Reconstructing the global human rights order in pursuit of a binding business human rights treaty in the era of decolonisation

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Abstract

The current global human rights order, eminently propagated in international legal instruments and statements, is to a great extent state-centric in character, bestowing obligations on states, whilst largely ignoring the conduct of non-state actors in the form of transnational corporations (TNCs) and trade governance institutions whose record of human rights adherence is scarcely convincing. This inability to aptly govern the conduct of transnational entities, even when it is evident that their power now eclipses that of states, raises the concern that the extant human rights regime is a neoliberal construct advancing market fundamentalism and widening the economic disparities between developed and developing countries. This article unsettles the doctrinal foundations underlying state centrism in international human rights law, arguing that such a version of human rights is exposing developing countries to neoliberal oligarchs, and market deficiencies, which if not reformed, may entrench underdevelopment. It calls for a decolonised human rights regime which impose human rights obligations on the conduct of transnational entities in pursuit of human dignity, equality and freedom.

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1. Introduction

Recent scholarship has shown a bourgeoning interest in employing the decolonisation paradigm as an antidote for addressing the shortcomings of the current international human rights regime.[4] Decolonisation as a theoretical construct

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[4] F. Hoffmann, B. Assy, 'Decolonising Human Rights' in J. Bernstorff and P. Dann (eds) *The Battle for International Law in the Decolonisation Era* 1st ed Oxford University Press, Cape Town, 2011, p.1; B. Fagbayibo*, Some Thoughts on Centring Pan-African Epistemic in the Teaching of Public International Law in African Universities*, 21, International Community Law Review (2019) 171; JM. Barreto, *Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto,* 3,

has its incipient core demands embedded in third world scholarship which offers a polemic proposition to the dominant western perspectives in the study of academic disciplines such as the social sciences and lately, the law.[5] The decolonisation of human rights is about the crucial emancipatory role that the discourse of human rights has and should play in the creation of material conditions necessary for the economic, social and political flourishment of humanity.[6] Its crucial element is the adoption of the language of human rights to articulate core demands of economic sovereignty, self-determination, equality and ultimately an egalitarian order.[7]

It can be strongly argued that the decolonisation of the international human rights order is not the same as the rejection of everything about the state-centric human rights governance based on its presupposed European orientation.[8] Such a view would be based on a misreading of the concept of decolonisation.[9] Current efforts to decolonise human rights [are] and [should] be foregrounded on Ngũgĩ wa Thiongo's idea of decolonisation which does not require the dismissal or the rejection of all Eurocentric viewpoints but rather focuses on placing the marginalised [third world socio-economic interests] at the centre of the international human rights order.[10] This localisation and re-centring of the periphery is a practical approach to the call for decolonisation of human rights which is informed by present realities.[11]

The argument is that the contemporary international human rights order widely believed to have emerged from the crucible of World War II devastation has been stretched beyond measure, exposing its structural deficits through its lethargic response to the ever widening economic chasm between developed and developing countries.[12] These structural deficits are evidently entrenched in the neoliberal-driven international human rights regime, masked and exacerbated by the international human rights "gramma" and the rise of populist authoritative capitalism.[13] Academic commentators are, therefore, exploring avenues to break

Transnational Legal Theory (2012), 3; W. Vandenhole, 'Decolonising children's rights: of vernacularisation and interdisciplinarity' in R. Budde and U. Manista, *Childhood and Children's Rights between Research and Activism* 1st ed Springer: Bern, 2020, p. 187.

[5] R. Burke, *Decolonisation and the Evolution of International Human Rights* 1st Pennsylvania University Press: Pennsylvania, 2011, p. 2.

[6] See above n. 3.

[7] See above n. 4.

[8] See above n. 5.

[9] See above n. 6.

[10] This is a re-reading of Ngugi wa Thiongo's version of decolonisation which focuses on centring the Pan-African interest as a polemic thesis to the dominant Eurocentric narrative. M. Recep Taş, Ngũgĩ wa Thiongo's *Decolonising the mind: The Politics of Language in African 1986 Literature Adli Eserinin Sömürgecilik - Dil İlişkisi Açisindan İncelenmes*, 5, International Journal of Language Academy (2017), 190.

[11] See above n. 191.

[12] B. Golde, *Beyond redemption? Problematising the critique of human rights in contemporary international legal thought*, 2 London Review of International Law (2014), 98; I. Wuerth, International Law in the Post-Human Rights Era, 96, Taxas Law Review (2017), 280.

[13] L. Kennedy and V. Singh, Drivers of Authoritarian Populism in the United States, retrieved from, (2018), 2, retrieved from, https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states/, consulted on 17. 06. 2021; J.

from the kind of scholarship which endorses the present Eurocentric construct of international human rights in this era of neo-liberal economic globalisation.[14] In his call for a new agenda for the study and development of the international human rights system, Alston substantiates this point by strongly arguing for an enhanced humanised human rights order which confronts the contemporary neoliberal-driven challenges in a more efficient manner.[15]

Alston's submission becomes more compelling if one recognises that in an era characterised by the pre-eminent "rhetoric" of international human rights, there is growing fear that the extant human rights regime masks neoliberalism in the form of transnational corporations (TNCs) and other supranational institutions which seem to be perpetuating global economic subjugation and hegemony.[16] Although TNCs can be a vehicle for fostering economic development, technological improvements, and poverty alleviation for their host countries, the economic hegemony created by them has the potential to consign the majority of people in developing countries to the position of hewers of "wood" with no real prospects of owning the means of production.[17] This argument becomes more compelling, if one considers that TNCs now wield colossal economic and social influence which, in some instances, eclipses that of states.[18] In spite of this overwhelming power, TNCs largely remain and operate beyond the reach of mainstream international human rights frameworks, spawning the debate on the role of these economic entities in facilitating, maintaining and achieving socio-economic hegemony without being subject to the governance and constraints of strong legal norms.[19]

This article is an intervention to provide a decolonial conceptualisation of the international human rights regime. It offers an alternative trajectory to un-think and re-think the constitution of the international human rights regime rather than

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Ward & C. *Flowers, How the Trump Administration's Efforts to Redefine Human Rights Threaten Economic, Social, And Racial Justice*, 27, Columbia Human Rights Law Review (2019), 5.

[14] E. Altmetric, *Decolonial Critique of Private law and Human rights*, 34, South African Journal on Human Rights (2018), 492.

[15] P. Alston, *The Populist Challenge to Human Right*, 9, Journal of Human Rights Practice (2017), 1.

[16] S. Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism,* 77, Law and Contemporary Problems (2017), 149; D. Grewal & J. Purdy *Introduction: Law and Neoliberalism*, 77, Law and Contemporary Problems (2014), 1; D. Miller, 'How Neoliberalism Got Where It Is: Elite Planning, Corporate Lobbying and the Release of the Free Market', in K. Birch and V. Mykhnenko, (eds.) *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order* 1st ed Zed Books: London (2010) at 23.

[17] F. Fanon, *The Wretched of the Earth* (1963) 35, retrieved from, http://abahlali.org/wp-content/uploads/2011/04/Frantz-Fanon-The-Wretched-of-the-Earth-1965.pdf, consulted on 03.08. 2021; J. D. Ruggie, *Just Business: Multinational Corporations and Human Rights* 1st ed 1. W. W. Norton and Company: New York (2013) at 2.

[18] J. D. Ruggie, *Multinationals as global institution: Power, authority and relative autonomy*, 12, Regulation and Governance (2017) 317.

[19] M. Ahmad, The Economic Globalisation and its Threat to Human Rights, 2, International Journal of Business and Social Science (2011) 274; S. McBrearty, The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity, 57, *Havard International Law Journal* (2014) 4.

what the present state-centric paradigms provide.[20] In the academic realm and beyond, the existential philosophical position which obliges the present international human rights order to be state-centric in orientation has remained unchallenged for a very long time.[21] However, with new frontiers for expanding the obligations generated by international human rights norms being explored, the present character of western construction of human rights has become unsustainable.[22] Importantly, this western constitution of international human rights is a point of view that does not explicitly present itself as western.[23] In this way, it conceals its epistemological expressions, paving the way for claims of universalism, egalitarianism and objectivity.[24]

The article is divided into three parts. The first part present a discussion on the origin and development of state-centrism in the international human rights order. The major objective is to offer some important insights into how the extant international human rights regime has limited itself to state-centric obligations, a position that has created an accountability deficit within the international order.[25] In the second part, the article examines the elements of state-centric within the international human rights order, elaborating on how the international human rights instruments embed state-centric as a critical predicament which allows TNCs to operate beyond the reach of mainstream international human rights regulation.[26] Finally, the article offer proposals on the decolonisation of the international human rights order in favour of a binary system of human rights accountability which closes the accountability gap.[27]

2. The origin of state-centric international human rights paradigm

Even though many academic commentators have exerted considerable effort in ascertaining the genealogy of the current international human rights order, lamentably, most of the works avoid the question about the origin of state-centrism in the international human rights order.[28] The result is a dearth of literature on the

[20] E. De Brabandere, *Non-State Actors, State-Centrism and Human Rights Obligations*, 22, Leiden Journal of International *Law* (2009) 191.

[21] K. Buhmann, *Business and Human Rights Research Methods*, 36, Nordic Journal of Human Rights (2018) 324.

[22] See above n. 325.

[23] B. Ikejiaku, *International Law is Western Made Global Law: The Perception of Third-World Category*, 6, African Journal of Legal Studies (2013) 339.

[24] J. Barreto, *Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice*, 21, Indiana Journal of Global Legal Studies (2014) 395.

[25] P. Alston, 'The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston, (ed) *Non-State Actors and Human Rights* 1st ed Oxford University Press: Oxford (2005) at 17.

[26] See above n. 18.

[27] See above n.19.

[28] M. Woessner, 'Provincialising Human Rights? The Heideggerian Legacy from Charles Malik to Dipesh Chakrabarty', in J. Barreto, (ed) *Human Rights from a Third World Perspective: Critique, History and International Law* 1st ed Newcastle upon Tyne: Cambridge (2013) 68; C. McCrudden, *Human Rights Histories*, 35, Oxford Journal of Legal Studies (2015) 180.

emergence of state-centrism in that legal order.[29] Despite paucity of literature, historians, human rights experts and international lawyers have contended that there is actually much at stake here when it comes to tracing the origin of the state-centric human rights order.[30] But that is where the consensus ends as the views reflected in the scarce but animated literature on the subject differ fundamentally in the viewpoints they advance.[31] This is because the history of state-centrism, like the historiography of international human rights itself, cannot be determined in a linear form.[32] The fluid nature of the development of international human rights makes that task impossible for academic commentators who have sought to decipher the precise points of origin for today's state-centric international human rights orientation.[33] What is clear is that doctrinally, the current international human rights regime has limited itself to state-centric obligations, a confinement which has exalted capital, international markets, and corporate entities to the position of holy cows.[34] TNCs and other transnational global regimes or institutions, the argument goes, are *quasi*-subjects of international law and thus do not bear [much] or [direct] obligations under the current international human rights order.[35]

Further, the view that the contemporary global human rights order is an essential component of international law largely rooted in the law of European statehood, is academically settled.[36] In this conception, the role of international law was to tame states so that they could best attain their developmental objectives through the avenue of a domestic human rights' oriented limited government.[37] It is noteworthy that the history of international human rights law is, therefore, both the history of self-governing states and the history of the universal norms and values that

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[29] J. C. Montero, *Is the State-Centric Conception of Human Rights Suitable For a Globalised World? A response to Cristina Lafont*, 33, Revista Latinoamerica de Filosofia Politica (2013) 7.

[30] D. Pendas, *Toward a New Politics? On the Recent Historiography of Human Rights*, 21, Contemporary European History (2012) 96; Hegel *The Philosophy of History* 1st ed Dover Publications: New York (1956) at 8.

[31] B. S. Brown, From State-Centric International Law towards a Positive International Law of Human Rights, (2008), 135, retrieved from, http://www.kentlaw.edu/faculty/bbrown/classes/Human RightsSP10/CourseDocs/2FromStateCentric.pdf, consulted on 07.06. 2021; N. Jagers, Human Rights Enforcement Towards a People-Centered Alternative? A Reaction to Professor Abdullahi An-Na'im, 21, *Tilburg law review* (2016) 275.

[32] V. Ozoke, The Imperialism of Rights: Tracing the Politics and History of Human Rights, 4, *American International Journal of Contemporary Research* (2014) 3; S. Moyn, *Substance, Scale, and Salience: The Recent Historiography of Human Rights,* 8, Annual Review of Law and Social Sciences (2018) 123; MJ. *Dembour, What are human rights? Four schools of thought*, 32, Human Rights Quarterly (2010) 21.

[33] See above n.22.

[34] C. Lafont, *Accountability and global governance: challenging the state-centric conception of human rights*, 3, Ethics and Global Politics (2010) 196.

[35] D. Uribe, Setting the pillars to enforce corporate human rights obligations stemming from international law, (2018), 2, retrieved from, https://www.southcentre.int/wp-content/uploads/2018/10/PB56_Setting-the-pillars-to-enforce-corporate-human-rights-obliga tions-stemming-from-international-law_EN.pdf, consulted on 24. 07. 2020.

[36] C. Walter, Subjects of international law, 28, *Max Planck Encyclopaedia of Public International Law* (2007) 129.

[37] K. Quintavalla, Priorities and human rights, 23, *The International Journal of human rights* (2019) 680.

should govern statehood and result in the establishment of universal egalitarianism and collaboration among the community of nations.[38]

Although academic commentators concede that the state-centric international human rights system is largely embedded in the concept of European state-hood, how, when and where the idea of statehood actually first emerged remains an educated guess.[39] Some academic commentators posit that the law governing autonomous political communities is historically traceable to antiquity, sometimes back to pre-colonial international relationships.[40] These scholars recognise the historical linkages which exist between the vocabularies of statehood and the collapse of the ancient political civilisations such as the early Babylonian and Greek empires.[41] The downfall of these historic civilisations is sequenced with the history of the demise of the ancient Roman civilisation, and the collapse of the universal church-driven states in early western modernity, as evidence of the emergence of early statehood.[42]

The subsequent depreciation and disappearance of the early forms of statehood expounded upon above, has led some academic commentators to conclude that the contemporary state-centric paradigm has been mainly about the relationship between European states and the [other] understood as more similar to individuals' relations in a particular domestic political environment.[43] This paradigm developed from the interaction between Europe and the non-European world regulated through the contractual form of diplomatic encounters or treaties and frequently governed by the laws of political economy also known as *Realpolitik*.[44] By signing these international treaties states were deemed to have consented to becoming part of an international association of nations.[45] In their legal form, these treaties implied that, unlike many traditional interstate agreements, their normative force rested less on the mutual performance of duties, but more on the universally acknowledged moral principles, or upon each state's declaration of commitment before the international community.[46]

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[38] D. J. Hill, Estimating the effects of Human Rights Treaties on State Behaviour, 72, *The Journal of Politics* (2010) 1161.

[39] N. Walker *et al*, *Law, polity and the legacy of statehood: An introduction, 16, International Journal of Constitutional Law* (2018) 1148.

[40] L. Wheatley, *The Emergence of New States in International Law: The Insights from Complexity Theory*, 15, Chinese Journal of International Law (2015) 580.

[41] See above n. 581.

[42] P. Carozza & D. Philpott, The Catholic Church, Human Rights, and Democracy Convergence and Conflict with the Modern State (2012) 5, retrieved from, https://www.stthomas.edu/media/catholicstudies/center/logosjournal/archives/2012vol15/153/15-3caro zza.pdf, consulted on, 24.07. 2021.

[43] C. Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International-Law*?, 31, European Journal of International Law (1993) 447.

[44] V. Ozoke, *The Imperialism of Rights: Tracing the Politics and History of Human Rights*, 4, American International Journal of Contemporary Research (2014) 1.

[45] See above n.2.

[46] K. Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*, 38, Human Rights Quarterly (2016) 329.

Whatever the differences between the aforementioned views, theoretical viewpoints drawn from both traditional or colonial and post-colonial schools of thought share a state-centric conceptualisation of the international human rights regime.[47] The dynamics of this view revolve around the ever-present struggle for political hegemony among self-proclaimed political communities acting on well-received Machiavellian ideology and principles.[48] Other theories, mainly espoused by free trade idealists, have justified the state-centric paradigm with the rules driving statecraft in the acclaimed traditions of *Laissez Faire* and *De Jure Belli Ac Pacis* articulated in the language of mercantilism, civilisation, and economic development.[49] Such "Westphalian" perceptions have engendered the depiction of international human rights law as mainly facilitating and taming state policy, in an attempt to achieve state cooperation in the community of nations for the betterment of humanity.[50]

From the above, it can be argued that the vision of the international human rights order was then legislated as either realist or idealist depending on the degree to which it emphasised and entrenched either national sovereignty or state-centric obligations.[51] This view was, from about the mid-20th century, largely supported by a number of academic commentators, international relations experts and diplomats who largely advocated for a post-colonial human rights order projected as an anti-thesis to the international accumulation of imperial power.[52] However, the narrative of universal progress of international human rights was eventually enthroned with a state-centric human rights order as the crowning achievement of contemporary legal modernity.[53] The current international human rights order has largely preserved and limited itself to this state-centric vision of human rights.[54]

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[47] S. Jensen, *The Making of International Human Rights: The 1960s, Decolonisation and the Reconstruction of Global Values* 1st ed Cambridge University Press: Cambridge (2016) at 7.

[48] S. Sims, *Political Philosophy and the Problems of International Order: Machiavelli, Kant, and Aristotle*, 46, Perspectives on Political Science (2017) 127.

[49] M. Palen, *Free-Trade Ideology and Transatlantic Abolitionism: A Historiography*, 14, Journal of the History of Economic Thought (2015) 291; B. Tierney, *The Idea of Natural Rights-Origins and Persistence*, 2, Northwestern Journal of International Human Rights (2007) 3.

[50] A. Hall, The Challenges to State Sovereignty from the Promotion of Human Rights (2010) 4, retrieved on, https://www.e-ir.info/2010/11/17/the-challenges-to-state-sovereignty-from-the-promotion-of-human-rights/, consulted on 29.07. 2021; H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625) 4, retrieved from, https://archive.org/stream/hugonisgrottiide02grotuoft/hugonisgrottiide02grotuoft_djvu.txt, consulted on 29.07.2021.

[51] T. Hanson, The Tensions between Realism in International Relations and Human Rights Studies (2008) 64, retrieved on https://socialsciences.exeter.ac.uk/politics/research/readingroom/Dunne-goodhart-chap04.pdf, consulted on, 01.05. 2021.

[52] A. Huneeus & M. Madsen, *Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems*, 16, International Journal of Constitutional Law (2018) 137.

[53] M. Freeman, 'Universalism of Human Rights and Cultural Relativism', in Sheeran and Rodley (eds) *Handbook of International Human Rights Law* 1st ed UNESCO Publishing: Paris (2013) at 61.

[54] J. P. Thérien & P. Jolly, All *Human Rights for All": The United Nations and Human Rights in the Post-Cold War Era*, 36, Human Rights Quarterly (2014) 36.

3. Exploring the elements and implications of the state-centric human rights order in the neoliberal economic era

As alluded to earlier, the contemporary international human rights order enshrines the basic rights of human beings across the world and imposes a duty on the United Nations (UN) member states to ensure that such rights are realised in their countries through their domestic and transnational juridical acts.[55] Article 55 of the Charter obliges member states to establish specialised regional human rights frameworks to advance the observance of international human rights.[56] In accordance with the precepts of the UN charter, the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,[57] the African Charter on Human and Peoples 'Rights (ACHPR),[58] and the European Convention on Human Rights (ECHR)[59] largely pursue the realisation of human rights through the agency of states as the major subjects of international law.[60] Conversely, the new Protocol to the African Court of Justice and Human and Peoples' Rights may to some extent be said to have departed from taking a non-state agency approach to the protection of human rights by authorising criminal prosecutions of companies that commit a range of international crimes.[61] Lamentably, a major flaw of the said Protocol is that it grants immunity from prosecution to any serving African Union (AU) head of state or government, or anybody acting in such capacity during their tenure of office.[62] In cases where the TNCs and their executives are accused of acting in complicity with state officials, one can opt to prosecute accomplices rather than

[55] See the preamble and article 4 of the UN charter. A. Anna'm, *The Spirit of Laws is not Universal: Alternatives to the Enforcement Paradigm for Human Rights*, 21, Tilburg Law Review (2016) 4.

[56] Article 55 of the UN Charter.

[57] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador. See "Protocol of San Salvador, retrieved from, https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf, consulted on, 20.04. 2021.

[58] The African Charter on Human and Peoples Rights was adopted 01 June 1981, retrieved from, http://srjc.org.za/wp-content/uploads/2019/10/African-Charter-on-Human-and-Peoples-Rights.pdf, consulted on, 21.04.2021.

[59] See European Convention on Human Rights, retrieved from, http://www.echr.coe.int/Documents/Convention_ENG.pdf, consulted on, 26.01.2021.

[60] M. W. Doyle, A Global Constitution? The struggle over the UN Charter (2010), retrieved from, http://www.iilj.org/ courses/documents/HC2010Sept22.Doyle.pdf, consulted on, 26.07. 2020.

[61] African Commission, Protocol on The Statute of The African Court of Justice and Human Rights, retrieved from, https://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf, consulted on, 26.08.2020; S. Nimigan, *The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity,* 17, Journal of International Criminal Justice (2019), 40; A. Rachovitsa, *On New 'Judicial Animals': The Curious Case of an African Court with Material Jurisdiction of a Global Scope*, 19, Human Rights Law Review (2019), 260.

[62] N. Ani, *Implications of the African Union's stance on immunity for leaders on conflict resolution in Africa: The case of South Sudan and lessons from the Habré case*, 18, African Human Rights Law Journal (2018), 438.

the principal perpetrators.[63] From the foregoing, a deduction can be made that the international human rights regime, including the regional systems, relies heavily on states as the primary agents for the achievement of a just world.[64] By recognising states as the primary duty bearers, the international human rights regime advances and promotes a state-centric accountability system which minimises the role of TNCs in promoting economic justice.[65]

A critical reading of the UN charter demonstrates that it entrenches state-centrism in sync with a number of philosophers who have helped shape the ideological foundations of the Westphalia system of international law.[66] Of particular import here are the views of John Rawls who contended that international human rights should be regarded as ubiquitous principles which any political community should adhere to in order to avoid military interventions by other enlightened countries.[67] This view is further explicated by Ronald Dworkin who argued that international human rights are simply rights to be treated by one's government as a human being whose dignity fundamentally matters.[68] In the same vein, Joshua Cohen refers to international human rights as legislated norms and principles predicated on the idea of membership in an internationally organised political community of nations.[69] The foregoing scholars, among others, view international human rights as moral and legal imperatives to be actualised by governments in order to avoid dehumanisation of human beings across the world. The UN Charter endorses and reflects this Eurocentric state-centric human rights paradigm.[70]

The Universal Declaration of Human Rights (UDHR) adopted in 1948 as part of the international bill of rights and supported by the UN advances state-centrism.[71] Perhaps such an ideological position was unavoidable given that the

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[63] K. Naldia and J. Magliveras, *The African Court of Justice and Human Rights: A Judicial Curate's Egg*, 9, International Organisational Law Review (2012), 399.

[64] A. Anna'im, Transcending Imperialism: Human Values and Global Citizenship (2010) 4, retrieved from, http://tannerlectures.utah.edu/_documents/a-to -z/a/An-Naim_10.pdf, consulted on 26/05.2021.

[65] M. Nowak *Human Rights or Global Capitalism: The Limits of Privatisation* 1st ed University of Pennsylvania: Philadelphia (2017) at 69.

[66] The UN Charter was signed on June 26, 1945 and entered into force on October 24, 1945. United Nations "Human rights education" http://www.humanrightseducation.info/hr-materials/theunited-nations-charter.html (accessed on 27/01/2019).

[67] J. Rawls, *The Law of Peoples*, 20, Critical Inquiry (1993), 36.

[68] R. Dworkin R "Rights as Trumps" in Waldron J (ed.) *Theories of Rights* 1st ed Oxford University Press: Oxford (1984) at 153.

[69] J. Cohen, *Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalisation*, 36, Political Theory (2008), 581.

[70] J. Zagel, *International Organisations and Human Rights: The Role of the UN Covenants in Overcoming the Accountability Gap*, 36, Nordic Journal of Human Rights (2018), 75; M. Terretta, *We Had Been Fooled into Thinking That the UN Watches over the Entire World: Human Rights, UN Trust Territories, and Africa's Decolonisation*, 34, Human Rights Quarterly (2012), 360.

[71] The Universal Declaration of Human Rights adopted on 10 Dec, G.A., Res.217A (UN) GAOR 3d Sess, art. 25. Doc A/ RES/3/ 217 (1948).

UDHR was adopted in a world dominated by states.[72] In 1948, the memory of World War II was still fresh in everyone's mind and the declaration sought to condemn and de-legitimatise the unspeakable state-sponsored atrocities the world had just witnessed.[73] However, it is noteworthy that this does not mean that states were the only perpetrators of such atrocities. Rather, it means that they were almost the only officially (and politically) recognised aggressors.[74]

However, since those times, the world has deeply transformed.[75] The Westphalian world comprising of only omnipotent autonomous sovereign states capable of committing dehumanising acts is fast disappearing.[76] The deeply integrated international economic life that globalisation has imposed upon humanity means that the activities and actions of TNCs and other supranational institutions have impacts on the realisation of the human rights of people across the world.[77] This explains why the rights contained in the UDHR ought to have and should be interpreted as part of a dynamic cosmopolitan project applicable not only or mainly to states or domestic institutions but also to any transnational institutional global regime imposed on humanity.[78] This requires, as Pogge argues, that the current international human rights regime be re-configured to ensure that these rights are realised across the world.[79] However, this view is not without shortcomings.[80] According to Montero, even if the trans-nationalisation of international human rights occur and obligations are imposed on other supranational institutions and TNCs, these obligations cannot be comparatively the same as the human rights responsibilities of states.[81] In spite of this critique, there is scholarly consensus that the state-centric approach of the UDHR to international human rights does not adequately provide for the human rights obligations of non-state actors in the form of the TNCs.[82]

When further examining how the contemporary international human rights order encapsulates state-centrism, the classification of human rights becomes significant.[83] First generation human rights, as articulated in the International

[72] P. Spiro, *The States and International Human Rights*, 66, Fordham Law Review (1997), 568.
[73] See above n.569.
[74] L. Gallegos and D. Uribe, *The Next Step against Corporate Impunity: A World Court on Business and Hu-man* Rights?, 57, Harvard International Law Journal (2016), 57.
[75] J. Contesse, *Settling Human Rights Violations*, 60, Harvard International Law Journal (2019), 317.
[76] See above n. 318.
[77] J. Bernstorff, *International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalisation*, 26, The European Journal of International Law (2015), 282.
[78] T. Pogge, *Cosmopolitanism: A Path to Peace and Justice*, 12, Journal of East-West Thought (2015), 9; C. Ryngaert, *Non-State Actors: Carving out a Space in a State-Centred International Legal System*, (2016) 63 Netherlands International Law Review (2016), 185.
[79] T. Pogge, *Are We Violating the Human Rights of the World's Poor?*, 14, Yale Human Rights and Development Law Journal (2011), 32.
[80] J. C. Merle (eds.) *Spheres of Global Justice* Springer: New York (2013) at 595.
[81] J. Montero, *International Human Rights Obligations within the States System: The Avoidance Account*, 25, Political Philosophy (2017), 38.
[82] See above n.40.
[83] S. Subedi, *A shift in paradigm in international economic law: From State-centric principles to people-centric policies*, 10, Manchester Journal of International Economic Law (2013), 314.

Covenant on Civil and Political Rights (ICCPR), and second generation human rights, embodied in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[84] though intertwined, are essentially different in the way they reflect state-centrism.[85] Civil and political rights oblige states to ensure that their people have a democratic right to participate in the civil and political affairs of the state.[86] State parties are enjoined to protect individuals' physical and mental integrity in terms of articles 6, 7, 9, and 10 of the ICCPR. According to article 17 of the ICCPR states must ensure that individuals enjoy freedom in their personal space, such as in their homes and families, with guaranteed freedom of thought, conscience, and religion in Article 18, opinion and expression in Article 19, non-discriminatory treatment in Articles 2(1) and 26, access to courts in Article 14, and the right to take part in the political system in Article 25.[87] Article 2(1) of the ICCPR reflects the state-centric character of the instrument by placing an obligation on state parties to "respect" and "ensure" the enjoyment of civil and political rights of individuals within their territories.[88] The ICCPR also makes it clear that states have "negative and positive" duties to respect human rights.[89] These obligations should be fulfilled immediately and independent of the question of the availability of resources in the states in question.[90]

At the behest of the Westphalian system, the state-centric conception of the international human rights order is reflected more in the ICESCR which imposes three primary types of obligations on states parties.[91] These legal obligations are to "respect, protect and fulfil" socio-economic rights.[92] The three obligations were famously coined by Henry Shue who maintains that states have a duty to promote, protect and fulfil fundamental human rights.[93] Henry Shue's three-level typology of obligations is explicitly recognised by the UN.[94] The three-level obligations are imposed on states to realise the right to education in Article 13 of the ICESCR, the

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[84] The ICESCR, United Nations General Assembly resolution 2200A (XXI) of 16 December1966 came into force on 3 January 1976.

[85] A. Von der Decken, K. Arnauld, 'Recognistion of New Rights' in Arnauld *et al* (eds) *The Cambridge Handbook of New Human Rights, Recognition, Novelty, Rhetoric* 1st ed Cambridge University Press: Cambridge (2020) 7.

[86] B. Simmons, *Civil Rights in International Law: Compliance with Aspects of the International Bill of Rights*, 16, Indiana Journal of Global Legal (2009), 17.

[87] A. Alston and G. Quinn*, The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9, Human Rights Quarterly (1987), 156.

[88] DC. Chirwa, & L. Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa* 1st ed Cambridge University Press: Cambridge (2016) at 3.

[89] R. Hirschl, *Negative Rights vs Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22, Human Rights Quarterly (2000), 1060.

[90] P. Macklem, *Human rights in international law: Three generations or one*?, 3, London Review of International Law (2015), 19.

[91] D. Marcus, *The Normative Development of Socioeconomic Rights through Supranational Adjudicati*on, 42, Stanford Journal of International Law (2006), 53.

[92] See above n.54.

[93] H. Shue, On Basic Rights (1981) 4, retrived from, https://commons.pacificu.edu/cgi/viewcontent .cgi?article=1317&context=eip, consulted on, 27. 08.2021.

[94] See above n. 5.

right to an adequate standard of living including adequate food, clothing, and housing in Article 11 of the ICESCR, the right to the highest attainable standard of health in Article 12 of the ICESCR and also the right to take part in cultural life in Article 15 of the ICESCR.[95] Larking has observed that by encapsulating socio-economic rights such as education, health, food, and housing, it appears that the ICESCR challenges the neoliberal contempt for non-market-based forms of economic redistribution.[96] However, many academic commentators find this view problematic as the ICESCR does not adequately address material inequality in accessing these social goods as an issue and does not require immediate fulfilment of socio-economic rights.[97] This is despite the fact that states are required to take concrete steps towards realising these rights to the maximum extent of their available resources.[98]

According to the Committee on Economic, Social and Cultural Rights (CESCR) which is mandated to monitor states' compliance, implementation and realisation of the rights contained in the ICESCR, states parties to the ICESCR are obliged to adopt broad based economic empowerment and market-based distributive policies to ensure that a minimum standard of material equality is met.[99] Such redistributive policies include support for fiscal distribution of economic resources, modest land redistribution programs, micro credit schemes and other limited methods of economic empowerment.[100] These broad based forms of economic empowerment advanced by the CESCR demonstrate, *prima facie*, that the current international human rights regime stands, to some extent, in opposition to neoliberalism.[101] But, conversely, the said human rights regime, especially the socio-economic rights elements, conform to rather than challenge the neoliberal paradigm.[102] This is because the realisation of socio-economic rights is founded on

[95] M. Ssenyonjo, *The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa*, 64, Netherlands International Law Review (2017) 13.

[96] E. Larking, *Human Rights Rituals: Masking Neoliberalism and Inequality, and Marginalizing Alternative World Views*, 32, Canadian Journal of Law and Society *(2017),* 9.

[97] M. Ssenyonjo, *Reflections on state obligations with respect to economic, social and cultural rights in international human rights law*, 15, The International Journal of Human Rights (2011), 969.

[98] See above n.16; G. MacNaughton and FD. Frey (eds) *Economic and Social Rights in a Neoliberal World* 1st Cambridge University Press: Cambridge (2018) at 4.

[99] P. Alston and G. Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 38, Human Rights Quarterly (1987), 299.

[100] Human Rights Commission, Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa (2017) 4, retrieved from, https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf, consulted on, 28.07.2021.

[101] C. Gilbert, Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights" Treatment of Land Rights as Human Rights (2015) 10, retrieved from, https://www.escr-net.org/resources/moving-towards-right-land-committee-economic-social-and-cultural-rights-treatment-land, consulted on, 29. 04. 2021.

[102] J. Gideon, *Accessing Economic and Social Rights under Neoliberalism: Gender and rights in Chile*, 27, Third World Quarterly (2006), 1270.

a market-based growth and development model.[103]

As noted above, in the ICESCR context, the state-centric model of human rights dominates.[104] States parties commitment to protect human rights, and claims of social harm or injustice are embedded in the language of state-based obligations. The espousing of this state-centric approach to socio-economic and cultural rights in the ICESCR can be deduced from the corpus of the instrument.[105] The ICESCR claims to depoliticise socio-economic matters that are highly political and controversial thereby masking the material interests at stake.[106] It can be strongly argued that the ICESCR is committed to the realisation of socio-economic rights based on a market-oriented society that adores individual self-interest, economic efficiency, and neoliberal ideology.[107] Therefore, the ICESCR concedes to neo-liberalism in all its three dimensions: (a) ideology; (b) mode of governance; and (c) policy preferences.[108] Charlesworth argues that it has been a conjecture of the international human rights order that underdevelopment is a result of failure to meet the prescriptions of the capitalist-driven economic order.[109] Development has been misinterpreted to mean industrialisation and westernisation.[110] Accordingly, while the nature and form of development that should be pursued under the human rights order is highly contested, neoliberalism has prevailed.[111]

Notably, the inability of the state-centric international human rights regime to act as an effective system of human rights accountability for the TNCs, their shareholders has resulted in the global domination of the neoliberal economic paradigm.[112] Additionally, the state-centric international human rights order cloaks the material realities of inequality, as evidenced in the way the ICESCR's "agrarian reform" provisions are couched and implemented in struggles for access to land by marginalised peoples in developing countries.[113] Under the pretext of moderate agrarian land reform, the World Bank (WB), the International Monetary Fund (IMF)

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[103] M. Pieterse, *Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited*, 50, Human Rights Quarterly (2007), 796.

[104] See above n.798.

[105] J. Fraser, *State-centricity and legalism: Promoting the role of social institutions in the domestic implementation of international human rights law*, 23, International Journal of Human Rights (2019), 976; V. Hoh, *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)*, 58, International Legal Materials (2019), 872.

[106] See above n. 887.

[107] See above n. 888.

[108] J. Wills & B. Warwick, *Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discour*se, 23, Indian Journal of Global Legal Studies (2016), 269.

[109] H. Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 19, Australian Year Book of International Law (1988), 196.

[110] See above n. 197.

[111] See above n. 199.

[112] G. Macnaughton & F. Frey, *Challenging Neoliberalism: ILO, Human Rights, and Public Health Frameworks on Decent Work*, 21, Health and Human Rights Journal (2018), 44.

[113] H.P. Hans *et al. Agricultural Land Redistribution toward Greater Consensus,* 1st ed. World Bank Publication: Washington, D.C. (2009) 45.

and other international financial institutions have conditioned their loans on, *inter alia*, the promotion of a neoliberal land reform regime where transfer of privately-held land, often in the hands of minority groups, is largely pre-conditioned state acquiring the land on a modest land reform "model.[114] The land holdings in question are vast in scale, and the history of their acquisition can usually be traced to colonial conquest or gifting from unrepresentative and, therefore, undemocratic governments.[115] Overlooking this colonial legacy, transfers to the landless facilitated by the WB through agrarian reform related loans are conditioned on the "willing buyer willing seller" policies slowing the pace for the attainment of distributive justice.[116] This model of economic development is premised upon limited market-based reform with minimum consideration of other forms of reform. It assumes that economic development and growth depend on the implementation of the neoliberal economic model.[117]

At the command of the state-centric international human rights order, under the "banner" of the natural right of freedom to trade, the international trading regime espouses a neoliberal economic model and framework of rights.[118] Notably, in the era of neoliberal globalisation there is a deliberate effort to establish a state-centric global governance system predicated on economic policies, property rights, rule of law, international human rights and even domestic constitutionalism that entrenches and institutionalises the political project called neoliberalism.[119] This project is established through international legal instruments or institutions such as the UN Charter, the General Agreement on Tariffs and Trade (GATT),[120] the World Trade Organisation (WTO), the United States Mexico-Canada Agreement (USMCA),[121] Bilateral Investment Treaties (BITs),[122] regional trade agreements, and powerful development finance institutions such as the IMF and WB, which largely seek to entrench the economic logic of neoliberalism and the interests of global economic

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[114] E. Lahiff, *Willing buyer, willing seller': South Africa's failed experiment in market-led agrarian reform*, 28, Third World Quarterly (2007), 157; R. Hall & T. Kepe, *Elite capture and state neglect: New evidence on South Africa's land reform*, 44, Review of African Political Economy (2017), 1.

[115] R. Home, *Culturally Unsuited to Property Rights?' Colonial Land Laws and African Societies*, 40, Journal of Law and Society (2013), 19.

[116] J. Pereira, *The World Bank's 'Market-Assisted' Land Reform as a Political Issue: Evidence from Brazil* 1997-2006, 82, European Review of Latin American and Caribbean Studies (2007), 21.

[117] J. Wills, Contesting World Order: Socio-Economic Rights and the Global Justice Systems, in J. Wills, *Neo-liberal Globalisation and Socioeconomic Rights: An Overview: Socioeconomic Rights and Global Justice Movements* Cambridge University Press: Cambridge (2017) at 49.

[118] C. Gammage, *Protecting Human Rights in the Context of Free Trade? The Case of the SADC Group Economic Partnership Agreement*, 11, European Law Journal (2014), 783.

[119] S. Regilme, *Constitutional Order in Oligarchic Democracies: Neoliberal Rights versus Socio-Economic Rights*, 16, Law, Culture and the Humanities (2016) 1.

[120] GATT is a multilateral agreement whose major purpose is to promote free trade between the contracting parties by reducing trade barriers such as tariffs and quotas.

[121] N. Butler & S. Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation*?, 64, Netherlands International Law Review (2017), 43.

[122] The USMCA is a free trade agreement between the US, Mexico and Canada.

entities.[123] According to Schneiderman the constitutional rules of this regime are also being internalised and materially embedded within the dialect of the international human rights order and national constitutional regimes via diplomacy and economic pressure.[124] In the domestic sphere, these are accommodated through constitutional reform and, oftentimes, adjudication processes. [125]

The aforementioned international legal instruments and institutions responsible for international trade governance, including global investment instruments or treaties which promote and protect investments are, in their present form largely asymmetrical and state-centric in character.[126] Foreign investors, which are mainly TNCs but sometimes individuals, enjoy substantive rights under these international treaties without being subject to comprehensive and meaningful obligations.[127] The inability of the state-centric human rights order to impose binding human rights obligations on TNCs participating in international trade and investment contributes to the subsistence of a dysfunctional global system of governance which is avowedly individualistic, and promoting of market fundamentalism.[128]

4. Transnationalising the international human rights order: dewesternisation and decoloniality

In order to move away from the current western state-centric international human rights order which is ineffective in deterring violations of human rights perpetrated by powerful TNCs operating in the context of a global economy, there is a compelling need to take a decolonised approach to reforming the international human rights order.[129] The dominant Eurocentric paradigm which recognises states as the [principal] subjects to which international law, including human rights law, is deployed needs to be supplemented with an inclusive dual accountability system

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[123] E. Haugen *et al.*, 'Trade and Investment Agreements: What Role for Economic, Social and Cultural Rights in International Economic Law?' in E. Riedel *et al* (eds) *Economic, Social and Cultural Rights in International Law* Oxford University Press: Oxford (2014) at 259; V. Besirevic, 'Pigeonholing Human Rights in International Investment Arbitration: A Claim or a Defense?,' in v. Várady and M. Jovanović, (eds) *Human Rights in the 21st Century* Eleven International Publishing: Amsterdam (2020) at 218.

[124] D. Schneiderman, Investor Rights and the Judicial Denial of the Neoliberal Constitutionalism (2015) 6, retrieved from, http://dx.doi.org/10.2139/ssrn.2671292, consulted on 26.07.2021.

[125] M. Pieterse, *Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa*, 14, Stellenbosch Law Review (2003), 3.

[126] See above n.974.

[127] V. Kube & E. Petersmann, *Human Rights Law in International Investment Arbitration*, 27, Asian Journal of WTO and International Health Law and Policy (2016), 5.

[128] M. Nolan, Human Rights and Market Fundamentalism (2014) 7, retrieved from, http://diana-n.iue.it:8080/bitstream/handle/1814/31206/MWP_LS_Nolan_2014_02.pdf?sequence=1&isAllowed=y, consulted on, 14.06. 2021; N. Nolan, *Gender and Utopian Visions in a Post-Utopian Era: Americanism, Human Rights, Market Fundamentalism*, 44, Central European History (2011),14.

[129] De Sousa Santos, Making the future possible again (2017) 7, retrieved from, http://www.boaventuradesousasantos.pt/media/Boaventura_Making%20the%20future%20possible%20again_April2017.pdf, consulted on, 5.02.2021.

which generates human rights obligations based on the conduct of TNCs and supranational institutions.[130] In other words, such a decolonised approach to the international human rights order recognises that TNCs and other supranational institutions ought to be subject to human rights accountability on similar footing or basis as states.[131]

It can be strongly argued that a decolonised international human rights order with its concomitant dual system of accountability recognises the crucial role that the incipient discourse of human rights should play in articulating the core demands of social justice, transparency, economic self-determination, and economic equality in a neoliberal era.[132] Further, a dual international human rights system of accountability should be designed in a way that tackles the doctrinal and other "complexity" issues emanating from corporate structures that have shielded TNCs who commit human rights violations with impunity.[133] This means there is also a need to re-define and develop the concepts of separate corporate entity and limited liability which make it particularly difficult to hold parent companies legally accountable for egregious human rights violations by their subsidiaries.[134] These long established legal concepts have their roots in colonisation and were first used to protect the British and Dutch East India Companies.[135] A parent TNC can escape liability for the actions of a subsidiary by simply asserting that they are separate legal entities, even when in a position to control the conduct of the subsidiary.[136] The principle of corporate entity in its present form enables parent TNCs to successfully argue that the subsidiary is the responsible party. Only in exceptional circumstances will the lifting of the corporate veil occur in order to enable the imposition of corporate accountability on the parent TNC.[137]

As observed by the CESCR, establishing the causal nexus between the conduct of a TNC based in one jurisdiction and human rights abuses that occurred in another jurisdiction remains a legal dilemma. In *Okpabi v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria* Ltd,[138] a case which revolves

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[130] T. Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*, 38, Human Rights Quarterly (2016), 294.

[131] M. Koskenniemi*, Histories of International Law: Dealing with Eurocentrism*, 19, Rechtsgeschichte-Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte (2011), 152.

[132] See above n.153.

[133] E. Petersmann, 'Limits of WTO Jurisprudence: Comments from an International Law and Human Rights Perspective', in T. Cottier Tand P. Mavroidis (eds), *The Role of The Judge In International Trade Regulation: Experience and Lessons for The WTO* University of Michigan Press: Michigan (2003) at 81.

[134] C. Christian & P, Pettit *The Possibility, Design, and Status of Corporate Agents* Oxford University Press: Oxford (2013)1.

[135] *Salomon v Salomon* (1896) KHL 1; A, Vastardis & R, Chambers, *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty*?, 19, International and Comparative Law Quarterly (2018), 389.

[136] D. Cabrelli, *Liability for the Violation of Human Rights and Labour Standards in Global Supply Chains: A Common Law Perspective*, 10, Journal of European Tort Law (2019), 110.

[137] *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1987) AC ACLC, *Gorton v Federal Commissioner of Taxation* (1965) 113 CLR 604; the *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C).

[138] (2018) EWCA Civ 191.

around violations of human rights by a TNC, a United Kingdom (UK) court ruled that it lacked jurisdiction to hear the claims of human rights violations against the TNC's subsidiary.[139] However, in *Vedanta Resources PLC v. Lungowe*,[140] the court dismissed the appeal of the UK Company, Vedanta Resources, which was challenging a previous court decision to allow claimants from Zambia to pursue their case in the UK thereby allowing the case to be adjudicated by the UK courts. This decision is significant because it demonstrates that there is a possibility of holding TNCs accountable for human rights violations committed by their subsidiaries in an extraterritorially.[141]

In order to develop a decolonised international human rights order underpinned by a dual system of human rights accountability, there is a need to adopt a comprehensive UN-driven treaty on business which incorporates substantive human rights principles and norms.[142] Such a treaty will expand obligations generated by the international human rights order and contribute towards holding to account injurious corporate power by imposing direct obligations on TNCs and providing remedies for their human rights violations.[143] The development of an international human rights regime which is sensitive to obligations generated by human rights is premised on reassuring objecting parties that such an alteration will lead to enhanced recognition of human rights, without reversing the business and human rights agenda. This means prudence must be taken to ensure that the creation of a revised model within the international human rights regime would not have a chilling effect on the attraction, protection and promotion of Foreign Direct Investment (FDI) in developing countries.[144]

However, the design and adoption of a dual international human rights system of accountability may be problematic when interrogated from a corporate business and human rights perspective. There is a potential conflict relating to the epistemic norms driving the regulation of business entities including TNCs and the principles governing the protection of international human rights.[145] Some academic commentators argue that the imposition of human rights obligations on TNCs, in the same way that states have accepted such obligations for themselves, may be overreaching.[146] International human rights law primarily generates obligations for

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[139] (2018) EWCA Civ 191.
[140] (2019) UKSC 20.
[141] (2019) UKSC 21.
[142] Europe-Third World Centre, Treaty on transnational corporations and their supply chain with regards to human rights" (2017) 9, retrieved from, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/CETIM-TNI_EN.pdf, consulted on 3. 02. 2021.
[143] See above n.10.
[144] D. Baumann-Pealy and J. Nolan, *Business and Human Rights: From Principle to Practice* 1st ed Routledge: Oxfordshire (2016) 77.
[145] M. Fasciglione, *Another Step on the Road? Remarks on the Zero Draft Treaty on Business and Human Rights*, 3, Diritti Umani E Diritto Internazionale (2018), 630.
[146] See above n.631.

states, as opposed to private entities.[147] The argument is that TNCs and other non-state actors are not endowed with the same democratic authority in the political economy as states whose responsibilities are to create the required socio-legal and political environment in which the fundamental human rights and the welfare of the people can be realised.[148] This means imposing international human rights obligations directly on TNCs and other non-state actors when such obligations often do not exist at the domestic level suggests that states may be seeking to use private entities as scapegoats for their own disinclination and inability to protect their people's human rights.[149] Transferring the states' obligations to TNCs would be inappropriate for those rights-holders who depend on their states to develop and enforce regulations.[150] It is, therefore, important to conceptualise an international human rights model which adequately provides potential solutions for dealing with the foregoing objections.

Another strong objection that can be potentially raised is that delegating states' responsibilities and duties to TNCs could be undesirable as it may amount to the privatisation of international human rights law.[151] This objection flows from the view that only sovereign states endowed with the necessary democratic authority can deliver effective protection of human rights while balancing the same with other pertinent competing political interests.[152] In this vein, TNCs neither have the democratic authority nor the ability to perform orthodox governmental duties and functions. The efforts of TNCs can only assist in advancing and promoting human rights in a complimentary way and not as a substitute for domestic level state efforts.[153] Further, some scholars maintain that the amorphous nature of the international law of human rights makes it prone to broad interpretation, which will still enable TNCs to escape liability for human rights violations whether criminal, civil, or otherwise.[154]

Notwithstanding the above, the proposal for adopting a non-state centric treaty on business and human rights is not entirely exclusive.[155] Such a treaty could

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[147] J. Ruggie, Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors (2014) 2, retrived on, http://www.ihrb. org/commentary/quovadis- unsolicited-advice-business.html, consulted on, 3.03.2021.

[148] See above n. 3.

[149] *Kiobel v Royal Dutch Petroleum Co* 569 U.S. 108 (2013) ; *S.A. v Brown* 564 U.S. 915, 131 S. Ct. 2846 (2011),

[150] J. Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, (2014)1, retrieved from, http://www.ohchr.org/ Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLaw Remedies.pdf, consulted on 8.05.2021.

[151] See above n. 2.

[152] See *Velásquez Rodriguez v. Honduras* Ct. H.R. (ser. C) No. 4, 175 (1988).

[153] R. Skinner *et al*, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (2016) 4, retrieved from, https://www.business-humanrights.org/en/latest-news/pdf-the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/, consulted on 17.04.2021.

[154] See above n.5.

[155] Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/17/4 of 7 July 2011.

appropriate or borrow other elements from the pertinent soft law, the UDHR and the ICESCR.[156] The more elements are incorporated, the more effective a treaty might be in ensuring TNCs' respect for human rights, and in providing appropriate remedies for any violations.[157] Conversely, the more ambitious the content of the treaty maybe, the harder it may become for states to accept the treaty, especially the home states of the TNCs, and to attract the support of the TNCs that exert significant influence on state positions during treaty negotiations.[158]

A global treaty which places the human rights obligations of TNCs at the centre of commercial activities and global human rights governance should enunciate the obligations of TNCs and other non-state actors, regarding socio-economic rights.[159] Such a treaty has the potential to reform global corporate governance thereby protecting socio-economically marginalised people mostly impacted by violations of human rights by players in the corporate sector.[160] Further, the creation of the framework treaty should be an inclusive, community-driven and participatory process encompassing the involvement of all affected stakeholders.[161] This would provide an essential platform for the participation of members of communities that are directly affected, including those in South Africa, seeking to address the issue of material inequality, distributive justice and economic empowerment.[162]

It is noteworthy that the idea of adopting an international treaty for addressing the human rights violations of TNCs is currently gaining traction among scholars and at the UN level.[163] The UN Human Rights Council has published the 2020 second revised draft treaty which generates binding human rights obligations for TNCs and other corporate entities.[164] Compared with the earlier drafts, the 2020 revised Draft treaty contains major improvements concerning the rights afforded to the victims of corporate human rights violations in particular under Article 4 and 5

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[156] C. Humberto, *Negotiating a Treaty on Business and Human Rights: The Early Stages*, 44, The University of New South Wales Law Journal (2017), 1200.

[157] O. De Schutter, *Towards a New Treaty on Business and Human Rights*, 1, Business and Human Rights Law Journal (2016), 41.

[158] De Schutter (2016) at 43.

[159] D. Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23, Minnesota Journal of International Law (2014), 135.

[160] Weissbrodt (2014) at 137.

[161] McBrearty (2016) at 13.

[162] J. Ruggie, The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty (2014) 1, retrieved from, http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf, consulted on, 9.07.2021).

[163] International Institute for Sustainable Development, The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects (2019) 1, retrieved from, https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter prospects-carlos-lopez/, consulted on, 10. 08.2021.

[164] UN Human Rights Council, Second Revised Draft 2020 1, retrieved from, https://www.ohchr.org/Documents/HRBodies/HR Council/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_ Human_Rights.pdf, consulted on, 9.08.2021.

of the aforesaid treaty.[165] Further, the 2020 Draft treaty provides access to remedy for the victims of corporate human rights violations and adjudicative jurisdiction under Articles 8 and 9 respectively.[166] Also noteworthy are provisions which require TNCs to foster accountability through adopting human rights due diligence measures. It also offer legal protection of human rights activities and defenders.[167] Innovatively, Article 7.5 of the 2020 Draft treaty prevents state parties from invoking the infamous doctrine of *forum non conveniens* often replied upon by the TNCs to escape liability by challenges judicial proceedings instituted against them by victims of their human rights violations in their home countries.[168] The doctrine allow courts in TNCs home states to dismiss cases based on the view that they should be heard in the jurisdiction where the abuse occurred although the courts in such countries may neither have the judicial independence and capacity to remedy the human rights violations.[169]

Further, Article 9.5 of the 2020 Draft treaty permits victims of TNCs human rights violations to bring their claims in home states of the TNCs if they will be potentially denied access to fair trial in their own countries.[170] Article 12 of the same treaty allows victims of human rights violations to request that their claim be determined in accordance with the law of the State where the abuse occurred or where the purported TNCs is domiciled thereby enabling them to elect the kind of legal rules amicable to their claim.[171] Article 9.4 of the 2020 Draft treaty provides to victims of TNCs human right violations the right to sue both the parent and the foreign subsidiary of a company in their place of origin provided there is sufficiently connected between the two.[172] While the 2020 Draft treaty is commendable, similar to earlier draft, it does not provide victims of the TNCs human rights violation with remedies of preventative nature.[173] The remedies under Article 4 of the 2020 Draft treaty are only based only *ex post* facto judicial action for groups or individuals who have suffered irreparable damage and fail to include the victims' rights to precautionary procedures and measures. The 2020 Draft Treaty fails to provide human rights victims right to reparation.[174] Adopting an express provision which recognise reparations is important for providing comprehensive protection of the victims' rights and distinguishing this notion from other available forms of remedies such as compensation and restitution.[175] The 2020 Draft treaty clumsly mention reparations under Article 8 without acknowledged it as a right afforded to victims of

[165] R V. Segate, *The first binding treaty on business and human rights: a deconstruction of the EU's negotiating experience along the lines of institutional incoherence and legal theories*, 1, International Journal of Human Rights (2021), 7.
[166] The 2020 revised Draft treaty.
[167] The 2020 revised Draft treaty.
[168] The 2020 revised Draft treaty.
[169] The 2020 revised Draft treaty.
[170] The 2020 revised Draft treaty.
[171] The 2020 revised Draft treaty.
[172] The 2020 revised Draft treaty
[173] The 2020 revised Draft treaty.
[174] The 2020 revised Draft treaty.
[175] The 2020 revised Draft treaty.

human rights.[176]

Notwistanding the above shortcomings, there is still an opportunity for improving the 2020 Draft treaty in pursuit of a decolonised human rights order which provides adequate protection to the victims of corporate human rights abuse.[177] On this score, it can be argued that the final binding treat should have a chapter that deals with the effects of the activities of non-state entities on the realisation of socio-economic rights and the attainment of global economic equality.[178] Some academic commentators envision the development an international treaty which consist of three facets, namely, the adjudicatory, investigatory, and promotional functions.[179] The adjudicatory function will consist of an ad hoc judicial committee, constituted as and when the need arises, with responsibility to make binding judicial decisions enforceable under international law, in a way to the WTO dispute settlement panels.[180] The judicial committee will adjudicate human rights claims against TNCs and other supranational institutions.[181] This means it will be composed of experts drawn from the disciplines of human rights, trade law, and corporate governance. It is submitted that at least one representative from the home state of the respondent TNC should be a voting member of the judicial committee.[182] The committee should be endowed with the power to decide on complaints concerning human rights violations committed by the TNCs domiciled in the territory of the parties to the treaty.[183]

The envisaged judicial committee should provide remedial recourse to the victims of human rights violations committed by the TNCs.[184] It should provide

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[176] The 2020 revised Draft treaty.

[177] N. Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12, *Hastings Business Law Journal* (2016), 593.

[178] See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), retrieved from, https://documents-ddsny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?Open Element, consulted on, 11, 02.2021.

[179] Business and Human Rights Resource Centre, Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council (2014) 3, retrieved from, humanrights.org/sites/default/files/media/documents/statement-unhrclegally-binding.pdf, consulted on, 18.07.2021.

[180] S. Suttle, *Rules and values in international adjudication: The case of the WTO Appellate Body*, 70, International and Comparative Law Quarterly (2019), 401.

[181] Settle (2019) at 402.

[182] L. Lan, *The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies*, 5, European Journal of Comparative Law and Governance (2018), 5.

[183] J. Ruggie, A UN Business and Human Rights Treaty?, retrieved from, http:// businesshumanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf, consulted on, 14.02.2021; European Parliament, Access to legal remedies for victims of corporate human rights abuses in third countries, retrieved from, https://www.europarl.europa.eu/RegData/ etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf, consulted on, 27.06.2021.

[184] P. Thielborger & T. Manandhar, Bending the Knee or Extending the Hand to Industrial Nations? A Comment on the New Draft Treaty on Business and Human Rights (2019) 1, retrieved from, https://www.ejiltalk.org/bending-the-knee-or-extending-the-hand-to-industrial-nations-a-comment-on-the-new-draft-treaty-on-business-and-human-rights, consulted on 16.08.2021.

sufficient compensation for such infringements in the form of guarantees of minimum monetary compensation, non-repetition, commitments to distributive justice, compliance with fair labour standards and sustainable development.[185] These remedies should be provided under the extant international human rights order and developing countries should fully incorporate them into their domestic legal frameworks.[186] Further, to ensure that the remedies availed by the judicial committee are made good, a fund may be created under the treaty. This fund should be resourced and replenished from taxes imposed on TNCs by the states in which they are domiciled.[187] Such a taxation system may be based upon the TNCs compliance with the obligations created by the treaty. This means corporates with poor human rights records will be required to pay more than those with better track records of human rights observance.[188] Additionally, the treaty body should be authorised to carry out investigative functions including yearly reviews of the world's major TNCs to ascertain the extent of their compliance with human rights obligations. This could be done in the same manner that the rotating annual Universal Periodic Reviews (UPR) are conducted by the Human Rights Council.[189] This means that major TNCs will be required to periodically report on their human rights compliance including the activities they have taken to advance socio-economic rights. The treaty body will also be empowered to receive submissions from other stakeholders including the community leaders, non-governmental organisations, and individuals.[190] Indeed, this global treaty could be a milestone development for the realisation of human rights in developing countries.[191]

5. Concluding remarks

This article has argued that the state-centric conception of the current international human rights order is unsuitable for the demands of the contemporary

[185] M. Español, The lengthy journey towards a treaty on business and human rights (2019) 2, retrieved from, https://www.open globalrights.org/the-lengthy-journey-towards-treaty-on-business-and-human-rights, consulted on, 2. 06.2021.

[186] S. Barrow, UN treaty on business and human rights vital for economic and social justice (2019) 2, retrieved from, https://www.socialeurope.eu/un-treaty-on-business-and-human-rights-vital-for-economic-and-social-justice, consulted on, 9.08.2021.

[187] D. Daum, A Future Treaty on Business and Human Rights - Its Main Functions (2018) 3, retrieved from, https://voelker rechtsblog.org/a-future-treaty-on-business-and-human-rights-its-main-functions, consulted on, 7.10.2021.

[188] A. Latorre, *In Defence of Direct Obligations for Businesses under International Human Rights Law*, 5, Business and Human Rights Journal (2020), 27.

[189] United Nations Office of the High Commissioner, Human Rights Council and its Universal Periodic Review, retrieved from, https://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/HumanRightsCouncilUniversalPeriodicReview.aspx, and consulted on, 26.08.2021.

[190] UN Office of the Commissioner, Human Rights: Handbook for Parliamentarians (2005) 5, retrieved from, https://www.ohchr. org/Documents/Publications/HandbookParliamentarians.pdf, consulted on, 28.10.2021.

[191] High Commissioner for Human Rights, Business and Human Rights: A Progress Report (2005) 4, retrieved from, https://www.ohchr.org/Documents/Publications/BusinessHRen.pdf, consulted on, 27.08.2021.

cosmopolitan governance of TNCs and other economic entities wielding significant economic and political influence[192] Since the inception of the Westphalian system of international law which embeds state-centric human rights accountability, the world has experienced deep transformations which present challenges for the realisation of human rights protection in a globalised era of economic interdependence and supranational political structures.[193] The state-centric view as developed and codified under the current international human rights order is unable to meet these challenges.[194] Accordingly, it has failed to effectively impose human rights obligations on TNCs in a manner that promotes distributive justice and challenges the neoliberal economic order which may sacrifice human rights in the pursuit of profit.[195]

In light of the scarcely convincing human rights adherence record of TNCs, the currently state-centred international human rights order must be decolonised, de-westernised and re-oriented in favour of a binary system of international human rights accountability.[196] Such a system may be developed via the adoption of a global treaty which imposes direct human rights and distributive justice obligations on all manifestations of transnational capital.[197] The adoption of decolonised binary human rights obligations will challenge the pervasive neoliberal deregulation, commodification, and privatisation agenda currently prevailing in the international human rights system.[198] This approach to international human rights governance will close the current regulatory gap with regard to TNCs' activities having a negative bearing on human rights, the unclear status of extraterritorial human rights obligations and the potential conflicts between the demands of international investment law and human rights law.[199] Such a call for a decolonised human rights regime has the potential to confront and significantly mitigate the effects of the TNCs' market fundamentalism in the pursuit of human dignity, equality and freedom.[200]

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[192] E. Petersmann, Human rights require 'cosmopolitan constitutionalism' and cosmopolitan law for democratic governance of public goods (2013) 2, retrieved from, https://cadmus.eui.eu/ handle/1814/27155, consulted on, 01.09.2021.

[193] See above n.3.

[194] J. Atteberry, *Turning in the Widening Gyre: History, Corporate Accountability and Transitional Justice in the Postcolony,* 19, Chicago Journal of International Law (2019), 357.

[195] A. Yamin*, Struggles for Human Rights in Health in an Age of Neoliberalism: From Civil Disobedience to Epistemic Disobedience*, 11, Journal of Human Rights Practice (2019), 372.

[196] A. Glück, De-Westernisation Key concept paper (2015) 3, retrieved from, http://www.mecodem. eu/wp-content/uploads/2015/ 05/Glueck-2016_De-Westernisation.pdf, consulted on 06.09.2021; S. Pandey, Are the Concepts of Human Rights Western-Centric Euro-Centric or Universalizable? (2016) 2, retrieved on, http;domain.003/Downloads/ResearchPaper.pdf, consulted on 7.09. 2021.

[197] See above n.1017.

[198] K. Nash, *The cultural politics of human rights and neoliberalism*, 18, Journal of Human Rights (2019), 493.

[199] See above.n.6.

[200] B. Olivier, *Decolonisation, Identity, Neo-Colonialism and Power*, 20, Phronimon (2019), 6.

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