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Economic, Social and Cultural Rights, Sustainable Development Goals, and Duties of Corporations: Rejecting the False Dichotomies

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Abstract

The attention that the Sustainable Development Goals (SDGs) has given to public-private partnerships in solving global concerns including poverty, sustainable development and climate change has shed new light on the question of duties of corporations in relation to economic, social and cultural (ESC) rights. At the same time, objections to recognising the obligations of corporations in relation to human rights in general and to ESC rights in particular have continued to be made. At the formal level, these objections are reflected in new distinctions such as between the duties of states and responsibilities of corporations, between primary duties of states and secondary duties of corporations, and between obligations of compliance and obligations of performance. All these objections and distinctions are untenable and serve only to stultify the discourse on business and human rights. The current state of human rights is dynamic, not static; commodious, not stale. There is ample space in it to accommodate duties of corporations regarding ESC rights.

1. INTRODUCTION

The idea that economic, social and cultural (ESC) rights are real rights deserving of full protection in domestic constitutions and international law on par with civil and political rights had been the subject of protracted controversy until 2011 when the United Nations (UN) adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,[1] which establishes a complaints mechanism for ESC rights, marking a formal end to the treatment, in international law at least, of ESC rights as second-rate rights. The long history of the marginalization of ESC rights in comparative constitutional law and international law

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[1] GA Resolution 63/117 (2008), UN Doc A/63/435 (adopted 10 December 2008, entered into force 5 May 2013).

hinges in part on the disquiet with the idea of imposing obligations on states that they might not be able to fulfill.[2]

This disquiet assumes more significance in the context of corporations[3] which, unlike states, do not have the institutional and political resources such as the legislature, law enforcement and regulatory agencies, and the bureaucratic machinery to enable them fulfill their responsibilities. Thus, even as the idea that corporations and other business enterprises have a 'responsibility' to respect human rights has increasingly received formal acceptance in various UN resolutions and other documents,[4] the nature of such responsibility remains unclear. First is the question whether such responsibility constitutes, or should constitute, a legal duty, and second is the issue whether corporations have more than the duty to respect human rights in general and ESC rights in particular.

Confusion about the nature of duties of corporations in relation to human rights has been heightened in recent years by the introduction in various UN resolutions – prominent among which are the UN Guiding Principles on Business and Human Rights (UNGPs) and other Human Rights Council (HRC) resolutions on business and human rights – of two dichotomies: one between responsibility and duty, and the other between primary and secondary

[2] See, e.g., Alfred Cockrell, 'Private Law and Bill of Rights: A Threshold Issue of "Horizontality"' in in Y Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (Durban: Butterworths, 2001) 3A—18; Halton Cheadle and Dennis Davis, 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *South African Journal on Human Rights* 44, 59—60.

[3] Except otherwise expressly differentiated, the words 'company', 'corporation', 'business' and 'investor' are used interchangeably in this article to connote a legal entity or an incorporated association of persons – regardless of size – carrying on commercial activities using the corporate form.

[4] See, e.g. Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31, 21 March 2011 (UNGPs). See also HRC Res 17/4 on Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4, 6 July 2011; HRC Res 26/22 on Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/26/22, 15 July 2014; HRC Res 35/7 on Business and Human Rights: Mandate of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/35/7, 14 July 2017; HRC Res 44/15 on Business and Human Rights: the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, and Improving Accountability and Access to Remedy, A/HRC/RES/44/15, 23 July 2020; HRC Re. 26/9 on Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/RES/26/9, 14 July 2014.

duties/responsibilities of states and corporations. More recently, an investment arbitral award of *Urbaser v Argentina*[5] uncritically accepted these dichotomies and introduced a third dichotomy: obligations of compliance versus obligations of performance.

This article rejects these dichotomies. Focussing on ESC rights, it argues that corporations, like states, have or ought to have a *legal duty* to respect all rights. Such a duty does not merely require inaction or refraining from acting; it also requires positive action. More importantly, this article argues further that corporations could be bound by positive obligations, some of which are already recognised in international law.

This discussion is particularly relevant in the context of the Sustainable Development Goals (SDGs)[6] which emphasise the role of business and public and private partnerships to facilitate sustainable development and realise selected development goals. There can be no doubt that the implementation of ESC rights is pivotal to the realisation of SDGs. This means that understanding the obligations of corporations in relation to ESC rights is critical to the realisation of SDGs. It also requires revisiting the fundamental assumptions and principles of corporate law which place too much premium on satisfying shareholder profit interests.

Section II explores the relationship between ESC rights and the SDGs to emphasise the interdependence of state and corporate action regarding the provision of basic services and, hence, the realisation of ESC rights. Section III then reviews some of the common objections to imposing ESC rights obligations on corporations and demonstrate that these objects rehash well-known arguments premised on false distinctions between positive and negative obligations, the public and the private spheres, and state and private action. This is followed in section IV by a critical discussion of the UNGPs and other HRC Resolutions which suggest that corporations only have the responsibility to respect human rights while states have the primary duties to respect, protect and fulfil human rights. Section V shifts to a discussion of *Urbaser*, where we offer a critique of the concepts of 'obligations of compliance' and 'obligations of performance', and tease out the obligations that corporations involved in a

[5] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26 Award (8 December 2016) (*Urbaser)*.

[6] UN General Assembly, 'Transforming our world: The 2030 agenda for sustainable development', UN GA Res 70/1, A/RES/70/1, 21 October 2015.

partnership with the state or privatisation arrangement concerning the provision basic services such as water could or ought to have. This award is critical to this discussion as it highlights the limits of maintaining the public and private divide as far as the application of ESC rights is concerned where private actors enter into concessions to provide basic services such as water. Section VI reflects on the limits of corporate law in ensuring that public/private partnerships facilitate the realisation of ESC rights.

II. ESC RIGHTS AND THE SDGS

In 2015 the UN adopted the 2030 Agenda for Sustainable Development,[7] replacing the UN Millennium Development Goals (MDGs) adopted in 2000.[8] The 2030 Agenda is a comprehensive, far-reaching and demanding international agreement, comprising 17 goals, 169 integrated and indivisible targets, and 230 indicators. The SDGs build on the successes of, and pulls together, all the strands of the 1972 Stockholm Declaration,[9] the 1987 Brundtland Report, the 1992 Rio Declaration[10] and the MDGs.[11]

The SDGs focus on the five P's: people, planet, prosperity, peace and partnerships.[12] They commit participating countries to achieving sustainable development in its three dimensions – economic, social, and environment – in a balanced and integrated manner. By subscribing to the SDGs, all states pledged to strengthen and revitalize the global partnership towards ending poverty, improving health and education, and reducing inequality.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[13] is a fundamental pillar of the 2030 Agenda, both of which aim to lift everyone out of poverty and

[7] Ibid.

[8] GA Res 55/2, 8 September 2000.

[9] Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14, at 2 and Corr.1 (1972).

[10] Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

[11] Nojeem Amodu 'Corporate Social Responsibility and Economic Globalization: Mainstreaming Sustainable Development Goals into the AfCFTA Discourse' (2020) 47:1 *Legal Issues of Economic Integration* 71, 77.

[12] See note 6, the Preamble.

[13] Opened for signature 10 years on 16 December 1966, 999 UNTS 3 and entered into force 3 January 1976.

ensuring that everyone maintains a life worthy of human dignity. In explaining the links between the ICESCR and SDGs, the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR, has said:

> The concept of leaving no one behind in the 2030 Agenda is in its essence a commitment by States to prioritize the needs of the most disadvantaged and marginalized in realizing the Sustainable Development Goals. Similarly, the Covenant requires State parties to protect and realize the rights of those left behind by poverty, socioeconomic and cultural exclusion and marginalization. Both the 2030 Agenda and the Covenant also seek to respond to the needs and circumstances of fragile countries, including least developed countries, small island developing States and countries in conflict and post-conflict situations. This demonstrates the heightened concern expressed in both the Covenant and the 2030 Agenda for those groups and countries that are the least privileged and face multiple challenges.[14]

The ESC rights enshrined in the ICESCR detail obligations of result and obligations of conduct: the former define the outcomes and targets that must be realised by duty bearers, while the latter define the manner in which the realisation of ESC rights must take place.[15] SDGs speak to both these obligations.[16] Not only do they specify the goals and targets that states collectively and individually must realise, they also stress the importance of ensuring that these goals and targets are realised through methods that are sustainable so as to ensure that ESC rights 'are secured both for present and future generations'.[17]

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[14] CESCR, 'The Pledge to "Leave No One Behind": The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development', Statement by the CESCR, UN Doc E/C.12/2019/1, 8 March 2019, para 6.

[15] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997) para 2 contained in CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2000/13 at 16 (2 October 2000), para 7.

[16] However, SDGs do not set out targets that can all be said to be derived from ESC rights. In fact, some commentators have pointed out the inadequacies of SDGs regarding the incorporation of ESC standards. See, e.g., Kate Donald, 'The 2030 Agenda for Sustainable Development: Opportunity of Threat for Economic, Social and Cultural Rights', in Jackie Dugard et al (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham: Edward Elgar Publishing Ltd, 2020); Inga T Winkler and Carmel Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2018) 21:8 *International Journal of Human Rights* 1023; Audrey R Chapman, 'Evaluating the Health-related Targets in the Sustainable Development Goals from a Human Rights Perspective' (2017) 21:8 *International Journal of Human Rights* 1098.

[17] CESCR, note 14, para 18.

Many of the 17 SDGs can be linked directly to ESC rights. For example, SDG 1 on ending poverty speaks to the *raison d'être* of all ESC rights.[18] SDG 2 on ending hunger is linked to the right to food. SDG 4 on ensuring a healthy life and wellbeing for all relates to the right to a health, while SDG 4 about quality education is directly connected with the right to education.

The 2030 Agenda recognises that, most importantly within the context of this article, realizing the SDGs and hence ESC rights is not a responsibility that can be borne by the state alone. Hence, SDG 17 specifically speaks about promoting cooperation and partnership towards achieving SDGs. This is particularly crucial considering that the implementation of ESC rights is dependent not only on political but very importantly also on the available economic and financial resources. SDG 17 encourages and promotes effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships. Fostering of global partnership between the state actors and the non-state actors has become more imperative than ever in light of the dwindling economic resources at the disposal of many states against the reality of the increase in power, influence and resources available to private actors including corporations.[19]

The CESCR has long recognised the role of private actors in the realization of ESC rights. For instance, in its General Comment No 4, it stated that:

> Measures designed to satisfy a State party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States parties of "enabling strategies," combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged.[20]

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[18] CESCR, 'Poverty and the International Covenant on Economic, Social and Cultural Rights', Statement of the CESCR to the Third United Nations Conference on the Least Developed Countries, , UN Doc E/2002/22, E/C.12/2001/17, 4 May 2001, para 8, noting that poverty is a 'human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.

[19] Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87 *Journal of Business Ethics* 385, 387.

[20] CESCR, General Comment No. 4: The Right to Adequate Housing, UN Doc E/1992/23 (1991) 14.

More recently, the CESCR has recognised the positive and negative impact of corporations on the realisation of ESC rights.[21] In General Comment No. 24, the CESCR observed:

> Businesses play an important role in the realization of economic, social and cultural rights, inter alia by contributing to the creation of employment opportunities and — through private investment — to development. However, the Committee on Economic, Social and Cultural Rights has been regularly presented with situations in which, as a result of States' failure to ensure compliance, under their jurisdiction, with internationally recognized human rights norms and standards, corporate activities have negatively affected economic, social and cultural rights.[22]

Similarly, in *Government of the Republic of South Africa and Others v Grootboom and Others* (*Grootboom)*,[23] the South African Constitutional Court said: 'It is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.'[24] [May be worth noting here that the Bill of Rights in SA and some other recent African constitutions apply to corporations]

These pronouncements acknowledge the involvement in the provision of basic services both as sole providers or in partnership with the state or other non-state actors, which is precisely what

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[21] For jurisprudence and literature showing that corporations can have a negative impact on ESC rights, see, e.g., *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights Communication No 155/96 (2001); Ugandan Consortium on Corporate Accountability, *The State of Corporate Accountability in Uganda: A Baseline Study Report for the Uganda Consortium on Corporate Accountability* (September 2016), available at https://www.accahumanrights.org/images/reports/UCCA.pdf; FIDH and Lawyers for Human Rights, 'Blyvooruitzicht Mine Village: The Human Toll of State and Corporate Abdication of Responsibility in South Africa', January 2017; Gonzalo Aguilar Cavallo, 'Pascua Lama, Human Rights, and Indigenous Peoples: A Chilean Case Through the Lens of International Law' (2013) 5(1) *Goettingen Journal of International Law* 215; Jernej Letnar Černič, *Corporate Accountability under Socio-Economic Rights* (Oxon: Routledge, 2019) 7–9.

[22] CESCR, General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc E/C.12/GC/24, 10 August 2011, para 22.

[23] 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

[24] Ibid, para 35. Notably, section 8 of the South African Constitution expressly provides that '[a] provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right'.

SDGs do and encourage, as shown above. There is no doubt about the interdependence between the state and businesses as regards sustainable provision of public goods and services and the realisation of ESC rights. With their strong emphasis on climate change, ecological consciousness,[25] SDGs call attention to sustainable and equitable use of resources so that both current and future generations can realise their ESC rights. SDGs can thus be seen as brining to the fore a neglected aspect of the current jurisprudence on ESC rights,[26] which seems to prioritise satisfying the needs of the living with limited or no regard for the needs of those yet to be born. They also point to the need to temper the emphasis on profit making and material accumulation at the expense of the environment, the poor and the marginalised. The UNGPs and CESCR General Comment No 24 elaborate the duty of states to protect citizens and other persons within their territories or under their control from violations of ESC and other rights that may be committed by corporations and other third parties. However, the implementation of the state's duty to protect cannot address all human rights issues raised by corporations. This is why talk of human rights duties of corporations has remained on the international agenda.[27]

III. ESC RIGHTS OBLIGATIONS AND CORPORATIONS: A RESPONSE TO OBJECTIONS

There are those who reject completely the idea of assigning human right obligations to corporations.[28] Hsieh, for example, has argued that '[t]o assign human rights obligations to

[25] See, e.g., SDGs 12 to 16.

[26] To date, none of the General Comments of the CESCR refer to the ESC rights of future generations.

[27] As Nicolás Carrillo-Santarelli has aptly said: '[state obligations] are obligations of means and due diligence, which implies that corporate abuses neither automatically nor always engage State responsibility. In such events, victims still have rights to protection and reparations, which must be fulfilled (States may volunteer to provide reparations when they are not responsible, but are not obliged to do so'. Nicolás Carrillo-Santarelli, 'Corporate Human Rights Obligations: Controversial but Necessary' (24 August 2015), available at https://www.business-humanrights.org/en/blog/corporate-human-rights-obligations-controversial-but-necessary/#one. See also Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) *Yale Law Journal* 443.

[28] See, e.g., John Bishop, 'The Limits of Corporate Human Rights Obligations and the Rights of For-profit Corporations' (2012) 22(1) *Business Ethics Quarterly* 119; John Ruggie, 'Business and Human Rights – Treaty Road Not Travelled' (1 may 2008); John Ruggie, "Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights'; Douglass Cassel and Anita Ramasastry, 'White Paper: Options for a Treaty on Business and Human Rights' (2015) 6 *Notre dame Journal of International and Comparative Law* 1.

MNEs and their managers … involves attributing to them a status that is at odds with the position they occupy in society as private, profit-seeking entities'.[29] Hsieh also argues that imposing human rights obligations on MNEs and their managers 'risks undermining an ideal central to human rights' – the protection of 'equal standing'.[30]

Hsieh's objection to assigning human rights obligations to transnational corporations and other business enterprises draws on the traditional public-private dichotomy which has been much criticised. The idea that the private sphere consists of 'all members of society [who] have equal moral standing not just in the eyes of the state but also with respect to one another' has been shown to be a misrepresentation of private relations which are also constituted by power asymmetries, hierarchies and repressive practices.[31] Those who rely on the public-private dichotomy to resist the reach of human rights to the private sphere assume that power is hegemonic, unitary, and inseparably linked to the state. This assumption misses the point that power is pluralistic, diffused, overt or covert, and manifests itself in various forms, in public and private spheres. Contrary to the supposition of equality between individuals in the private sphere, power asymmetries are endemic in the private sphere. The sources of such power imbalances range from gender, sex, and race to heredity, socio-economic status, and place of origin. If locus of power is pluralistic, decentralized and dispersed in society, the threat to human rights is thus also diverse and not limited to state or public power.

Then there are those who accept that corporation have human rights obligations but argue that such obligations should not be extended to ESC rights,[32] or only to some ESC rights.[33] Arnold, for example, seems to advocate an approach to business and human rights rooted in basic rights

[29] Nien-Hê Hsieh, 'Should Business Have Human Rights Obligations?' (2015) 14 *Journal of Human Rights* 218, 219, 226.

[30] Ibid.

[31] See, e.g., Hilary Charlesworth, 'Worlds Apart: Public/Private Distinction in International Law', in Margaret Thornton (ed.) *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995) 243, 245–246; Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Ashgate, 1996) 86; Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Cambridge: Polity, 1989) 43; Margaret Thornton, 'The Cartography of Public and Private', in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995) 2–3.

[32] See, e.g., Cheadle and Davis, note 2; Cockrel, note 2.

[33] Hsieh, note 29; Nien-Hê Hsieh, 'Business Responsibilities for Human Rights: A Commentary on Arnold' (2017) 2 *Business and Human Rights Journal* 297.

such as liberty, physical security, and subsistence, which serve as 'side-constraints' on corporations to refrain from violating these rights.[34] These views are reminiscent of, and draw largely on, the much-discredited hierarchies and dichotomies such as first, second and third generation rights, positive and negative rights, positive and negative duties. Seen as positive rights, ESC rights are believed to engender onerous obligations that corporations cannot fulfill. Expecting corporations to bear these obligations, it has been argued, would divert primary responsibility to ensure the realization of human rights from states to corporations which in turn would derail them from achieving their principal goal which is to make profit for their shareholders.[35] Linked to these arguments is the way in which positive obligations have been developed and conceived and the institutional and political framework within which they are expected to be implemented and fulfilled. The implementation of the duties to protect and fulfil envisages the legislative apparatus, the policymaking and implementation processes and mechanisms, and the law enforcement agencies and adjudicatory of the state. Corporations are said to lack the resources or the political legitimacy to exercise the power that comes with wielding such resources. According to Cheadle and Davis, ESC rights flow from a social democratic vision of the state, which sees the state as the sole provider of the basic services necessary to facilitate basic equality of the citizenry, which in turn, is essential to achieving equal and fair participation in democratic processes.[36]

Attempts at hierarchizing rights derive from efforts to impose one philosophical tradition on the diverse corpus of international human rights law. It is now settled that all human rights are indivisible, inter-related and interdepended.[37] Arguments that ESC rights are fundamentally different from civil and political rights, or that some rights are more important than others, have

[34] See, e.g., Denis Arnold, 'Corporations and Human Rights Obligations' (2016) 1(2) *Business and Human Rights* Journal 255, 264.

[35] See, e.g., Hsieh, note 29, 255–256; Sir Geoffrey Chandler, 'Commentary on the United States Council for International Business "Talking Points" on the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 20 November 2003, available at https://media.business-humanrights.org/media/documents/files/reports-and-materials/Chandler-commentary-on-USCIB-Talking-Points.htm (accessed 27 October 2020).

[36] Cheadle and Davis, note 2, 59–60.

[37] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5.

been shown to be wrong.[38] The same could be said about the distinction between negative and positive duties.[39] Henry Shue famously demonstrated that civil and political rights 'are more "positive" than they are often said to be' and subsistence (ESC) rights are more "negative" than they are often said to be'.[40] Critically, he argued that every basic right entails three duties: 'to avoid depriving', 'to protect from deprivation', and 'to aid the deprived'.[41] This classification of duties was adopted and refined by Asbjørn Eide in 1987, who refrained them as duties 'to respect', 'to protect' and 'to fulfil' respectively.[42] International human rights practice has now accepted these categories.[43] This means that both civil and political rights and ESC rights generate negative and positive obligations on duty bearers. This does not mean that duty bearers have the same kind of obligations.

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[38] See, e.g., Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1; Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems', in Abjorn Eide et al (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd rev. edn.) (Dordrecht: Martinus Nijhoff Publishers, 2001) 55, 57–61; Pierre de Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13:1 *South African Journal on Human Rights* 67; Christopher Mbazira, 'Bolstering the Protection of Economic, Social and Cultural Rights under the Malawian Constitution' (2007) 1:2 *Malawi Law Journal* 220. Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8:4 *South African Journal on Human Rights* 464.

[39] This distinction derives from Berlin's distinction between 'negative liberty' and 'positive liberty' which holds that the former merely requires non-interference while the latter requires action from the duty bearer. See Isaiah Berlin, *Four Essays on Liberty* (Oxford: Clarendon Press, 1969) 121–154. For critiques of this distinction, see, e.g., Charles Taylor, 'What's Wrong with Negative Liberty' in Alan Ryan (ed) *The Idea of Freedom* (Oxford: Oxford University Press, 1979) 175–193; Quentin Skinner, 'A Third Concept of Liberty' (2001) 117 *Proceedings of the British Academy* 237–268.

[40] Henry Shue, *Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980) 37.

[41] Ibid, 52.

[42] Asbjørn Eide, Final Report on the Right to Adequate Food as a Human Right' UN Doc E/CN.4/Sub.2/1987/23; Asbjørn Eide 'Economic, Social and Cultural Rights as Legal Rights' in Asbjørn Eide, Catarina Krause & Allan Rosas (eds) *Economic, Social Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff Publishers, 1995) 21, 35 – 40.

[43] See, e.g., the African Commission's decision in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No 155/96 (2001) (*SERAC*); General Comment No 13, above n 123, para 46; General Comment No 14, above n 110, para 33; General Comment No 12, above n 75, para 15; and section 7 of the South African Constitution, which provides that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

The problem of the feasibility of corporations fulfilling the positive duties is no different from that raised in connection with states. Many claims have made about the vagueness of such obligations and how difficult it is to enforce them against the state. There is now considerable ESC rights jurisprudence that shows that appropriate standards can be developed to guide states to fulfil their duties and for bearers of ESC rights to enforce these rights.[44] Curiously, those who oppose the idea of imposing positive obligations on corporations take it for granted that the state's duty to protect is enforceable. This duty is positive in nature and, not long ago, it was not recognized as an enforceable obligation.[45] Although ESC rights have been developed in a state-centric fashion thus far, this does not mean that it is impossible to adapt the existing concepts to corporations or to develop entirely new ones. Already, in relation to the workplace, the family, parent-child relationship, marriage and other social institutions, for example, private individuals and institutions have already been assigned positive and negative human rights obligations most of which are socio-economic in nature.[46] The implementation of these duties does not depend on the institutional resources of the state and do not raise the legitimacy concerns alluded to earlier.

In short, no sound new arguments have been offered to justify restricting the application of human rights to corporations to civil and political rights or to negative obligations only.

IV. CRITIQUE OF THE THREE DICHOTOMIES

[44] *See, e.g., SERAC*, ibid*; Grootboom*, note 23; Danwood Chirwa and Lilian Chenwi (eds), *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (Cambridge University Press, 2016); M Langford (ed) *Socio-economic rights jurisprudence: Emerging trends in comparative and international law* (Cambridge: Cambridge University Press, 2008); Christina Binder et al (eds) *Research Handbook on International Law and Social Rights* (Cheltenham: Elgar, 2020).

[45] *Velásquez Rodríguez v Honduras* [1988] Inter-Am Court HR (ser C) No 4 is probably the first known instance of judicial enforcement of this duty.

[46] Within the context of labour, ILO conventions protect freedom of association and the right to bargain collectively; non-discrimination in the workplace, prohibition of forced labour, child labour and other forms of economic exploitation, the right to safe and healthy work environment; and the right to a reasonable working hours. The Convention on the Rights of the Child (GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, imposes human rights obligations on parents and other actors, while Convention on the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195, entered into force 4 January 1969, imposes obligations on men to refrain from abusing, exploiting and marginalizing women.

For all their merits, the UNGPs heralded two false dichotomies: the duty-responsibility distinction and, rather fortuitously, the primary-secondary duty bearer distinction. The third dichotomy between obligations of compliance and obligations of performance is drawn in *Urbaser*.[47] These distinctions have a bearing on both whether corporations have ESC rights duties and, if they do, to what extent. In this section, we critique each of these dichotomies.

A. The Duty-Responsibility Distinction

As regards the first dichotomy, in defining obligations of states with regard to human rights, UNGPs uses the term 'duty' or 'obligation' while with respect to corporations the term 'responsibility' is used.[48] In his 2008 report to the HRC, John Ruggie said: 'The [Protect, Respect And Remedy] framework rests on differentiated but complementary responsibilities. It comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.'[49] In explaining the distinction between duty and responsibility, Ruggie said that the state's duty to protect lay 'at the very core of the international rights regime' but the corporate responsibility to respect arose from 'the basic expectation society has of business'.[50]

In a later report, Ruggie shed further light on this distinction:

> The term "responsibility" to respect, rather than "duty", is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level, the corporate responsibility to

[47] Note 5.

[48] Part I of the UNGPs is headed 'The state duty to protect human rights'; Part II is headed 'The corporate responsibility to respect human rights'.

[49] John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/8/5, 7 April 2008, para 9.

[50] Ibid.

> respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council itself.[51]

It is clear that Ruggie aimed to distinguish between 'duty' and 'responsibility' based on his understanding of the state of international law as regards the obligations of states and corporations. According to his reports, international law placed a clear duty on the state to protect human rights, but corporations did not have any human rights duties, only soft-law responsibilities.

But this distinction, which has been recycled over and over by the HRC resolutions, is based on a mistaken understanding of the legal meanings of both terms.[52] Duties arise from human rights norms protected in international law. Such norms constitute what are called 'primary rules' of international law. These norms lead to legal responsibility, which means that a duty bearer could be held accountable through the available means of enforcing the norms at hand. The rules governing how duty bearers are held accountable for violating primary norms are called 'secondary rules'.

Thus, the distinction drawn by Ruggie confuses the legal meaning of the two terms. The state has duties in relation to human rights and can be held responsible for failing to perform those duties. The same can be said about corporations.[53] The terms duty and responsibility can be applied to corporations where there are norms that bind corporations and mechanisms for holding them accountable. It is thus not surprising that in describing the responsibility of corporations, the UNGPs effectively define 'duties', not the rules for holding corporations accountable. These two main duties presented as responsibilities are 'to respect human rights' and to exercise due diligence to 'identify, prevent, mitigate and account for how they address their adverse human rights impact'.[54] These are primary rules on which responsibility depend.

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[51] John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/8/5, 7 April 2008, para 55.

[52] See, e.g., Alain Pellet 'The Definition of Responsibility in International Law' in James Crawford et al (eds) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 3–16; Volker Roeben, 'Responsibility in International Law' (2012) 16 *Max Planck UNYB* 100, 106–110.

[53] Pellet, ibid, 6–8.

[54] UNGPS, Principles 14 and 17. The other principles are essentially an elaboration of these two.

Although Ruggie's distinction was informed by the laxity with which the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)[55] had conflated the obligations of states with those of corporations, by consigning all duties of corporations to the status of soft-law norms, he failed to recognize the rapidly evolving nature of comparative constitutional and international law on human rights and corporations and the various ways in which domestic other jurisdictions are imposing duties on corporations and holding them responsible.[56] He also ignored some of the international treaties and declarations which define human rights in a non-state centric fashion or impose duties of individuals.[57] It can therefore be argued that the duty-responsibility

[55] UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003), approved August 13, 2003, by UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11 at 52 (2003).

[56] In Africa, the following Constitutions recognise the horizontal application of the bill of rights: Cape Verde Constitution 2010, art 18; Ghana Constitution 1992, sec 12(1); Malawi Constitution 1994, sec 15(1); South Africa Constitution 1996, sec 8(2); Gambia Constitution 1996, sec 5(1); Kenya Constitution 2010, art 20(1); Uganda Constitution 1995, art 20(2). In America, the state action doctrine is applied to private conduct, see, e.g., *Shelley v Kraemer*, 334 US 1 (1948); *Marsh v Alabama*, 326 US 501 (1946). In Germany, the *Drittwirkung*, holds that while basic rights cannot form the basis of constitutional actions between private persons, they can be invoked in litigation between private parties through the general clauses and concepts of private law. See, e.g., *Lüth Case* BVerfGE 7, 198 15 January 1958 (Germany) in DP Kommers (trans), *The Constitutional Jurisprudence of The Federal Republic of Germany* 361–368 (1997). In *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 345, the Irish Supreme Court held that the constitutional right to freedom of association could be enforced by the employees against the employer and hence that the law that permitted a trade union to picket was unconstitutional to the extent that it purported to sanction the curtailment of freedom of association of the nine employees.

[57] For example, the Universal Declaration on Human Rights (UDHR) (adopted 10 December 1948, GA Res 217 A (III), UN GAOR, 3rd Session, UN Doc A/810 (1948)) recognises rights without tying them to states. More specifically, article 30 provides: 'Nothing in this Declaration may be interpreted as implying for any State, *group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein' (emphasis added). A similar provision is in art 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221. According to the preambles to the ICCPR and the ICESCR, 'the individual, having duties to other individuals and to the community to which he belongs', is 'under a responsibility to strive for the promotion and observance of the rights'. Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981, enjoins states to 'take appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'. See also arts 27–

distinction serves as an impediment to the evolution of international human rights law as far as the issue of business and human rights is concerned.

B. The Primary-Secondary Duty-Bearer Distinction

While John Ruggie took pains to reject the primary-secondary dichotomy used by the UN Norms in defining the obligations of states and corporations,[58] and was careful to avoid using these terms in the UNGPs, various HRC resolutions have prompted the use of this language.[59] These resolutions have repeatedly stressed that 'the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State', while emphasizing that 'transnational corporations and other business enterprises have a responsibility to respect human rights'.[60] This suggests that corporations have secondary responsibility for human rights; and that the fulfilment of secondary duties depend on the fulfillment of primary duties. Ruggie was correct to reject this distinction. He argued: 'The corporate responsibility to respect exists independently of State's duties. Therefore, there is no need for the slippery distinction between "primary" State and "secondary" corporate obligations – which in any event would invite endless strategic gaming on the ground about who is responsible for what.'[61]

Saying that 'the obligation and the primary responsibility to promote, protect and fulfil human rights and fundamental freedoms lie with the State' creates the impression that corporations cannot or do not have corresponding or simultaneous direct duties in relation to human rights.

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29 the African Charter on Human and Peoples' Rights, 1520 UNTS 217, which recognise duties of individuals, and arts 20, 29–30 of the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), which recognises general and specific obligations of parents, children and other non-state actors.

[58] At para 1, the UN Norms provided: 'States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.'

[59] See note 4 and the accompanying notes.

[60] Ibid.

[61] Ruggie, note 49, para 55.

For example, the duty of the state to protect human rights depends on the supposition that the state will enforce the prior duty of corporations to respect human rights. Bilchitz makes this point aptly:

> The state 'duty to protect' is not an absolute obligation and is formulated in such a way so as to require it to exercise reasonable due diligence to ensure that it establishes the relevant legal frameworks and mechanisms to prevent third parties from harming fundamental rights. … Without a recognition of direct obligations upon corporations, there will be no possibility of corporate liability in such a scenario and no access to a remedy for the victims of those violations.[62]

Again, both the state and corporations have the duty to respect human rights. Neither can be complicit in violating human rights. The corporations' duty to respect human rights does not depend on the implementation of the state's duty to respect human rights. In short, neither the state nor a corporation can wait for the other to implement its human rights duties before attending to theirs. Even with regard to the duty to protect, it cannot plausibly be said that corporations or other non-state actors have to wait for the state to discharge its duty before corporations and other non-state actors carry out their duties. For example, while the state might be obliged to pass legislation regarding workplace safety, corporations might simultaneously be obliged to guarantee that the workplace is safe for workers.

In conclusion, the primary versus secondary duty-bearer distinction undermines the interdependence and interrelation between duties of states and corporations which is critical to creating a culture of respect for human rights by all duty-bearers concurrently.

C. The Obligations of Compliance and Obligations of Performance Distinction: *Urbaser v Argentina*

In *Urbaser*, the arbitral tribunal introduced a third distinction based on the concept of positive and negative obligations in order to distinguish between the obligations of states and of corporations with regard to the right to water and sanitation. This arbitral award is critical because it deals with a private-public partnership of the kind envisaged by the SDGs. It introduces this distinction in a context that would ideally warrant imposing more positive ESC

[62] David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 *Business and Human Rights Journal* 203, 209.

rights obligations on corporations than in normal circumstances, and yet the tribunal failed to do so. This section critically engages with the nature of this distinction and circumstances under which it was invoked.

1. Facts and Holding

Under the framework of a 1991 bilateral investment treaty (BIT), Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, [63] Argentina had granted a water and sewage concession contract to Aguas Del Gran Buenos Aires SA (AGBA). Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoaa, the claimants in this case, are shareholders of AGBA. Soon after the concession was concluded, the claimants failed to obtain loans to finance the expansion of water and sanitation services. Following severe economic crisis experienced by Argentina between 2001 and 2002, Argentina introduced emergency measures that had a further impact on the financial position of the claimants and after several unsuccessful attempts to renegotiate the concession, the authorities of the Province of Buenos Aires terminated the concession. The claimants commenced arbitration proceedings under the BIT. In contesting the claimants' action, Argentina also filed a counterclaim alleging that the claimants had violated the human right to water guaranteed under international human rights law by failing to fulfil their obligation to raise funds to invest in the project to provide water and sanitation services as required by the terms of the concession. In short, Argentina argued that the failure to make appropriate investments was not only a violation of concession terms, it was also a breach of the right to water and sanitation which is recognised in the International Bill of Rights.[64]

The tribunal rejected the claimants' argument that corporations could not by their very nature be subjects of international law in a state-to-state system. It held that 'while such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals'.[65] The tribunal stressed that considering recent developments in

[63] (1992) UNTS, Vol 1699, 1-29403, 202–208, concluded on 3 October 1991, came into force on 28 September 1992, the date on which the Parties notified each other (on 9 July and 28 September 1992) of the completion of the required constitutional procedures, in accordance with article XI (1).

[64] More specifically, article 30 of the UDHR; and articles 5(1) and 11 of the ICESCR.

[65] *Urbaser v Argentina*, note 5, para 1194.

international law, it could no longer be admitted that companies operating internationally fell out of reach of international law. It said:

> The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.[66]

However, noting that several initiatives have been undertaken at the international level to bring corporate conduct under human rights scrutiny, the tribunal doubted whether these initiatives were, 'on their own, sufficient to oblige corporations to put their policies in line with human rights law'.[67] According to the tribunal, '[t]he focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual'.[68]

After considering several sources of international including the provisions of the Universal Declaration of Human Rights[69] and the ICESCR,[70] the tribunal concluded: 'it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts [sic], public and private parties, not to engage in activity aimed at destroying such rights'.[71] Here, the tribunal can be seen to accept without qualification that the right to human dignity and the related rights to housing and living conditions impose the same obligations on public and private parties to refrain from violating these rights. As regards the duty of an investor in a water reticulation system to provide water and sanitation services to the population, the tribunal drew a sharp distinction between the obligations state actors and private actors. It held that the state had such

[66] Ibid, para 1195.

[67] Ibid.

[68] Ibid.

[69] article 30.

[70] Articles 11 and 5(1).

[71] *Urbaser v Argentina*, para 1199.

an obligation, but in this case, the claimants did not have such a direct obligation,[72] drawing a distinction between obligations of compliance and obligations of performance. According to the tribunal:

> The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services.[73]

According to the tribunal, Argentina's argument conflated the concessionaire's contractual obligation to provide water and sanitation services under the BIT with the obligation to fulfil the human right to water. The Tribunal stated that 'for such an obligation to exist and to become relevant in the framework of this BIT, it should either be part of another treaty or it should present a general principle of international law'.[74] According to the tribunal, the situation would be different if a negative obligation was at stake (for example, an obligation to abstain).[75] In the end, the respondent's counterclaim based on the right to water and sanitation services was dismissed.

2. The Distinction Between Positive and Negative Obligations

Although the tribunal held, correctly, that corporations were bound by the right to water and sanitation, it drew a problematic distinction between 'obligations of compliance' and

[72] On this it must be noted that the Tribunal accepted the argument that the BIT had to be interpreted in the light of international law (para 1200), which it had interpreted as recognizing the right to water and sanitation. Para 1205.

[73] *Urbaser v Argentina*, para 1208.

[74] Ibid, para 1207.

[75] For instance, in the Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria signed at Abuja on 3rd December 2016 (not yet in force) , there are several progressive provisions focusing on the obligations of the investor. Article 24(2) not only specifies that 'Investors should apply the International Labour Organization (ILO) Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectoral standards of responsible practice where these exist,' but also in article 18 such investing companies are obliged to 'uphold the human rights in the host state'; and 'to act in accordance with core labour standards required by the ILO Declaration on Fundamental principles and Rights of Work, 1998.'

'obligations of performance'.[76] This arises from the supposed difference between positive and negative obligations. Obligations of compliance, being essentially negative, are presumed easier to meet while obligations of performance are deemed not feasible to fulfil by corporations because they require action and the deployment of resources. This distinction is too sharp to hold. Obligations of compliance can be positive in nature and hence require positive action. For example, a corporation involved in waste production might need to spend significant amounts of money to ensure that it does not pollute the environment and, hence, not violate the right to clean water, the right to food, or the right to health. To comply with such a duty, the corporation might also need to employ qualified personnel or train its existing staff. Furthermore, a human rights impact assessment might be necessary for a corporation to take steps to prevent violations of the duty to respect ESC rights.

As noted earlier, the UNGPs themselves acknowledge the link between positive and negative aspects of the concept of 'business responsibility to respect', but they muddle the concept of 'respect' in the process. This responsibility under the UNGPs includes the concept of due diligence to prevent and mitigate human rights violations and to account for them if they have already occurred. This is practically the definition of the duty to protect as it has been developed in international human rights law.[77]

In drawing the distinction between obligations of compliance and obligations of performance, the tribunal relied on the distinction between the primary obligations of the state and secondary responsibility of corporations, something which we have already questioned above.[78] The tribunal held that international human rights law does not recognise positive obligations of corporations in relation to the right to water and sanitation.[79]

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[76] Of course, the counterclaim by Argentina was rather unusual. It is not clear whether Argentina was claiming damages for the alleged violation of the right to water of its citizens or of the state itself. This anomaly is most evident in the computation of damages Argentina claimed which bore no relation to the impact on access to water that citizens experienced. In international law and comparative constitutional law, the right to water is held by natural persons and not states.

[77] *Velásquez Rodríguez v Honduras*, note 45, paras 174–177; *SERAC*, note 43, para 59–60; General Comment No 6 (16) on Article 6, adopted by the HRC at its 378th meeting (16th session, 27 July 1982, para 2.

[78] See section III.

[79] At para 1207, it said: 'The Tribunal further finds that none of the provisions of the BIT has the effect of extending or transferring to the Concessionaire an obligation to perform services complying with the residents'

This holding is problematic, especially in a context of privatisation arrangements involving the provision water and sanitation services as was the case here. Corporations entering into such an arrangement know that the service to be provided relates to an important human right whose realisation cannot take place without the cooperation of both the state and the private partner. The tribunal sought to separate the obligation Argentina had in relation to the right to water and sanitation arising from international human rights law (the duty to respect) from the obligations the concessionaires had arising from the concession, which it said did not flow from international law. It did so at the risk of contradicting an earlier dictum saying that an enforceable covenant between the government and the corporations to provide water and sanitation services had to be read in line with all relevant international laws.[80]

There are some obvious obligations that require positive action that should be considered binding on corporations providing water services. For example, the CESCR has stated the normative content of the right to water includes the following key elements:

- 'The water supply for each person must be sufficient and continuous for personal and domestic uses';[81]
- 'The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health';[82]
- 'Water, and adequate water facilities and services, must be within safe physical reach for all sections of the population';[83]

human right to access to water and sewage services. Respondent does not invoke any such provision to this effect. For such an obligation to exist and to become relevant in the framework of the BIT, it should either be part of another treaty (not applicable here) or it should represent a general principle of international law.'

[80] At para 2000, the Tribunal said: 'The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.'

[81] CESCR, General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant), UN Doc E/C.12/2002/11, 20 January 2003, para 12(a).

[82] Ibid, para 12(b).

[83] Ibid, para 12(c)(i).

- ‘Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable’;[84] and
- ‘Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds’.[85]

Where water services are provided by a concessionaire as was the case with *Urbaser*, it cannot be said that the state could retain the duties connected to them while the concessionaire is free from such duties. For example, the obligation to provide clean and safe water, free from pollution, cannot be borne by the state in this situation. The provision of adequate services is another obligation that the concessionaire takes over by reason of the concession. This obligation inseparably tied to water services provision. As regards the duty to provide water to those who cannot afford it, there is a degree to which a concessionaire can be bound by aspects of this duty. It is possible that a water concession can result in higher water tariffs causing the poor to have less access to water or result in neglect of services to the poor. In this regard, the CESCR has noted:

> The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation.[86]

This scenario could constitute a retrogressive measure which has to be justified by the state and by extension the concessionaire.

In short, the distinction between obligations of compliance and obligations of performance cannot be sustained. It builds on the old distinction between positive and negative obligations, which has been much criticised. In the context of a concession to provide water, positive duties become even more relevant. It does not make sense to say that the state retains the whole range

[84] Ibid, para 12(c)(ii).

[85] Ibid, para 12(c)(iii).

[86] CESCR, General Comment No 24, para 22.

of obligations even when it is not in charge of the provision of water. In the next section, we discuss some of the specific obligations that arise from ESC rights and should (and can) be borne by corporations. Some of these obligations already have a fair degree of legal validity.

V. CORPORATE LAW AS A BARRIER TO COMPLIANCE WITH AND PERFORMANCE OF ESC RIGHTS DUTIES BY CORPORATIONS

The SDGs have once more highlighted the importance the interdependence of state and non-actor activities (including public-private partnerships) to the sustainable realisation of the ESC rights. The encouragement of partnerships and cooperation between the public and private sectors does not mean that corporations should betray their commercial focus. However, the pursuit of profit should not be at the risk of ESC rights. So far many corporations have not had the balance right. We suggest that the reason lies in the foundational ideology underpinning corporate legislation and business arrangements called the shareholder primacy model. The shareholder primacy business ideology is not new. It has been criticised as much as it has been widely researched.[87] The model proceeds on a fundamental assumption that corporations are exclusive private properties of their incorporators, and as such the success of the company must be narrowly taken as the success of its shareholders. It is about the assemblage of rules and regulations towards a quasi-constitutional protection of investments. Further, the shareholder primacy model essentially sees corporate governance from the prism of the agency problem.[88] Therefore, corporate governance is a simple agency problem. Having placed the shareholders at the centre of corporate governance discourse and in whose interests the companies must be exclusively managed, the only relevant corporate governance question being how directors (as agents) should act in the best interests of their principals (the shareholders) or how they should exercise their corporate fiduciary duty for the benefit of shareholders.

[87] Nojeem Amodu, *Corporate Social Responsibility and Law in Africa* (London: Routledge 2020) 41–48; Beate Sjåfjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5:2 *Business and Human Rights Journal* 179 -199.

[88] See generally, Ige Bolodeoku, 'Corporate Governance: The Law's Response to Agency Costs in Nigeria' (2007) 32 *Brooklyn Journal of International Law* 467; Douglas Branson, 'Corporate Governance "Reform" and the New Corporate Social Responsibility' (2001) 62 *University of Pittsburgh Law Review* 605; Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

The dominance of the shareholder primacy model has led to the 'financialization' of the global economy, meaning the increasing role of profits motives, financial incentives and motives, financial markets, financial actors and financial institutions in the operations of the world economies.[89] The implication of the foregoing is that this wide-spread ideology has succeeded in isolating corporation and their governance principles from wider societal concerns such as corporate responsibility to fulfil ESC rights. This shareholder primacy model has been supported by the nexus-of-contract theory[90] with the assumption that the sole purpose of the company should be to maximize shareholders' profits and that the wider stakeholder groups together with their ESC rights are only protected to the extent that the provisions of their contracts with the corporation allow.[91] Put bluntly, shareholder primacy is the main barrier to businesses behaving responsibly and fulfilling the ESC rights. Sjafjell has noted that:

> … shareholder primacy is the main barrier to sustainable business, understood as business that contributes to and does not undermine society's possibility of achieving sustainability: of securing the social foundation for humanity now and in the future within planetary boundaries. This article positions the discussion of securing business respect for human rights in the context of achieving the contribution of business to the transition to sustainability. Achieving sustainability is intrinsic to securing human rights – and vice versa. (references omitted). [92]

The shareholder primacy theory has fostered the entrenchment of company law principles which have in turn encouraged complex business arrangements making corporate regulation and accountability for human rights violation extremely difficult.[93] Premised on the fact that the ESC rights have been strongly tied to availability of economic resources, the financialization of the global economy underpinned by the shareholder primacy will likely

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[89] Amodu, note 86, 43.

[90] Otherwise known as the contractarian theory, corporate law is taken only as a fictional extension of contract law and whose business really should be focusing on facilitating the contractual interrelationships in the most efficient manner. Henry Butler and Larry Ribstein, 'Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians' (1990) 65 *Washington Law Review* 1, 7; Grant Hayden and Matthew Bodie, 'The Uncorporation and the Unraveling of the "Nexus of Contracts" Theory' (2011) 109 *Michigan Law Review* 1127, 1130; and Janet Dine, *The Governance of Corporate Groups* (New York, Cambridge University Press, 2000) 10.

[91] Olufemi Amao, 'Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria' (2007) 29 *Dublin University Law Journal* 312, 313 and 314.

[92] Sjafjell, note 76, 183.

[93] Ibid, 6.

ensure the ESC rights continue to play second fiddle to other rights. Shareholder primacy model is among the reasons why ESC rights remained permanently controversial in the quest for sufficiency and never seemed plausible.[94] Further acknowledging this Achilles heel to effective human rights safeguard, Moyn has noted that:

> The real trouble about human rights, when historically correlated with market fundamentalism, is not that they promote it but that they are unambitious in theory and ineffectual in practice in the face of market fundamentalism's success. … And the critical reason that human rights have been a powerless companion of market fundamentalism is that they simply have nothing to say about material inequality. [95]

In light of the foregoing, the way forward for the sustainable fulfilment of the corporate responsibility for ESC rights is for states to revisit the current corporate law ideology underpinning their respective corporate legislations and business arrangements. Unless this is done, even the concept of the state's duty to protect will remain undermined, if not rendered meaningless. It would be useful for states to enact corporate legislation which is more society-friendly and stakeholder-oriented: while a few states have made some legislative efforts to jettison the shareholder primacy model,[96] such are hardly enough to address relevant issues. In addition, states could further incorporate human rights due diligence requirements as part of financial reporting necessary for the public trading of securities;[97] or as a default principle in a corporate legislation, require all corporations carrying on business within its jurisdiction (not just territory)[98] to respect ESC rights of all stakeholders. As seen in *Urbaser*, there is no justifiable basis for prohibiting corporations' legal liability for human rights infringements including ESC rights. If states wish to impose direct obligations on companies, it is important

[94] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2018) 31.

[95] Ibid, 216.

[96] Section 172 of the 2006 English Companies Act; section 166 of the 2013 Indian Companies Act; and sections 7(d), (k), 72(4) and 76(3) of the 2008 South African Companies Act No. 71; and, Regulations 26 and 43 of the 2011 Companies Regulations (South Africa).

[97] Larry Cata Backer 'Considering a Treaty on Corporations and Human Rights: Mostly Failures but with a Glimmer of Success' in Jernej Letnar Cernic and Nicolas Carrillo-Santarelli (eds) *The Future of Business and Human Rights* (Cambridge: Intersentia, 2018) 106.

[98] The state may have jurisdiction or be responsible under certain circumstances for acts or omissions of its agents which produce effects or are undertaken outside the state's territory. Further, the extraterritorial application of human rights would apply to all types of human rights whether ESC or CP rights. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, (Merits) (2006) 45 ILM 271, para 217; McCorquodale above note 71 at 387.

to do so through explicit language[99] (in domestic legislation, BITs or by ratifying any multilateral treaties with such legally binding obligations).

VI. CONCLUSION

There can be no doubt that the SDGs and ESC rights are interlinked and mutually reinforcing. On the one hand, the SDGs represent obligations of result implicit in ESC rights. On the other hand, the SDGs have placed sustainability at the centre of the realisation of the goals and targets which lie at the core of ESC rights. Thus, the realisation of ESC rights for the current generation must not be done at the expense of the Planet. Equally important is the fact that the SDGs have placed public-private partnerships at the centre of the realisation of the stipulated goals. The role of the private sector in the realisation of ESC rights has long been recognised within the jurisprudence on ESC rights.

Yet, objections to recognising the obligations of corporations in relation to human rights in general and to ESC rights in particular have continued to be made. For the most part, these objections rehash old arguments. Despite this, the UNGPs and several HRC resolutions have introduced distinctions that draw on these objections and create the impression that only states have human rights obligaitons, but not corporations. This article has shown that the duty-responsibility dichotomy makes no legal sense and is untenable. In particular, the UNGPs conflate the duty to respect and duty to protect as regards corporations by presenting both as responsibility to respect.

More recently, *Urbaser* introduced yet another distinction – between obligations of compliance and of performance, a replay of the distinction between positive and negative obligations. As this article has shown, the context of public-public partnerships or concessions involving corporations in the provision of basic services like water make it even more relevant for burdening corporations with duties arising from relevant ESC rights.

The current state of human rights is dynamic, not static; commodious, not stale. It is important that dichotomies which serve no plausible explanatory function are introduced.

[99] Nojeem Amodu 'Stakeholder Protection and CSR from Comparative Company Law Perspective: Nigeria and South Africa' (2020) 64:3 *Journal of African Law* 425, 445-447.