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## **THE RIGHT TO DEVELOPMENT AND NON-STATE ACTORS: RETHINKING THE MEANING, PRAXIS AND POTENTIAL OF ACCOUNTABILITY OF NON-STATE ACTORS IN INTERNATIONAL LAW**

MIYAWA MAXWEL\*

### **Abstract**

Mainstream legal scholarship has paid much attention to clarifying the meaning of the right to development by placing a great deal of scrutiny primarily on obligations of states to the neglect of non-state actors, as if states are the only integral players in the global economy necessary for realizing the right to development. This entrepreneurship steered clear of assessing viability of the right's founding vision of redressing institutional imbalances and unfairness of the global economic order. If the discourse took a global order reform trajectory, it would have injected thoughts on how accountability of international economic institutions and transnational corporations can be formulated in a way that bridges the disjuncture between human rights and economic globalization. This article argues that contemporary accountability practices underpinned by the state responsibility doctrine are ill-conceived and inadequate because they overplay the role of the state. Yet, the state is subordinated to the vested interests of unaccountable global capital which seed the global economy with numerous incidences of rights violations. Thus, the article recommends an expanded notion of accountability (answerability, responsibility, sanctions) detached from a state-centric conception of accountability, and which bears the potential of resolving the non-state actor accountability deficit in international law.

**1. A MAJORITY OF** academic thinking around non-state actors' accountability deficit have not been conducted on the basis of a common understanding of the concept of accountability. This article notes that lack of a uniform conception of accountability has led to an overproduction of literature that tends to conflate rather than reform the phenomenon of non-state actors' accountability deficit in the human rights regime. It is demonstrated that accountability is a much broader concept that encompasses actors' responsibility, answerability, and enforceability of rights obligations and duties. This emerges from an interdisciplinary excursion and a detailed examination of accountability practices in international law, which reveals that responsibility, answerability, and enforceability dimensions of accountability exist in international human rights

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protection procedures even though they do not take these concise designations. It is consequently shown that the current accountability frameworks that have been built on a state-centric conception of rights are ill-conceived and inapplicable to non-state institutions. Therefore, to fill this void, it is proposed that the undergirding philosophy of human rights needs to be re-conceptualized in a manner consistent with a cosmopolitan understanding of rights that radically departs from the liberal tradition which considers rights as constraints on state powers. Taking the *Declaration on the Right to Development* as the unit of analysis, this article argues that there is a necessity for global operationalization strategies to reflect these considerations.<sup>1</sup>

## II. THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

### A. HISTORICAL CONTEXT

Ever since its birth and induction into international human rights systems, the right to development has met and lived through mixtures of puritanical skepticism and faith. Earlier rejectionists, such as Yash Ghai and YK Pao, feared that the Declaration was fraught with penumbras in terms of defining rights holders and duty bearers.<sup>2</sup> They doubted the bleak prospects of attaining states' domestic and international accountability for breach of the right, arguing that inefficacy in enforcement could also render the right meaningless.<sup>3</sup> In a similar vein, Jack Donnelly considered the right an unnecessary distraction that is morally and legally unfounded, while others discounted any additional value the right would inculcate, arguing for

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<sup>1</sup> *Declaration on the Right to Development*, GA Res 41/28, UNGAOR, 41st Sess, Supp No 53, UN Doc A/RES/41/128 186.

<sup>2</sup> Yash Ghai & YK Pao, *Whose Human Right to Development* (London: Commonwealth Secretariat, 1989) at 12.

<sup>3</sup> *Ibid.*

its absorption altogether within the corpus of international human rights frameworks.<sup>4</sup> Writing during the right's incipient stages, Mohammed Bedjaoui however sounded overly optimistic, seeing in the right a crowning potential if effected in states' fraternal relations within the world economy.<sup>5</sup> Today, even Ghai himself has climbed down from his initial agnosticism, seeing a realization of the right's potential in domestic implementation.<sup>6</sup>

Observably, these predilections tended to ignore an interrogation of the impetus and aspirations that drove the right to development.<sup>7</sup> If criticism had followed the historical pathway and founding motivation of the right as a liberation mantra of a particular constituency of the global community, conceptual disagreements would have taken a completely different hue. The original intention of securing global justice for developing countries could perhaps have seen some progress by now. As it is now, an inordinate emphasis on pure legalism (justiciability, clarity of content, enforceability, beneficiaries, or duty holders) outweighed any form of engagement with core objectives in a way that steered the right into deeper ideological muddle. Although this author remains cautious in this generalized broad evaluation, it does, nonetheless, seem difficult to deny today that scholarship placed much scrutiny on obligation, particularly of

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<sup>4</sup> Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal W Int'l LJ 473 at 477; Arne Vandenberg, "The Right to Development in International Human Rights Law: A Call for Its Dissolution" (2013) 31:2 Nethl QHR 187 at 209.

<sup>5</sup> Mohammed Bedjaoui, "The Right to Development" in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Dordrecht, The Netherlands: Martinus Nijhoff and UNESCO, 1991) 1177 at 1182, 1186-1187. See also Arjun Sengupta, "The Human Right to Development" in Bård A Andreassen & Stephen P Marks, eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Boston: Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 9 [Sengupta, "The Human Right to Development"].

<sup>6</sup> Yash Ghai, "Redesigning the State for Right Development" in Bård A Andreassen & Stephen P Marks, eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Boston: Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) 141 at 141 [Ghai, "Redesigning the State for Right Development"].

<sup>7</sup> Olajumoke O Oduwale, "International Law and the Right to Development: A Pragmatic Approach for Africa" (Inaugural Lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 delivered at the International Institute of Social Studies, The Hague, Netherlands, 20 May 2014) at 8, online: <[www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic\\_publications/PCC\\_Inaugural\\_Lecture\\_20May2014.pdf](http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic_publications/PCC_Inaugural_Lecture_20May2014.pdf)>.

states, as if states were the only players integral to realizing the right to development in the global economy.

An essential step in channeling the right back from the marginalization and alienation in which ideological contestations consigned it, it must not lose sight of the following historical factors. First is the recognition that the right to development remains an offshoot of discourses of discontentment with the global economic order skewed to the advantage of some.<sup>8</sup> Second is the fact that this right amalgamated voices of resistance against the elaborate schemes of economic domination and systematic exploitation, which reappeared in the wake of dissolution of colonial forms of power in the 1970s.<sup>9</sup> Flowing from this is another historical fact that the new international economic order, an agenda which coordinated voices of opposition to the institutionalized unfairness perceived as baneful to the interests of the developing world<sup>10</sup> received a stamp of approval when the General Assembly declared that the dream of a new international economic order would be predicated on “equity, sovereign equality, interdependence, common interest and cooperation among all States”, aimed to eliminate disparities between states.<sup>11</sup>

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<sup>8</sup> Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Oxford/Portland: Hart Publications, 2012) at 43; Sengupta, “The Human Right to Development”, *supra* note 5 at 33.

<sup>9</sup> Adeoye Akinsanya & Arthur Davies, “Third World Quest For a New International Economic Order: An Overview” (1984) 33:1 ICLQ 208 at 208. See also Balakrishnan Rajagopal, “Global governance: old and new challenges” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) 169 at 172 [OHCHR, *Realizing the Right to Development*].

<sup>10</sup> Tamara Kunanayakam, “The Declaration on the Right to Development in the context of United Nations standard-setting” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York and Geneva: United Nations, 2013) 17 at 46.

<sup>11</sup> *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UNGAOR, 6th Special Sess, Supp 1, UN Doc A/RES/S-6/3201 3 [NIEO].

These historical events, together with the economic philosophy of NIEO, have been imprinted in the *Declaration on the Right to Development*.<sup>12</sup> While this legacy is a major reason for a stunted headway in the implementation of the right within the UN and intergovernmental operationalization strategies,<sup>13</sup> scholarship shows that insistence by some developing countries that the right should inform an institutionalized framework for asserting their claims (as right holders) of development against developed countries as duty bearers has produced similar standoffs.<sup>14</sup> Baxi has argued that the right presents a moral nuisance because of its cosmopolitan character that runs counter to current predatory practices of globalization.<sup>15</sup> However, what is often unnoticed is the fact that this standoff gave excessive emphasis on the responsibility dimension of the right to development, particularly in respect of states without any engagement with human rights responsibility of international economic institutions and transnational business entities. However, these entities determine and influence global economic policy and outcomes in very significant ways, which affect and undermine people's living conditions.

## **B. CONSENSUS ON CORE ASPECTS OF THE RIGHT TO DEVELOPMENT**

Even if the disputations to the right were to continue in the mold of traditional persuasions, the experiential story of the African regional human rights tribunal must now shift the discourse

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<sup>12</sup> See NIEO, *ibid*. Compare *Declaration on the Right to Development*, *supra* note 1, art 3(3). Article 3(3) provides the following:

States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest as well as to encourage the observance and realization of human rights.

<sup>13</sup> Stephen P Marks, "The Human Right to Development: Between Rhetoric and Reality" (2004) 17 *Harv Hum Rts J* 137 at 141; Bunn, *supra* note 8 at 57.

<sup>14</sup> Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford: Oxford University Press, 2009) at 132 [Baxi, *Human Rights in a Posthuman World*].

<sup>15</sup> *Ibid* at 133.

from theory to practice.<sup>16</sup> The experiences of adjudicating the right, in the context of Article 22 of the *African (Banjul) Charter on Human and Peoples' Rights*, may, as Obiora Okafor illustrates, correct lingering misgivings on questions of justiciability, entitlements, duty bearers, and right holders.<sup>17</sup> In his appraisal of the jurisprudential milestones emerging from the African Commission's determination of a few cases on the right to development, Okafor distills precedent-setting authorities that now foreground the right as an enforceable norm. He leans on the *Endorois* case to show that the question of states as duty-bearers and people as beneficiaries of the right to development is now settled.<sup>18</sup> In that case, the African Commission on Human and Peoples' Rights determined that the *Endorois* peoples' right to development is infringed by the state where considerations of equity and participation are not adhered to in the government's development projects.

Endless efforts of the United Nations and its human rights agencies in the clarification of various aspects of the right have also ensured some degree of progress in consensus building. First was the *Vienna Declaration of Human Rights* in 1993, which emphasized and located the right to development in the mainstream body of human rights.<sup>19</sup> The Vienna Declaration came at a time when the right was engulfed in a heavy cloud of objections. In its report, the High Level

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<sup>16</sup> For a discussion on lessons from the African Commission on Human and Peoples' Rights, see Obiora Okafor Chinedu "African Lessons for Post-2015 Global Right to Development Conceptualization and Practice" (2015) 2 *The Transnat'l Hum Rts Rev* 168.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya*, Communication No 276/03 (25 November 2009), online: African Commission on Human and Peoples' Rights <[www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf)>.

<sup>19</sup> UN, Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993 at para 10.

Taskforce, operating under the aegis of the Working Group on the right to development, has also contributed to clarifying the legal content of the right.<sup>20</sup>

International legal scholarship has not been left behind in charting the language of consensus.<sup>21</sup> A prominent expert, Arjun Sengupta, has given extensive input in explaining core concepts contained in the *Declaration of the Right to Development*.<sup>22</sup> Based on a reading of Article 1 of the Declaration, he surmises that “[t]he right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy the particular process of development.”<sup>23</sup> Development is defined as a process entailing a realization of all human rights (civil, political, social, cultural, and economic),

which aims at constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.<sup>24</sup>

In his conjunctive reading of Articles 2, 3 and 8 of the *Declaration*, development entails a process guaranteeing basic necessities for livelihood, and places the state under a duty to take positive measures towards that goal. Development, as a process, also entails values of equity and justice which seek to expand to a majority of impoverished people an opportunity to participate in uplifting their living standards.<sup>25</sup> Thus, this approach conceives of the right to development as a rights-based process to development, aimed at achieving social order and securing individual

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<sup>20</sup> *Report of the high-level task force on the implementation of the right to development on its sixth session*, HRC UNGAOR, 15th Sess, Addendum, UN Doc A/HRC/15/WG.2/TF/2/Add.2 (2010) at para 1.

<sup>21</sup> United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013).

<sup>22</sup> Arjun Sengupta, “Conceptualizing the right to development for the twenty-first century” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) 67 [Sengupta, “Conceptualizing the Right to Development”].

<sup>23</sup> *Ibid* at 68.

<sup>24</sup> *Ibid*.

<sup>25</sup> Sengupta, “Conceptualizing the right to development”, *supra* note 22 at 69.



well-being based on justice and equity in a participatory process. The human person is projected as the main focus of development.

The above buttresses the argument that, despite the controversies and predilections that greeted the right to development at the incipient stages of its evolution, there is now unanimity on the right as a universal standard, agreement on right holders, duty bearers, its normative content and specific entitlements. However, the international dimension of the right still seems steeped in some controversy. The international dimension of the right calls on states to cooperate in fostering a new international economic order, create conditions favorable for human rights realization, and act individually and collectively in formulating international development policy.<sup>26</sup> The fact that only inter-state duties to cooperate in development mainstreaming are recognized ignores the reality of the global economic order in which international economic institutions are inextricably linked to a series of relations that structure and condition international interdependence. The Declaration suffers the same limitation, as do many international instruments that generate norms limited to regulating state interactions in total disregard of existence of supra-statal institutions that further states' interests.

The duty of states to cooperate at the international level in development prioritization implies that domestic and international economic policies in matters of trade, finance, aid, debt relief, investment, and technology transfer must at some level intermesh. These are domains where the World Bank, World Trade Organization (WTO), International Monetary Fund (IMF), and transnational corporations are also integral players. By conferring obligations only on states, the *Declaration* explicitly excludes these actors, failing to appreciate that states are no longer the only actors with regulatory and planning capacity necessary for realization of rights and that the

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<sup>26</sup> *Declaration on the Right to Development*, *supra* note 1, arts 3(2)-(3), 4(1), 6(3).

private sphere is central in driving the global economy's policy priorities which profoundly affect the right to development of people in the global South.

It should, however, not be mistaken that by this proposition, non-state actors' accountability deficit is being presented as a shortcoming peculiar to the right to development regime and not a structural limitation of the entire human rights system. The main aim is to illustrate that in re-thinking international governance, particularly regulation of international economic institutions by way of human rights standards, the right to development provides a common pedestal on which we can reflect on accountability principles. As Sengupta noted, this right provides a unifying ideology that integrates civil and political rights with socio-economic rights into a theme of global justice, a fact which has allowed it be viewed as an umbrella right.<sup>27</sup> While scholarship has achieved consensus in defining the legal content and the global justice objective that the right to development underpins, fundamental questions about accountability of global economic institutions, though not trivialized, have not been given any sustained attention.<sup>28</sup> Thus, the shift to a conversation on accountability of international economic institutions is due to a necessity, and not a priority for, the discourse in the context of the right to development. It complements and reinforces, rather than obstructs, the search for an accountability mechanism for non-state actors. Addressing this issue requires a clear understanding of the concept of accountability, its meaning, and normative potential.

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<sup>27</sup> Arjun Sengupta, "On the Theory and Practice of the Right to Development" (2002) 24(4) Hum Rts Q at 840.

<sup>28</sup> Obiora Chinedu Okafor, "A Regional Perspective: Article 22 of the African Charter on Human and Peoples' Rights" in OHCHR, *Realizing the Right to Development*, *supra* note 9 at 381.

### III. CONCEPTUALIZING ACCOUNTABILITY IN INTERNATIONAL LAW

#### A. MEANING OF ACCOUNTABILITY

Even though a large body of literature exists on this subject, only a modest amount has addressed the issue of non-accountability of private actors in the context of the right to development. A review of current conversations reveals that most writers have engaged the question of human rights obligations of non-state actors but few have approached the subject on a uniform and monolithic understanding of the concept of accountability. As James Crawford concedes, accountability in its technical expression has not yet lent itself to a concise definition in international law scholarship.<sup>29</sup> What then may accountability mean from an interdisciplinary standpoint? The concept bears glaringly different connotations depending on the professional and disciplinary orientation of those who have made their contribution in this area of scholarship. There are those who consider accountability and transparency as synonymous terms.<sup>30</sup> Others see it as carrying such meanings as responsiveness, transparency, checks, scrutiny, surveillance, trust, monitoring or, in the political sense, electoral choices.<sup>31</sup>

However, it is in political and development studies that the concept of accountability has attracted a near unanimous attribution of meaning and which now informs its usage and application in contemporary discourses. In political philosophy for instance, power matrix (*i.e.* the relational idea of the governor and the governed) is at the core of and underlies the notion of political accountability as a value in social relations. Peter Newell and Shaula Bellour have considered accountability to be triggered when a society confers responsibility on particular actors and, by virtue of their position as the repository of that power, reserve the right to question

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<sup>29</sup> James Crawford, *State Responsibility* (New York: Cambridge University Press, 2013) at 83.

<sup>30</sup> Rob Jenkins & Anne Marie Goetz, "Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India" (1999) 20:3 *Third World Q* 603 at 607.

<sup>31</sup> Adam Przeworski, Susan C Stokes & Bernard Manin, eds, *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999) at 29, 39.

the manner of its exercise.<sup>32</sup> The occurrence of a breach or violation of a defined code, Ruth W. Grant and Robert O. Keohane claim, invites imposition of sanctions.<sup>33</sup>

In a delimited two-dimensional proposition, Andreas Schedler has advanced this debate, defining accountability as being comprised of two elements: answerability and enforcement.<sup>34</sup> Answerability is conceived of in two prongs. On the one hand, it implies the imposition of an obligation on public office holders to offer material information explaining and justifying their actions (the duty to *inform*). The process of giving an account of decisions undertaken entails giving information by the accountable and communicating that information in an illustrative manner to those who demand it (*explanation aspect*). Information and explanation integrally constitute key components of the answerability dimension whereby the right to receive full information regarding public decisions correlates with the duty to justify, defend, and offer an information-based account of conduct.<sup>35</sup> *Enforcement* entails imposition of sanctions or punishment on officeholders for infringement of governing codes.<sup>36</sup> Enforcement presupposes institutionalized forms of exacting sanctions, legal or otherwise, for non-conformity to the law which may take a non-punitive dimension; for instance, public censure, public scrutiny through media, public shaming or vacation of office.<sup>37</sup>

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<sup>32</sup> Peter Newell & Shaula Bellour, *Mapping Accountability: Origins, Context and Implications for Development* (Brighton: Institute of Development Studies, 2002) at 2.

<sup>33</sup> Ruth W Grant and Robert O Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99:1 *American Political Science Review* at 29.

<sup>34</sup> Andreas Schedler, "Conceptualizing Accountability" in Andreas Schedler, Larry Diamond & Marc Plattner, *The Self-restraining State: Power and Accountability in New Democracies* (Boulder, Colorado: Lynne Rienner Publishers, 1999) at 14.

<sup>35</sup> Rob Jenkins & Ann Marie Goetz, *supra* note 30 at 606.

<sup>36</sup> Schedler, *supra* note 34 at 26.

<sup>37</sup> *Ibid* at 16.

One element of accountability missing in Schedler's political conception, but which is the footstool of human rights accountability is *responsibility*.<sup>38</sup> Responsibility is defined as the assigned mandate to a given authority with specified duties and performance criteria.<sup>39</sup> As a consequence, to be held answerable in the context of public authority, conduct must have been constrained by specified or implied duties. There can be no right to demand information where no responsibilities have been assigned.<sup>40</sup> Recently, while approving the meaning of accountability in the political and non-judicial sense, the UN Office of the High Commissioner added a third aspect of responsibility to Schedler's answerability and enforcement criteria. According to this endorsement, accountability

refers to the obligation of those in authority to take responsibility for their actions, to answer for them by explaining and justifying them to those affected, and to be subjected to some form of enforceable sanction if their conduct or explanation for it is found wanting.<sup>41</sup>

That analytical frame sums up accountability as a concept characterized by three constituent elements: responsibility, answerability and enforceability. This article endorses this definition.

The idea of accountability has pervaded international law scholarship for a long time and has seen an explosion of usage even though the term did not lend itself to a uniform definition. Now, however, one can authoritatively point to a common understanding of accountability. In sync with accepting this newfangled approach lies a recognition that accountability always aims to achieve a singular objective, across all fields — securing a mechanism for countering power

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<sup>38</sup> Those who have defined accountability strictly in accordance with Schedler's proposition are Anne Marie Goetz & Rob Jenkins (2001) "Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-sector Oversight in India" (2001) 3:3 Public Management Review at 366; Newell and Bellour, *supra* note 32.

<sup>39</sup> Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013) at 10, online: OHCHR <[www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf](http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf)> [OHCHR & CESR, *Who Will Be Accountable?*].

<sup>40</sup> Grant & Keohane, *supra* note 33 at 30.

<sup>41</sup> *Ibid.*

abuses; granting victims affected by those abuses mechanisms for putting wielders of power to answer for their transgressions; and to apprehend, punish, or remedy such transgressions. In teleological understanding, accountability as a concept imports ideas related to finding of liability and a consequential redress of that liability.<sup>42</sup>

In human rights practice, the responsibility dimension is signified when formal or informal codes specify primary obligations, duties, and performance criteria for actors. For instance, human rights treaties always hold out the state as the primary duty bearers. Such duties are generally understood to be negative or positive constraints.<sup>43</sup> Answerability engages a process by which authoritative abuse of rights is subjected to a formal forum to explain decisions, justify, or defend anomalous conduct and to engage those who may be affected in a dialogic and participatory process of redress. Inculcating responsiveness and collaborative engagements is the ultimate aim of answerability. Enforcement of rights may take manifold forms and processes such as actual implementation of policies through state or non-state bureaucracies. Enforcement may also occur when claims are adjudicated before international tribunals, such the UN-backed special tribunal into the Rwandan genocide or the African Commission on Human and People's Rights. These bodies review complaints and may grant remedies either for corrective or distributive justice ends. The crucial point is that in international human rights law, accountability occupies the very core of human rights protection.<sup>44</sup>

It is now apposite to assesses whether the discussion of non-accountability of non-state actors have been faithful to or departed from this conceptualization of accountability and then

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<sup>42</sup> Lisa Yarwood, *State Accountability Under International Law: Holding States Accountable for a Breach of Jus Cogens Norms* (New York: Routledge, 2011) at 12.

<sup>43</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980) at 51-60.

<sup>44</sup> OHCHR & CESR, *Who Will Be Accountable?*, *supra* note 39 at 10.

finally examine whether these subtypes have found expression within international human rights law frameworks and processes. It is argued that mechanisms and processes of accountability exist, even though they may not be assigned a similar appellation or may take different configurations or procedures that do not neatly correspond to the tripartite tripology described above.<sup>45</sup>

## **B. EXISTING LITERATURE ON NON-STATE ACTORS' ACCOUNTABILITY**

Scholarship on human rights in the private sphere has identified the non-accountability of non-state actors as a fact explainable by the very nature of international law.<sup>46</sup> On this side of the divide is the liberalist approach which scrutinizes the state-centric international law and its liberal tradition of excluding human rights obligations and duties for non-state entities. For them, a notion that human rights apply as a legitimization and limitation of state power presents a formidable obstacle to recognizing human rights responsibilities (obligations, duties, and performance standards) of non-state actors.<sup>47</sup> In their view, the liberal foundation of rights explains the non-accountability of non-state institutions in international law. Adherents of this school attack the advocacy of extending rights norms to the private sphere as some sort of iconoclasm.<sup>48</sup> They see such advocacy as “trivializing”<sup>49</sup> and fraught with the possibility of triggering eventual fragmentation and demise of human rights enterprise.<sup>50</sup> Their objections also claim that inducing the private sphere with human rights norms has the unacceptable possibility

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<sup>45</sup> Bunn, *supra* note 8 at 192.

<sup>46</sup> Philip Alston, “The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 20 [Alston, “Not-a-Cat syndrome”].

<sup>47</sup> A good text on this robust debate is captured in chapter 1 of Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) [Clapham, *Human Rights Obligations*].

<sup>48</sup> For a summary of these responses, see Alston, “Not-a-Cat syndrome”, *supra* note 46 at 21-25.

<sup>49</sup> Clapham, *Human Rights Obligations*, *supra* note 47 at 59.

<sup>50</sup> *Ibid* at 32.

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of legitimizing non-state actors.<sup>51</sup> On the other hand, opponents argue that, since public authority is diffused and its ambit may extend to private domains in certain cases, there is no longer a justification to consider rights as protection against public authority.<sup>52</sup>

The second approach is to be found in the focus on the process of globalization and its effect on the domains of the state. They see the emerging dominance of non-state actors, such as international financial institutions, as an unprecedented onslaught on state sovereignty and a structural hindrance on states' human rights mandates.<sup>53</sup> Globalization scholarship focus on new values such as free market ideals and neoliberalism and their implications for the state's traditional functions. Their diagnosis portrays a variety of images of the state. It is argued that the state has lost relevance, influence or is in decline or subordinated to the vested interests of capitalism.<sup>54</sup> According to Margot E. Salomon, the roles that international financial institutions play in global development praxis by influencing rules and policies governing trade, investment, and finance have had the sad impact of shrinking the policy scope of national governments.<sup>55</sup> Globalization comes with the push towards neoliberal ideals which impels relegation of human rights agenda by the state and this has meant that the right to development, a non-market goal, cannot deliver goods for the poor.<sup>56</sup> Often, such an agenda is pursued with the aim of limiting the ability of the state to steer planning, regulation, and distribution.<sup>57</sup> What worries them most is that “macroeconomic policies stand dictated by undemocratic and unaccountable international and

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<sup>51</sup> *Ibid* at 59.

<sup>52</sup> Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993) at 136-137 [Clapham, *Human Rights in the Private Sphere*].

<sup>53</sup> Philip Alston, “The Myopia of International Handmaidens: International Lawyers and Globalization” (1997) 3 *EJIL* 435 at 442 [Alston, “The Myopia of the Handmaidens”].

<sup>54</sup> *Ibid*.

<sup>55</sup> Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) at 14.

<sup>56</sup> Daniel Aguirre, *The Human Right to Development in a Globalized World* (Burlington, VT: Ashgate Publishers, 2008) at 6.

<sup>57</sup> Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2006) at 291.



regional financial institutions and multilateral treaty frameworks.”<sup>58</sup> Thus the arguments for their regulations stem from the fact that because they exercise some kinds of public authority (responsibilities), their decisions and activities assume a public character justifying amenity to institutions of accountability.<sup>59</sup> They too interrogate the rationale of a continued taxonomical decoupling of the public from the private domains.

For their contribution and discrepant approaches to the accountability debate, this rich body of academic work has made an achievement in only one respect: identifying and clarifying the need for responsibility of actors in the private sphere. Clearly, it has overemphasized the imperative of enshrining human rights obligations for non-state actors, yet accountability, properly conceived, encompasses answerability and enforceability besides identifying human rights responsibilities for actors.<sup>60</sup> The inadequacy of the current literature is therefore its failure to define a clear and monolithic conception of accountability. If we narrow our focus further, we discover that a tripartite conception of accountability has been missing in right to development discussions or that insufficient attention has been given to the three constituent elements of accountability.

Okafor, while reviewing judicialization of development contests before the African Commission on Human and People’s Rights, demonstrates that exclusion of international economic institutions from human rights instruments is problematic.<sup>61</sup> He cites the *Ogoni*<sup>62</sup> case

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<sup>58</sup> Baxi, *Human Rights in a Posthuman World*, *supra* note 14 at 154.

<sup>59</sup> See *e.g.* Jan Wouters et al, “Accountability for Human Rights Violations by International Organizations: Introduction Remarks” in Jan Wouters et al, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010).

<sup>60</sup> OHCHR & CESR, *Who Will be Accountable*, *supra* note 39 at 10.

<sup>61</sup> Obiora Chinedu Okafor, “A Regional Perspective: Article 22 of the African Charter on Human and Peoples’ Rights” in OHCHR, *Realizing the Right to Development*, *supra* note 9 at 373-84.

<sup>62</sup> *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, Communication No. 155/1996, online: African Commission on Human and People’s Rights <[www1.chr.up.ac.za/chr\\_old/indigenous/documents/Nigeria/Cases/SERAC1.pdf](http://www1.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Cases/SERAC1.pdf)> [*Ogoni*].

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where the Commission leaned on a traditional understanding of state responsibility for human rights and considered it the duty of the state to take positive measures to enact protective legislation to restrain private parties from inflicting human rights violations.<sup>63</sup> He laments that the Charter's stricture of statism limited the Commission to censure only the Nigerian state's inaction and not Shell's culpability on technical grounds *locus standi*, without having noticed that this is an enforceability shortcoming of the African Charter.<sup>64</sup>

As a handful of other scholars wrestled with the problem of the inequitable and unaccountable global structural arrangements and invoked the extraterritorial obligations embodied in the *Declaration* as a mechanism for enlisting state and non-state actions to combat global poverty, they failed to supply details for enriching the *Declaration's* accountability void in terms of two other dimensions of answerability and enforceability.<sup>65</sup> Much the same can be said of Andreassen's analysis of the responsibility of transnational corporations.<sup>66</sup> Its focus on the voluntary soft law codes now in practice, on a proper understanding of accountability, can be doubted for giving no account of how soft law or voluntary models would figure in the essential requirement that human rights norms be universal and possess binding force. Furthermore, Aguirre's proposed "meso-level" of obligations, like the traditional scholarship, advocates imposing duties on non-state actors while silent on the enforceability and answerability

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<sup>63</sup> *Ibid* at para 58.

<sup>64</sup> Obiora Okafor, *supra* note 30 at 380.

<sup>65</sup> Margot E Salomon, "International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice" in Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) 98 at 111.

<sup>66</sup> Bård A Andreassen, "Development and the Human Rights Responsibilities of Non-State Actors" Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) 119 at 138.

dimensions of accountability.<sup>67</sup> The meso-level approach, while intended to circumvent the entrenched power differentials as impediments to holding powerful actors accountable, has not proposed even a modest measure of answerability, such as participation and responsiveness, that the right to development envisages.

Perhaps Salomon is the one scholar who may be credited for giving a comprehensive contribution to the theme of global justice in the context of the right to development. She proposed a structuralist approach which supposes that the right to development, broadly construed, imposes negative duties against the international community that states can invoke to resist harmful decisions imposed by supranational actors.<sup>68</sup> She then advances the due diligence principle that has been applied in domestic law to hold states accountable for failing to restrain foreseeable rights violations from private actors. Its significance, she contends, lies in its ability to “render imperfect obligations perfect” in the context of an “integrated global economy where actions and decisions within the global order [are interwoven and] cannot be easily disaggregated for purposes of state responsibility”.<sup>69</sup> While it offers a limited account of the enforceability dimension, its fixation on the responsibility aspect gives no mention of answerability, indicating that the work proceeded from no common understanding of accountability. Its other inadequacy is that it fails to assess how due diligence can reinvigorate the state to reclaim its centrality in domestic economic mainstreaming.

From the above account, one notices that the accountability deficit has prompted intense debate on whether or not to include non-state institutions into human rights frameworks. Of course there is consensus that international economic institutions and transnational business must

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<sup>67</sup> Aguirre, *supra* note 56 at 305.

<sup>68</sup> Margot E Salomon, *Global Responsibility for Human Rights*, *supra* note 55 at 51.

<sup>69</sup> *Ibid* at 186.

now be regulated as their presence and contribution in development-related activities affect or promote human rights.<sup>70</sup> But the reality that international law still retains its statist character and that states have yet to show an inclination to generate rights norms and values for the private sphere is the one challenge that new thinking of human rights in the private sphere needs to address. The problem is compounded by the fact that liberal foundations of rights remain unshaken and human rights retain its state-centric posture, even with the onslaught of private actors into the traditional domains of the state.

Discrepant in approach as they are, international law scholarship has addressed only the responsibility dimension of accountability. Once it is accepted that human rights principles and standards apply to the private sphere, the logic of rights as restraint on the power of the state is inverted and scholarship would need to reimagine the entire human rights foundation and architecture. We will have to think of how non-state institutions may be held answerable; *i.e.* how can they be made to explain and communicate their decisions or omissions to people who may be affected by those indecisions or decisions? It is always assumed that once non-state actors become bound by human rights obligations, various enforceability processes that apply to states in international law will be triggered. Perhaps this assumption is the reason why the enforceability aspect has not been vigorously pursued in a majority of debates. However, this is a doubtful presumption. Enforceability of rights-based claims against non-state actors is a complex process, given that international and state bureaucracies may be engaged to redress injustices occasioned by decisions in which states are placed at the disposal of inter-governmental institutions, or vice versa. Such intricately interwoven issues need to be given keen reflection in a way that is markedly different from current approaches, which assume that current enforcement

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<sup>70</sup> OHCHR & CESR, *Who Will be Accountable*, *supra* note 39 at 24.

machinery of international law are adequate and suitable to non-state institutions. It means we must think of accountability in terms of actors and not in terms of the state as it currently operates in international law. A clear conception of accountability as proposed in this article contributes a unique mechanism to the human rights regime which, if operationalized in international law and practice, will completely shift our thinking from a theory of state responsibility as it currently undergirds in accountability practices.

#### **IV. CURRENT ACCOUNTABILITY FRAMEWORKS IN INTERNATIONAL LAW FOR NON-STATE AND STATE ACTORS**

##### **A. NON-STATE ACTORS**

International law has a role in determining who comes to embody legal personality, so as to be regarded as a subject in its procedures and relations.<sup>71</sup> In classical international law tradition, states have been treated as the prototypical legal persons in international legal relations, with capacity to be conferred rights and bear responsibility. *A fortiori*, only states were conceived of as duty bearers, on or against whom individuals could assert their claims. When, however, the 1949 Advisory Opinion of the International Court of Justice in the *Reparations* case altered the legal landscape by recognizing that in certain situations intergovernmental entities could possess a measure of international “legal personality,” that attitude was significantly affected.<sup>72</sup> The peripheral treatment had meant that international organizations were not only outside the regulatory province of international law, but that they could not hold any rights and obligations as they were not considered subjects.

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<sup>71</sup> Bin Cheng, “Introduction to Subjects of International Law” in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Dordrecht, The Netherlands: Martinus Nijhoff and UNESCO, 1991) 23 at 34.

<sup>72</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 1949 174.

In succeeding cases, this jurisprudence has been built upon (especially by the European Court of Human Rights) to affirm that achieving status as a subject of international law comes with a corollary of human rights obligations.<sup>73</sup> In 2014, the Parliamentary Assembly of the Council of Europe provided its nod in the same direction.<sup>74</sup> So far, human rights obligations of international organizations may be clear, but there is still no normative clarity regarding private persons, such as individuals, transnational corporations, and other entities.<sup>75</sup> With the exception of international criminal law, where the concept of individual responsibility for international crimes such as genocide, crimes against humanity, and war crimes is crystalized,<sup>76</sup> international human rights law retains its stately outlook and treats non-state actions as indirect human rights actions of the state under the doctrine of due diligence. This, however, is not to suggest that international organizations cannot have direct human rights responsibilities. They can, as the ICJ Advisory Opinion in *Cumaraswamy*<sup>77</sup> suggests – but, in terms of enforcement, procedural limitations such as rules of standing before international tribunal or courts will stand in the way of instilling accountability.<sup>78</sup> There is also a further problem of diplomatic immunity before national jurisdictions.

For multinational corporations, the approach has been somewhat different. Tellingly, almost all international efforts for reforming this normative gap proffer voluntary models for

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<sup>73</sup> *Waite and Kennedy v Germany*, (2000) 30 EHRR 261 at para 67; *Behrami and Behrami v France, Germany and Norway*, (2007) 45 EHRR SE 10.

<sup>74</sup> Council of Europe, PA, Committee on Legal Affairs and Human Rights, *Accountability of international institutions for human rights violations*, AS/Jur (2013) 17, online: <[www.assembly.coe.int/CommitteeDocs/2013/ajdoc172013.pdf](http://www.assembly.coe.int/CommitteeDocs/2013/ajdoc172013.pdf)>.

<sup>75</sup> James Crawford, “The System of International Responsibility” in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 17 at 18.

<sup>76</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 art 25 (entered into force 1 July 2002); *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 art 4 (entered into force 12 January 1951).

<sup>77</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] ICJ Rep 62 at paras 46, 66.

<sup>78</sup> Crawford, *supra* note 75 at 17.

imposing human rights obligations on business entities. One such voluntary model is the 2011 United Nations Guiding Principles on Business and Human Rights (Ruggie Principles).<sup>79</sup> Though they enunciate human rights obligations for business entities, the Ruggie Principles still embrace the statist outlook and fall back on the state, specifying that it is its mandate to protect against violations of business entities.<sup>80</sup> This appears on their foundational and operational principles which explicitly make reference to the state as the principal actor, thus affirming that such approaches are yet to contend with horizontal human rights obligations.

It seems these three elements of accountability are far from achieved in relation to international economic institutions and transnational corporations. Given the absence of substantive and formal human rights obligations on non-state actors, the responsibility aspect remains unfulfilled. There is still no consensus that human rights duties and obligations enshrined in treaties and conventions ratified and domesticated by states are binding on international organizations and multinational corporations.<sup>81</sup> With that said, answerability may have been achieved in various contexts, such as social movements that challenge and demand justification of decisions of transnational companies through civil society protests, media censure, public campaigns and other processes. The right of access to information, freedom of expression, and participation have enabled resistance movements to collect information and challenge abuses of multinational corporations at various stages. In terms of enforcement, as the

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<sup>79</sup> *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, HRC UNGAOR, 17th Sess, UN Doc A/HRC/17/31 (2011) at 6.

<sup>80</sup> *Ibid.* See also Secretariat to the ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (Heidelberg, Germany: Fian International, 2013) at 9 (principle 24), online: [www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUId%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23) >.

<sup>81</sup> Francois Gianviti, "Economic, Social and Cultural Rights and the International Monetary Fund" in Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 120. See also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*" (2008) 19:3 *Euro J Intl' L* 491.

*Ogoni* case demonstrates, rules establishing international tribunals do not recognize non-state actors as parties with standing to bring claims or be subjected to adjudication. The UN and treaty mechanisms only contemplate state reporting, monitoring, and review procedures, but even then a well-structured enforcement mechanism does not exist. In domestic contexts, immunity of international institutions is a major impediment towards reviewing their administrative decisions. For transnational corporations, the fact that most national constitutions retain the liberal logic of rights as limitations of state power means that their wrongful conduct cannot give rise to rights-based claims before any court or tribunal, save where claimants ground their rights of action in tort law, for example. The World Bank and IMF, however, have developed their own internal procedures, but these are limited for want of universality of standards and for their inability to be monitored externally.

## **B. STATE ACTORS ACCOUNTABILITY IN INTERNATIONAL LAW**

This section assesses the institutional forms and mechanisms in international law for protecting, implementing, and enforcing human rights against the state. In this section, this article argues that contemporary human rights practices and processes of implementing and enforcing human rights standards and obligations in their multifarious forms finely dovetail into the tripartite tripology of accountability elucidated in the previous section. It is this author's contention that the existing frameworks and processes of international law, disparate as they are, do possess salient structural features that reflect or subsume the subtypes of accountability.

Normative practices of human rights protection that subsume the triads of accountability in international law are not difficult to discern. They are "presented in many ways: from the



point of organs, instruments, means of protection”<sup>82</sup> in a two-stage process comprised of a body of hard laws entrenching a panoply of rights, specifying rights holders and duty bearers on the one hand, and spelling out mechanisms of policing implementation on the other. The modus of a human rights protection framework is to provide elaborate rights, specify duty bearers and spell out broad outlines for generating and regulating rights claims while laying out procedural enforcement mechanisms. In practice, this scheme may involve the three subtypes operating in a mutually inclusive process or the individual processes may operate independently of each other.

In terms of spelling out rights guarantees, customary law and treaties provide comprehensive sources in the various forms, without specifically providing any unitary mode of accountability. The responsibility aspect of accountability requires specification and assignment of obligations. For effective accountability, duties must be stipulated and assigned.<sup>83</sup> While the language of treaties may vary from one treaty to the next, there is one commonality that pervades them when states take up the cardinal responsibilities under international law to respect, protect, and fulfill human rights obligations.<sup>84</sup> These instruments provide forums for enforcement in a variety of ways.

For example, the United Nations human rights systems provide a variety of mechanisms that vary from the international and regional treaty bodies. In these two systems, the relevant

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<sup>82</sup> Janusz Symonides, ed, *Human Rights: International Protection, Monitoring, Enforcement* (Burlington, VT/Paris: Ashgate & UNESCO Publishing, 2003) at xiii.

<sup>83</sup> Sengupta, “Conceptualizing the Right to Development”, *supra* note 25 at 72.

<sup>84</sup> See e.g. article 1 of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, Supp 28, UN Doc A/RES/25/2625 (1970) 121 at 121. See also *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 2 (entered into force 23 March 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 2 (entered into force 3 January 1976) [ICESCR]; *Declaration on the Right to Development*, *supra* note 1, art 3(1); *European Convention on Human Rights*, 4 November 1950, ETS 5 art 1 (entered into force 3 September 1953); *African (Banjul) Charter on Human and Peoples’ Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 art 1 (entered into force 21 October 1986).

accountability mechanism depends on the context of the right being implemented and the mechanism of enforcement that is involved. This article analyzes accountability mechanisms within the United Nations and two international treaty frameworks – the *International Covenant on Economic Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

(i) *WITHIN THE UN CHARTER*

Article 1 of the Charter of the United Nations mentions one of its purposes as “promoting and encouraging respect for human rights.” The General Assembly and Economic and Social Council are both empowered to conduct studies and make recommendations towards realization of human rights.<sup>85</sup> The Human Rights Council, an inter-governmental body, was set up by the General Assembly in 2006 as a sequel to the Commission on Human Rights. Its mandate is *inter alia* to: “promote human rights education and learning”; “serve as a forum for dialogue” on human rights issues; “promote the full implementation of human rights obligations undertaken by states”; “contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies”; “make recommendations with regard to the promotion and protection of human rights”; and submit annual human rights report to the General Assembly.<sup>86</sup>

These roles make the Council double up as an institution of enforcement and a forum for answerability. The mandate of the Council presupposes dialogue with states regarding human rights compliance in their jurisdictions. Cooperative processes of engagement regarding human rights entail information sharing that reflect non-coercive and deliberative approaches to human

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<sup>85</sup> *Charter of the United Nations and Statute of the International Court of Justice*, 26 June 1945, 1 UNTS XVI arts 13, 62 (entered into force 24 October 1945).

<sup>86</sup> *Resolution adopted by the General Assembly on 15 March 2006*, GA Res 60/251, 60th Sess, UN Doc A/RES/60/251 (2006).

rights as a global governance issue. The Human Rights Council also works through the Universal Periodic Review, a mechanism set up to provide “the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.”<sup>87</sup> Through this cooperative stakeholder engagement, the Universal Periodic Review engages states to be faithful to their human rights commitments and act as a forum for answerability. For example, as of 24 June 2016, it is recorded that sixty-three states submitted voluntary mid-term reports, while other states are documented to have also submitted reports in compliance with various Universal Periodic Review cycle requirements.<sup>88</sup>

The Council also provides a human rights complaint procedure mechanism through which victims of rights violations can lodge complaints through a working group on communication.<sup>89</sup> Complaints communications are handled in a bifurcated process before being transmitted to the Council.<sup>90</sup> The processes of the working groups are confidential, victim-oriented, and the state is expected to offer optimal cooperation. This process of cooperation and giving ‘substantive reply’ by the state fits into answerability requirement of explaining, providing information, and communicating details regarding why certain decisions have been taken. Involving the complainant and the state in the inquiry process is a mark of accountability where a third party institutionally mediates between the state as an axis of power and the complainant as the victim of a rights breach resulting from the state’s pursuit of either legitimate or illegitimate mandates.<sup>91</sup> Consider the situation of human rights in Eritrea, where a complaint

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<sup>87</sup>See United Nations, Office of the High Commissioner for Human Rights, *Universal Periodic Review*, online: <[www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx](http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx)>.

<sup>88</sup> United Nations, Office of the High Commissioner for Human Rights, *UPR: Mid-term reports*, online: <[www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx](http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx)>.

<sup>89</sup> See *Institution-building of the United Nations Human Rights Council*, HRC Res 5/1, UNGAOR, 5th Sess, Annex, UN Doc A/HRC/RES/5/1 (2007), ss 89-99 [*Institution-building of the UN HRC*].

<sup>90</sup> *Ibid*, s 98.

<sup>91</sup> *Institution-building of the UN HRC*, *ibid*, s 107.

was raised alleging a litany of human rights breaches.<sup>92</sup> The Council took account of the government's cooperation but lamented the marginal information presented. As a result, the Council voted to discontinue confidential proceedings and mandated the Special Rapporteur to conduct further investigations in the matter.

The lever of accountability is the Office of the High Commissioner for Human Rights, which is charged with the promotion and protection of human rights, reacting to situations challenging human rights, and coordinating the frameworks of the United Nations human rights protection.<sup>93</sup> It performs this role through a number of ways, including the following: receiving stakeholder reports, monitoring, field visits, early risk warning measures, technical advice, standard setting, and policy formulation. Though the office is central to the UN human rights coordination, the accountability mechanism it serves is of a different nature, ensuring a broader realization of human rights culture on the globe.

The special procedure mechanisms of the United Nations, supported by the Office of the High Commissioner for Human Rights, play a vital role in anchoring monitoring and answerability processes and standards evaluation. Special procedures may be constituted by the Human Rights Council in a number of circumstances and may involve assignment of a working group, independent expert, or special rapporteurs with either thematic or country-specific mandates on human rights. In accountability terms, these mandates vary and depend on the accountability agenda that actuates their assignments. In summary, special procedures may engage either in monitoring, surveillance, information gathering, information seeking or sharing, dialogue, or provision of technical support to a state. Undertaking a specific country assignment

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<sup>92</sup> *Situation of human rights in Eritrea*, HRC Res 21/1, UNGAOR, 21st Sess, Annex, Agenda Item 5, UN Doc A/HRC/RES/21/1 (2012).

<sup>93</sup> *High Commissioner for the promotion and protection of all human rights*, GA Res 48/141, UNGAOR, 48th Sess, Supp No 49, UN Doc A/RES/48/141 20 (1994) at para 4.

by a special rapporteur may, for example, entail a mission to unearth ongoing or past human rights abuses in a process of collating information regarding the human rights situation of a given country. In 2008, Kenya, of its own volition, invited the UN Special Rapporteur on extrajudicial killings to do so in response to heightened criticisms regarding its crackdown on a militant group known as Mungiki, as well as other alleged forms of human rights violations.<sup>94</sup> A broader understanding of accountability within these special procedures will therefore not fail to identify critical roles that non-coercive and non-punitive implementation of a human rights culture can play within the UN Charter frameworks. Whether a special procedure intervention arises from the Human Rights Council or is prompted by state action, the underlying objective of this mechanism cannot be overstated. Philip Alston emphasizes the critical roles these procedures play:

Such communications with Governments raise international awareness of specific domestic incidents and encourage Governmental attention. They create a regular and ongoing system of monitoring State behavior, generate a record of abuses over time, provide clarity on the circumstances of specific incidents and give States an opportunity to set the record straight. The communications can also shed light on the interpretation of applicable law, promote accountability and encourage measures to reduce future killings.<sup>95</sup>

These special procedures advance development of international human rights standards in consonance with the responsibility aspect of accountability.

*(ii) ACCOUNTABILITY MECHANISMS WITHIN THE INTERNATIONAL TREATY BODIES*

Two institutions are covered in this part. Within the *International Covenant on Civil and Political Rights (ICCPR)*, states are bound “to respect and to ensure to all individuals within its

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<sup>94</sup> See generally Philip Alston, “Statement by Professor Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions” (Statement delivered to the United Nations Human Rights Council, Geneva, Switzerland, 3 June 2009), online: <[www.un.org/webcast/unhrc/11th/statements/Alston\\_STMT.pdf](http://www.un.org/webcast/unhrc/11th/statements/Alston_STMT.pdf)>.

<sup>95</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, HRC UNGAOR, 14th Sess, Addendum, Agenda Item 3, UN Doc A/HRC/14/24/Add.6 (2010).*

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territory and subject to its jurisdiction the rights recognized in the present Covenant” and “to adopt such laws or other measures as may be necessary to give effect to the rights recognized.”<sup>96</sup>

Article 28 establishes a Human Rights Committee, which is a body of experts charged with monitoring implementation of civil and political rights. Its institutional structure is reflected in its constitutive modalities.<sup>97</sup> The role of the Committee takes manifold forms and may not necessarily conform to the triadic sense of accountability. Above all, the Committee’s existence signifies a sense of “supra-statal” institution, superintending over states in matters of human rights.

The procedure for submitting reports upon request and the methods of review and feedback (in the form of “concluding observations” by the Committee) satisfies a majority of the accountability subtypes;<sup>98</sup> so too does the unique inter-state complaints procedure provided therein. The overall objective is to hold states answerable to some authority and to commit to human rights obligations and assess the levels of implementation or violations. The entire process of information exchange between the state and the Committee affirms an existence of a dialogic engagement in the mission of human rights protection, reflective of the explanatory and communication aspect of answerability. Under the Optional Protocol to *ICCPR*, “a state party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals” provided that “such individuals have exhausted all available domestic remedies.”<sup>99</sup> The Committee on Economic, Social and Cultural Rights within the *International Covenant on Economic Social and Cultural*

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<sup>96</sup> *ICCPR*, *supra* note 85, arts 2(1)-(2).

<sup>97</sup> *ICCPR*, *ibid*, arts 29-39.

<sup>98</sup> *ICCPR*, *supra* note 85, art 40.

<sup>99</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 arts 1, 2 (entered into force 23 March 1976).

*Rights* monitors state parties in their implementation by receiving and considering periodic reports, giving its advice, and issuing General Comments relating to the Covenant rights.

These two committees act as standard-setting platforms when they generate General Comments and professional and expert views about various aspects of the Covenant rights, which aid in human rights interpretation and understanding. Evaluation of relevant rights normally occurs in a comprehensive comparative context, taking into account jurisprudence and practices from various regions and bodies. The General Comments aid in delineating the nature of obligations, proffer insights into grey areas, and offer recommendations.<sup>100</sup> Information resource and expert advice contribute to accountability frameworks by advancing the level of awareness of state structures that bear the mandate of enforcing and implementing rights. As a result of periodic reporting, review and feedback mechanisms are grounded upon the principle of cooperation and dialogue with state parties. Dialogue contributes several positives, including highlighting key problematic areas that states may face in implementing human rights codes.<sup>101</sup> Above all, the dialogic engagement fosters the answerability dimension of accountability.

All in all, these procedures for monitoring state compliance, handling complaints or creation of special mandates on specific bodies or persons, such as rapporteurs, affirm that it is the institution of the state in whose purview the burden of human rights protection lies. The desponsibility dimension of accountability is indicated by express and implied human rights obligations imposed by covenants, treaties, and customary law, or other instruments to which states are signatory. The answerability dimension is implicated by cooperative processes of

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<sup>100</sup> Janusz Symonides, *supra* note 83 at 34.

<sup>101</sup> UN, Office of the High Commissioner for Human Rights, *Civil and Political Rights: The Human Rights Committee: Factsheet No. 15* (New York: OHCHR, 2005) at 18-19, online: <[www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf)>.

engagement, such as information sharing in the state reporting, monitoring, and review procedures. These reflect the duty to inform, communicate, explain, justify, and defend state decisions that affect or violate rights within a domestic set-up. Enforcement occurs through the non-coercive and deliberative approaches to human rights, such as the UN Security Council resolutions or sanctions, universal periodic review, Human Rights Council, General Assembly and complaints communications in which these bodies mediate between the state and persons affected by human rights violations. Some instruments also provide judicial and quasi-judicial mechanisms at the international level.

What these procedures tell us is that whether human rights derogations are occasioned by private actors' conduct, the state is still liable under the doctrine of state responsibility to international structures of accountability, even when causality and blameworthiness lies with actors more powerful and influential than the state. More profoundly, it shows that various paradigms of accountability are anchored on the idea that the state is the principal actor in international law and is burdened with rights obligations that make it responsible and answerable for all rights-based claims that persons may stake out against violators, even if those violators are non-state actors. How do we account for this predominantly statist approach to accountability that international law has constructed? Where are its origins?

## **V. THE CLASSICAL LIBERAL FOUNDATION OF HUMAN RIGHTS**

The classical liberal philosophy explains that rights are a bulwark against intrusion into the private domain by the state and thus act as devices for challenging and constraining state power



in its various forms.<sup>102</sup> It holds that the authorial responsibility that the state performs in safeguarding the rights of individuals simultaneously make its machinery the potent source of rights violations.<sup>103</sup> Given that the state is not always neutral and is amenable to manipulative influences and interests of its agencies, the resulting power manifests excessively in human rights violations.<sup>104</sup> The fear of governmental overreach, according to libertarians, has led to an emphasis on “strict limitations on state power, formulating negative rights and freedoms which ultimately found their way into the constitutions”.<sup>105</sup> Thus, human rights came to constrain only the public realm and would not intrude into the private domain, and thereby arose the non-regulation of the private sphere through human rights accountability norms.<sup>106</sup>

In the post-war twentieth century, this ideology came to permeate collective action of states when generating and cascading human rights norms through treaties. Andrew Clapham observes that the state-centric nature of rights arose from human rights treaty making by states which focused on creating obligations and mechanisms of accountability solely for the states on the basis of the traditional understanding of state responsibility.<sup>107</sup> While these instruments and customary law provided, in certain cases, primary rules defining nature of obligations, secondary rules relating to breach of obligations were defined by state responsibility.

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<sup>102</sup> Paul Gordon Lauren, *The Evolution of International Human Rights- Visions Seen* (Philadelphia PA, University of Pennsylvania Press, 2011) at 2.

<sup>103</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed (Ithaca New York, Cornell University, 2013) at 33.

<sup>104</sup> “Introduction” in Jack Donnelly & Rhoda E Howard, eds, *International Handbook of Human Rights* (New York: Greenwood Press, 1987) at 20.

<sup>105</sup> Manfred Nowak & Karolina Miriam Januszewski, “Non-State Actors and Human Rights” in Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford and Portland: Hart Publishing Ltd, 2015) at 131.

<sup>106</sup> *Ibid* at 132.

<sup>107</sup> Andrew Clapham, “Non-State Actors” in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumara, eds, *International Human Rights Law* (New York: Oxford University Press: 2010) at 562.

State responsibility rests on the assumption that it is the state, and the state only, while acting domestically or internationally through its organs, which bears the primary responsibility for human rights.<sup>108</sup> State responsibility is, however, a general rule of international law that governs “the general conditions under international law for the State to be considered responsible for actions or omissions, and the legal consequences which flow therefrom”.<sup>109</sup> The concept of wrongful conduct is incredibly broad and covers in its range human rights violations, amongst other conduct.<sup>110</sup> Applied in the context of human rights, the principle’s corollary holds that wrongful private persons’ conduct cannot be attributed to the state, except those specific circumstances where the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) apply. These apply particularly in relation to attribution of wrongful conduct to the state. Thus, private conduct may be attributed to the state in the following circumstances: Article 5, in situations where conduct of private parties have expressly been authorized to exercise governmental functions of the state; in Article 8, where conduct of private parties have been carried out on instructions or direction of the state or its organs; in Article 9, in situations where certain groups or persons are acting in the absence of official governmental authority; in Article 10, which relates to attributing conduct to the state in circumstances of insurrection or other subversive movements; and Article 11, where conduct has been adopted or ratified by the state as its own, either expressly or through its conduct.

As Ryngaert observes, “states are, in principle, not responsible for acts done by private or non-state actors... and that [o]nly acts of state organs can engage the responsibility of the state,

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<sup>108</sup> James Crawford, Alain Pellet & Simon Olleson, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 17.

<sup>109</sup> See generally United Nations, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (United Nations, 2001), online: <[legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>.

<sup>110</sup> *Ibid* at 32.

even if the act has been done *ultra vires*.”<sup>111</sup> This may seem as a systematization and consolidation of state-centricity of human rights and it may appear to conceal the strategic retention of the traditional public/private divide. Applied in the human rights regime, it re-enacts liberal orthodoxy of rights and conceives of rights violations by private actors as indirect conduct of the state under the well-known doctrine of due diligence (as espoused in *Velasquez Rodriguez v Honduras*). By this rule, the state is accountable for rights violations, not directly related to or arising from its wrongful conduct, but for its failure to prevent occurrence of those violations by private or third parties.<sup>112</sup>

Clapham believes, however, that state responsibility is not the source of the disjuncture and its central tenets need no alteration.<sup>113</sup> Likewise August Reinisch has argued that, where non-state actors have been appropriated into the traditional functional domains of states in certain public functions, there arises an obvious necessity to craft mechanisms of accountability for such non-state conduct for the purposes of attributing “subsidiary liability” in recognition of the now expanded view of *state responsibility*.<sup>114</sup> However, the fact is that the fundamental premises of this principle remain doubtful. The complexities of globalization and international economic relationships that manifests in various forms and rationalities of hegemonic powers have come to present the state as an institution subordinated to the vested interests of powerful non-state institutions. Therefore, to unthinkingly embrace the notion of a strong state capable of restraining harmful activities of powerful actors under the principle of due diligence ignores the fact that

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<sup>111</sup> Cedric Ryngaert, “State Responsibility and Non-State Actors” in Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford/Portland: Hart Publishing, 2015) at 163.

<sup>112</sup> (1988) Inter-Am Ct HR (Ser C) No 4 at para 172, *Annual Report of the Inter-American Court of Human Rights: 1988*, OAS/Ser.L/V/III.19 doc. 13 (1988) 71.

<sup>113</sup> Clapham, “Human Rights Obligations”, *supra* note 47 at 28-29. Clapham posits that since states have fixed non-state actors with rights and duties, international law applies to them in the same way as states even though they possess no law-making powers.

<sup>114</sup> August Reinisch, “The Changing International Legal Framework for Dealing with Non-State Actors” in Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 81-82.

unwillingness or inability of states in “regulating and supervising corporate activities” may be dictated by external factors that are beyond its scope.<sup>115</sup> If we reflect more deeply and contextualize the reality of a neoliberal state, in which human rights values compete with and are trumped by free markets, the idea of a stronger state, propped by doctrines and principles of international law such as state responsibility, may in itself be no cure to the overbearing presence of non-state actors.<sup>116</sup> More crucially, the point is that the considerable impact on state autonomy by global institutional and regulatory powers now challenge a unidimensional conception of rights as a counterweight to the authorial overreach of state powers and, by extension, the state responsibility doctrine founded upon it.

If we are to reimagine accountability of actors for underdevelopment resulting from global development pursuits, we have to be conscious that the global economy comprises both the state and non-state actors, with their respective policies and development agenda interfacing in diverse areas of trade, finance, investment, aid and debt, and which seed the international order with the ability to promote or undermine human rights agenda. This new demand has unmasked the failings of the state as the fulcrum of legal validity in international law and the state-centric accountability regimes founded upon it. That international law is being impelled to evolve its foundational principles and values beyond a fixation with the state and to include non-state actors into a direct human rights accountability machinery is beyond question. The question and the uncertainty are mechanisms for realizing this objective. To this end, various approaches for direct regulation have been broached. One of them centers on institutional cosmopolitanism, the counter-theory to classical liberal philosophy which enjoins all persons, not only to refrain from or keep the injunction to avoid harm to others, but also to avoid being complicit in an

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<sup>115</sup> Ryngaert, *supra* note 112 at 180.

<sup>116</sup> Alston, “Myopia of Handmaidens”, *supra* note 53 at 442, 448.

institutional order that promotes the creation of adverse arrangements that cause human harms.<sup>117</sup> Its central proposition is that, to coopt human rights norms into the private sphere, we need to christen rights anew, in a departure from the right-duty, individual versus state criteria of liberalism.<sup>118</sup> According to moral theorization, human rights norms need to be viewed as constraints on all persons, including the state and non-state institutions that may engage in conduct harmful to the human person.<sup>119</sup> Thomas Pogge's re-characterization of rights as imposing "negative duty not to harm" offers to this school the groundwork for advancing the contested idea of human rights in the private realm.<sup>120</sup> This philosophy jettisons the liberal notion of rights as a constraint against state powers for a new theory of rights as negative duty not to harm, a duty imposed against any person that may construct an institutional arrangement with the potential to harm persons.<sup>121</sup> It provides a compelling sense of how human rights deficits need to be understood in relation to the global institutional arrangement or the roles that global institutions play in the perpetuation of human rights violations in a monolithic world order whereby no human rights obligations are binding upon them. Pogge's cosmopolitanism has the potential to reorient the dominant perceptions that human rights generate and perpetuate norms only for the public sphere in terms of specifying entitlements of persons and duties of the state. If we are to formulate a direct accountability mechanism for non-state actors in the three dimensions, this approach is appropriate for rethinking the creation of direct and binding obligations of non-state actors for which human rights frameworks and norms can instill answerability and enforceability. What remains to be seen is the future behavior and attitude of

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<sup>117</sup> Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*, 2nd ed, (Cambridge: Polity Press, 2008) at 174-78.

<sup>118</sup> *Ibid* at 51-52.

<sup>119</sup> Clapham, "Human Rights Obligations", *supra* note 47 at 59.

<sup>120</sup> Pogge, *supra* note 118 at 73.

<sup>121</sup> *Ibid*.

states vis-à-vis embracing and translating this new rationalization of rights into real practice when they generate human rights norms.

## VI. CONCLUSION

The conclusion of this study is that the non-state actor accountability deficit is a reality rooted in the *statist* character of international law. This article has argued that to realize the egalitarian and emancipatory aspiration of the right to development, its international dimension must, of necessity, be reconstructed to coopt non-state actors into its regime. Doing so entails a reorientation of the dominant perceptions that consider human rights as a counterweight to authorial overreach of state power. In its current form, the *Declaration on the Right to Development* does not render a proper account of how that can be achieved. Though there exist accountability mechanisms in various human rights regimes, as a cursory study of the major UN and international treaty frameworks has shown, the fact that these mechanisms contemplate only state accountability shows a glaring legal anomaly. This article has responded to this structural limitation by proposing Thomas Pogge's negative duty criteria to assign a new significance and logic towards the concept of rights in international law. Second, it has recommended an expanded notion of accountability (responsibility, answerability, and enforceability) that detaches from the state as the fulcrum of accountability and argues that it is this conception that can remedy the flaws in the existing accountability regimes.