term relationship between the home-state (the state of incorporation) and host-state (the state in which the investment is made) of the corporation. The Multilateral Agreement on Investment⁵² would have given investors enhanced rights within their host-states automatically. An international system regulating this important dimension of economic globalization has failed to materialize so far. Nevertheless, the proliferation of bilateral and regional negotiations has facilitated increases in foreign direct investment. Bilateral investment treaties purport to be politically neutral and economic in nature, despite their obvious consequences, both positive and negative, for development, governance and human rights.⁵³

Bilateral investment protection treaties are contracts between states. States also bear responsibility for upholding human rights law. Investment treaties can prioritize the property rights of foreign investors over many non-market initiatives derived to fulfill positive human rights law obligations.⁵⁴ Various investment treaty provisions may prohibit regulations that address market failures in protecting collective goods during development. Investment treaties potentially override the rights-based development process essential for the fulfillment of the right to development.

50 Wai, R. (2002), 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', *Columbia Journal of International Law* 40, 214.

51 Chossudovsky, M. (2003), *The Globalization of Poverty and the New World Order* (2nd edn, Montreal: Global Research), 24.

52 Organization of Economic Cooperation and Development, 'Multilateral Agreement on Investment: Draft Negotiating Text' (24 Apr 1998).

53 Wai, R., *supra* n. 50, 214.

54 Shalankany, A. (2000), 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism', *Harvard International Law Journal* 41, 419.

Bilateral regimes can only work fairly if conducted between states of relatively equal economic development. Otherwise, the reciprocity governing the agreement will be illusory. Bilateral agreements are intended to encourage investment by protecting the basic interests of both the capital importing and exporting state.⁵⁵ Yet, at the bilateral level, developed-underdeveloped relations are characterized by dependency. Dependent relationships make it difficult for states to regulate foreign investment in order to address human rights concerns. By contrast, multilateral deals can allow developing states to group together in negotiations with dominant states.⁵⁶ An international agreement should contain human rights safeguards and protect the human rights regulatory role of developing states.

The prioritization of investment in global governance appears to dislocate citizens from their entitlements under human rights law.⁵⁷ Democracy requires a state to control social and economic conditions within its jurisdiction.⁵⁸ Representative debate should reflect the will of the populace on economic regulations.⁵⁹ Conflicts of interest can arise between the rights-based approach to development and the investment protection system. The prioritization of investment insulates states from the demands of citizens. The proliferation of these agreements can render states more accountable to foreign investors than to local populations. There is no doubt that such treaties strengthen the position of corporations.⁶⁰

International investment law compels states to enact legislation ensuring domestic enforcement. Under the 1965 Convention on the Settlement of Disputes Between States and Nationals of Other States,⁶¹ corporations have standing in tribunals concerning the terms of investment treaties. These tribunal systems can compromise regulations related to human rights.⁶² A number of cases have raised worrying questions about the legitimate sphere of host-state regulation. For example, a fee schedule for health care or education targeted at ensuring equal access and participation would be prohibited as a performance requirement, or as indirect expropriation, both prohibited under investment treaties. Investors could challenge the provision of subsidized public services, affirmative action policies or a public insurance system as indirect expropriation of market opportunity.⁶³

55 Shaw, M. (2003), *International Law* (5th edn, Cambridge University Press), 747.

56 'The Future of Globalization', *The Economist* (29 July 2006), 11.

57 Shalankany, A., *supra* n. 54, 419.

58 See generally, Held, D. (1995), *Democracy and the Global Order* (Cambridge: Polity Press).

59 Koenig-Archibugi, M., *supra* n. 3, 3.

60 Shalankany, A., *supra* n. 54, 429.

61 The Convention on the Settlement of Disputes between States and Nationals of Other States, 18 March 1965, Reprinted in 4 ILM (1965), 532. For commentary, see Schreuer, C. (2001), *The ICSID Convention: A Commentary* (Cambridge University Press).

62 De Palma, A. (11 March 2001), 'North American Free Trade Agreement's Dirty Little Secret', *New York Times* 1(3).

63 Peterson, L. (2 July 2004), 'Canadian Province Rejects Public Auto Insurance; Think Tank Sees Treaty Chill', *Investment Law and Policy Weekly News Bulletin*.

Investment agreements concern the right to development. They represent the binding legal framework for the transfer of capital between developed and underdeveloped states. The right to development puts forward a contrasting structure based on global solidarity and rights-based development. It recognizes that the human rights violations resulting from globalization are failures of governance. Human rights law is capable of monitoring and regulating foreign investment. Respect for human rights requires governments to protect, promote and fulfill obligations. The right to development process can provide a framework focused on the implementation of a rights-based approach to development. The right to development is versatile and promotes global responsibility for globalization.

The Declaration on the Right to Development requires states to guarantee rights in a manner applicable to globalization. While the Declaration remains non-binding, it is a focal point of United Nations human rights activity concerning development and has been reaffirmed as a universal human right by the international community.⁶⁴ In order to be universal and remain relevant, human rights law must protect those marginalized by the exigencies of globalization by empowering local peoples.⁶⁵ It must form a bottom line below which no one can fall no matter what the economic justification may be. Human rights should be guided by the entitlements of those alienated by the globalization process rather than the property rights of those benefiting from it.⁶⁶ The United Nations General Assembly recognizes the right to development as an integral component of a just globalization process.⁶⁷

Globalization disconnects the right to development process. Underdeveloped states are unwilling or unable to implement human rights. States have collective duties to cooperate in order to overcome this and afford developing states the opportunity to enact rights-based development policy. This responsibility should be the basis of global governance. The legal origins of this responsibility can be traced to the Charter of the United Nations⁶⁸ and its codification in the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights.⁶⁹ The Declaration on the Right to Development provides a relevant framework for applying global responsibility to global governance and development. Recognizing the economic handicap of developing states, the right to development extends entitlements and responsibility beyond national borders. The international community is responsible. This requires political will on the part of both developing and developed states, acting individually and collectively, in order to create a system in which human rights can be realized. The prioritization of foreign

64 Human Rights Council (15 March 2006), UNGA Res. 60/251, UN Doc. A/RES/60/251, Preamble, para.4.

65 De Feyter, K., *supra* n. 48, 3.

66 *Ibid.*

67 UNGA, 'Globalization and its impact on the full enjoyment of all human rights' (16 Dec 2005), UN Doc. A/RES/60/152, para.6 and 10.

68 The Charter of the United Nations (adopted 26 June 1945, entered into force 24 Oct 1945), 59 Stat. 1031, T.S. 993, 3 Bevans 1153.

69 International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec 1996, entered into force 3 Jan 1976), G.A. Res. 2200A (XXI), 21 UN GAOR Supp. No. 16 at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3 (ICESCR).

investment reflects a different set of national interests.⁷⁰ Existing human rights law needs to be implemented, not changed, in response to parochial self-interest.

Human rights law governs the conduct of states towards its citizens.⁷¹ Non-state actors can violate and directly affect the provision of human rights.⁷² This legal conundrum has focused attention on non-state actors.⁷³ Is the state-centric human rights law system relevant to the problems of economic globalization? Can non-state actors be regulated in order to play a beneficial role in the right to development process when their interests are secured through investment laws? The decline of state sovereignty over domestic policy has created a regulatory vacuum that is being filled by non-participatory and unaccountable entities.⁷⁴

Thus, the right to development faces challenges in a globalized world. Human rights law developed at a time when international relations were the domain of states alone. Accordingly, the system of human rights protection mirrored this state-centric structure.⁷⁵ In simpler times, a centrally organized system for governing security, economic and social development was envisioned. States had responsibility towards their own inhabitants. Individuals held rights connecting to their own state. There was little recognized scope for the interference with human rights by non-state actors and the international community. The state was the only actor considered to have the capacity to violate and protect these rights at the national level.⁷⁶ Economic globalization has altered these basic premises of the human rights regime. In many cases, direct responsibility for the fulfillment of entitlements is disjointed. Accountability is further altered by the international structure of the corporate sector, which operates globally in various national legal systems.⁷⁷

As a response, many within the human rights community now call for the direct regulation of corporations under human rights law.⁷⁸ Some advocates consider the

70 De Feyter, K., *supra* n. 48, 20.

71 Humphrey, J. (1991), 'The International Law of Human Rights in the Middle of the Twentieth Century', in Lillich, R., *International Human Rights: Problems of Law, Policy and Practice* (2nd edn, Boston: Little, Brown and Co.), 1.

72 See generally, Report of the Secretary-General (2 July 1996), 'The Realization of Economic, Social and Cultural Rights: The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of All Human Rights, in Particular Economic, Social and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject-Matter' UN Doc. E/CN.4/Sub.2/1996/12; Orentlicher, D. and Gelatt, T. (1993), 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China', *North Western Journal of International Law and Business* 14, 66.

73 Clapham, A. (2006), *Human Rights Obligations of Non-State Actors* (Oxford University Press), 2.

74 Thomas, C. (1998), 'International Financial Institutions and Social and Economic Rights: An Exploration', in Evans, T. (ed.), *Human Rights Fifty Years On: A Reappraisal* (Manchester University Press), 182.

75 Shaw, M., *supra* n. 55, 250-54.

76 *Ibid.*

77 Stephens, B., *supra* n. 24, 39.

78 Clapham, A., *supra* n. 73, 6.

state-centric system exclusionary and increasingly irrelevant.⁷⁹ Corporations are able to avoid stringent national regulations or persuade against the adoption of rights-based regulation.⁸⁰ They are also able to outsource their illegitimate activities or criminal behavior to subsidiaries in states with less stringent regulations.⁸¹ National regulatory systems are unable to keep up with the speed of this change. States, instead of adapting and promoting regulation matching the merging global paradigm, acquiesce and allow for the further erosion of the regulatory role to further a perceived competitiveness in the race for investment. Global civil society demands universal respect for human rights despite these challenges.⁸² New ways of understanding global human rights law may be needed that take into account a more diverse set of actors and responsibilities.⁸³

Corporations have duties and obligations under international human rights law. They have begun to accept increased responsibility in conjunction with their increased role in international relations and human rights development. Voluntary initiatives created by the private sector, independently and in partnership with various levels of civil society have started to fill the regulatory gap. Corporate social responsibility is a welcomed venture that indicates a willingness of corporations to be part of the answer to the globalization and human rights law dilemma.

The problem remains with accountability. As a general rule, the home-state of the corporation takes the view that it is not concerned with human rights violations committed in another state by one of its corporations. And yet at the same time, states act to protect their corporations through investment treaties. That is to say, they are intensely concerned about what ‘their’ corporations do abroad, but they do not seem to be concerned about the human rights violations in which these corporations are involved or the negative affect their interests may have on rights-based development. The home-states continually resist the regulation of corporations internationally, fearing lost profits and competitiveness. Likewise, voluntary corporate social responsibility is unlikely to address these issues satisfactorily as it turns attention to the corporation itself, rather than to the state.

It is the state that has proven largely ineffective at regulation despite calls from civil society to ensure human rights fulfillment. States are unwilling to prioritize human rights law and appear to be highly influenced by organized lobbying from corporations. The rights of the people are then subject to the whims of whoever controls the political process. State regulation of corporations is tenuous where:

... the leaderships are dependent on these same foreign interests for their social and political survival. It should be recognized that foreign investors are inherently part and parcel of the political economies within which they operate. To say that they should not ‘intervene’

⁷⁹ *Ibid.*, 7.

⁸⁰ Blumberg, P. (1993), *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (5th edn, Cambridge University Press), 205.

⁸¹ Garoupa, N. (2004), ‘The Economics of Business Crime’, in Sjogren, H. and Skogh, G. (eds), *New Perspectives on Economic Crime* (Cheltenham, UK: Edward Elgar), 12.

⁸² Clapham, A., *supra* n. 73, 7.

⁸³ Teubner, G. (1997), ‘“Global Bukowina”: Legal Pluralism in World Society’, in Teubner, G. (ed.), *Global Law Without a State* (London: Dartmouth), 5.

in the internal affairs of the countries they operate in is absurd and demonstrates the nature of legal thinking that fails to recognize the integrated nature of foreign capital. Provisions on the duty of states to regulate the activities of transnational corporations are also only relevant if one assumes a political leadership whose social interests and ideology stands in contradiction to those of such foreign institutions.⁸⁴

Therefore a triadic system, undertaken at the micro, macro and meso-levels of regulation, must be developed. The micro-level is an economic term referring to the domain of action and decision-making taken at the individual level. In this case, it refers to the activities of individual people and corporations. The macro-level of regulation is the rules system in which the activity of corporations is undertaken. This is primarily regulated at the national level by States, which make up the second set of actors in this triad. The state must take into account the views and interests of all stakeholders within its borders, including local minority and indigenous groups. The meso-level refers to the concrete and instructional or abstract and discursive coordination systems regulated by the international community.⁸⁵ Here, the obligations of states to cooperate internationally in ensuring the functionality of the micro and macro-levels are paramount. In addition, the activities of international organizations such as financial institutions and non-governmental organizations should also be considered and monitored in accordance with the right to development. This third component must create a foundation upon which the first two components can rest. The emerging cooperative system of global governance must form the third level of responsibility. Without international cooperation, developing states are unable to hold corporations liable or protect their domestic policy-making ability at the macro level. Likewise, in the absence of international cooperation and monitoring, corporate social responsibility can be reduced to a public relations exercise. The meso-level is the most underdeveloped, but a gap between the general rules on specific action is apparent throughout.

The reason for this triadic approach to regulating corporations is that it gleans the practicable elements of the corporate social responsibility agenda and the direct human rights responsibility of corporations, the human rights obligations of both home and host-states, as well as the duties of the international community to cooperate for the realization of human rights and social development. It is hoped that avoiding the persistent discussion over which actor is directly responsible, this comprehensive approach will actually begin to deal with the failure of the international community as a whole to ensure the right to development. Rights-based development in a global world influenced by corporations as well as the home and host-states requires this triadic approach to governance. Clearly, the micro, macro and meso-levels of governance are interdependent. Addressing one level of the triad, while ignoring another, renders the entire system ineffectual.

84 Gutto, S. (1984), 'Responsibility and Accountability of States, Transnational Corporations and Individuals in the Field of Human Rights to Social Development: A Critique', *Third World Legal Studies Association, Human Rights and Development*, 180-81.

85 These terms are borrowed from Wayne Sandholtz and Alec Stone Sweet, see Sandholtz, W. and Stone Sweet, A. (2004), 'Law, Politics and International Governance', in Reus-Smit, C. (ed.), *The Politics of International Law* (Cambridge University Press), 239.

The world is now more poly-centric than the post-war climate human rights law was designed to regulate. Nevertheless, pressure on states for the implementation of human rights law must be maintained. States are the most accountable to governance in international relations. The monitoring and enforcement of human rights law remains nationally based and subject to national interests. Shifting human rights responsibility away from states may play into the hands of recalcitrant states, and allow them to avoid responsibility. The problem with extending exclusive human rights responsibility beyond the state is evident. Human rights law has not overcome national interests in a system consisting of less than two hundred states. How can human rights law responsibility be extended to hundreds of thousands of non-state actors, each with their own interests, and with little or no independent accountability outside of state monitoring functions?

Despite the new challenges arising from the globalization process and non-state actors, the state remains the only full subject of international law responsible under human rights law. It is the state, acting individually or collectively, that ultimately controls international relations. It creates the framework and rules in which the relevant non-state actors thrive. Despite human rights law's predilection for liberalism, realism, which prioritizes national interests, is still the prominent paradigm of international relations.⁸⁶ National interests are still the priority of international relations and human rights law is consistently subordinated to them. It is important for the human rights community to display in clear terms why global governance based on human rights is in the interest of dominant states.

The layout of the book is as follows: Part 1 focuses on the different versions of international cooperation. Chapter 2, *Human Rights and Development Cooperation in Context*, anchors human rights within the context of global governance based on international investment and globalization. The chapter highlights the problems associated with a system that dislocates governmental regulatory ability and domestic populations. The chapter goes on to analyze the impact of two global projects, the first human rights and the second foreign investment. The prioritization of the latter and its persistent impediment to human rights within the development process is outlined. Chapter 1 observes that foreign investment, rather than the right to development, has become synonymous with international development. The positive and negative aspects of this development system are scrutinized. The debate is important. If economic globalization is viewed as positive, then no further regulation is required. On the other hand, if economic globalization's exigencies are considered intolerable then regulation is required. The chapter then examines the influence of corporations on the development project and its ability to undermine a state's regulatory function, emphasizing the continued role of the state. The concepts of economic justice and equality are examined as the basis of governance and are linked to human rights law, in particular, economic, social and cultural rights. The chapter concludes by linking these ideas to the investment system, and suggests that global governance must be guided by a process conducive to the realization of human rights.

⁸⁶ Forsythe, D. (2006), *Human Rights in International Relations* (2nd edn, Cambridge University Press), 251.

Chapter 3, entitled Development Cooperation in Theory: The Right to Development, focuses on the commitments of the international community to a rights-based process of development. It presents the right to development as the best indication of rights-based global governance. The Declaration on the Right to Development is an informative interpretation of states' commitments to international cooperation. The chapter outlines the content of the right to development and its legal basis. It highlights the importance of the right to development and its evolution into its present form. Fundamentally, Chapter 3 outlines the duties arising from the right to development, its legal basis and its subjects and duty bearers. It is here that the right to development is shown to be applicable to global governance thanks to its approach based on international solidarity with rights and responsibilities that transcend national borders. The right to development is conditional. It is restricted to those states implementing a rights-based process of development nationally and can only be used in conjunction with a participatory and accountable system. For clarification, the framework of the rights based process is outlined. This limitation is essential in preventing elite capture. While the Declaration does not impose binding legal responsibilities, it is a source of law. It should create important norms for national and international economic and political policy-making. It provides a basis to hold governments accountable to their own populations for their international actions.

Chapter 4, Development Cooperation in Practice: International Investment Law outlines contemporary international cooperation for development. It details the barriers to human rights presented by the collective action of states through the network of bilateral investment treaties. This chapter explains the emergence of binding standards on the treatment of foreign investors that conflict with the right to development. It examines the unsure evolution of these standards and their potential reduction of the state's regulatory ability through the prioritization of developed state's national interests. Chapter 4 looks at various ways that human rights discourse might be included in investment law. It examines how the emerging norms of investment are confronting human rights law in a number of pending cases. These include cases involving equality in South Africa, public services in Argentina and indigenous rights in a number of other states. Direct challenges to governmental public purpose regulations can result in an institutionalized reduction the regulatory ability of states. It remains to be seen whether human rights law will be prioritized in the investment arbitration process.⁸⁷

Part 2 searches for a framework for international cooperation and suggests a tripartite system of micro, macro and meso-level responsibility. This means that corporations, states and the international community must abide by legal, political/economic and moral obligations to ensure that developing states retain policy-making space to implement the right to development. The regulation of influential non-state actors is addressed in light of a paradigm shift in international relations.

Chapter 5 looks at the micro-level of regulation. It examines the important advances made by the corporate social responsibility movement. Chapter 5 looks in

⁸⁷ *Methanex Corporation v. United States of America*, in the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug 2005.

depth at the direct legal responsibility of corporations under human rights law and examines the Draft Norms on the Responsibility of Transnational Corporations.⁸⁸ These advances are discussed and criticized in relation to problems at all three levels of the tripartite system proposed in Part 2.

The macro-level of regulation is developed in Chapter 6. As the primary decision makers in international relations states should retain the primary duty for fulfilling human rights law. In doing so, they must hold corporations liable for direct violations and retain their regulatory function despite corporate pressures. This chapter addresses the framework of international law regarding the horizontal application of human rights law and the responsibility to protect of host-states. It provides a detailed examination of the increasingly important role of the home-state and the potential for extraterritorial application of home-state human rights laws.

The meso-level is the essential component of regulation examined in Chapter 7. Global governance should be based on international human rights law obligations. The framework for international law applicable to international cooperation is traced. The chapter draws upon the international legal obligations of states to international cooperation. It emphasizes political commitments to collective security that prioritizes cooperation for human development. It deals with realist international relations and human rights. Development and human rights are put in terms of national security and national interest to further engrain the need to promote the right to development.

The concluding chapter looks at the value added of the right to development as a framework for global governance. The right to development could be used as a tool for evaluating global development policy, including investment treaties. The concluding chapter examines the problems of realism and national sovereignty and briefly discusses ways in which international cooperation can overcome such barriers. Rights-based development is emphasized citing the linkage between human development and political stability. Stability is the foundation for investment, economic growth and global security. The business case for the right to development is put forward with similar goals. The purpose of this is to convince states that rights-based development, including the regulation of non-state actors, is in their own best national security and economic interests. The concluding chapter also contains a commentary on the international cooperation, interdependence and the changing nature of sovereignty. The book concludes with a last word promoting international cooperation for human rights law in order to improve and legitimize economic globalization. A final warning is issued based on historical lessons of past attempts at economic globalization. When profit creation outstrips the ability of societies to protect and promote their own social, economic and cultural goals, a backlash against the economic system is inevitable. Emerging responses to contemporary economic globalization are noted.

⁸⁸ Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) E/CN.4/Sub.2/2003/12.