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Title	The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation
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Publication Date	2012
Publication Information	Curtis, J. and Darcy, S. (2012) The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation in David Keane and Yvonne McDermott (eds.), The Challenge of Human Rights: Past, Present and Future, Edward Elgar Publishing.
Item record	http://hdl.handle.net/10379/2185

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THE RIGHT TO A SOCIAL AND INTERNATIONAL ORDER
FOR THE REALISATION OF HUMAN RIGHTS:
ARTICLE 28 OF THE UNIVERSAL DECLARATION
AND INTERNATIONAL COOPERATION

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forthcoming in David Keane and Yvonne McDermott (eds.), The Challenge of Human Rights: Past, Present and Future, Edward Elgar Publishing, 2012.

Introduction

The United Nations declared in the 1948 Universal Declaration of Human Rights that ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised’. It is an intriguing provision, in that Article 28 seems to straddle the line between the substantive rights of the Declaration and the last few articles which do not speak of rights themselves, but rather of duties and limitations. It was important that this foundational document recognised the entitlement of every individual to a social and international order in which the rights and freedoms of the Declaration could be fully realised, for it shows an understanding of how context, both nationally and internationally, impacts on the enjoyment of human rights. The emerging globalisation of the post-war world is now a fully-fledged reality, and it is clear that the realisation of human rights is challenged not just by national set-ups but also by developments at the regional or global level, notably regarding trade, investment and finance, not to mention environmental changes attributable to climate change.

Since the adoption of the Universal Declaration of 1948, we have seen the construction of significant human rights machinery at the international, regional and national levels. Colonialism, the great antithesis of human rights, has formally ended, by and large. But a reading of Article 28 of the Universal Declaration requires a consideration of whether the present social and international orders are adequately designed for the realisation of rights and freedoms. For example, does the current international order continue to prioritise states’ and even corporate rights, over their existing and potential duties, and thus over the rights and freedoms of individuals and peoples? In particular, has the obligation of international cooperation between states, which is fundamental to the universality of the Declaration and to the human rights system as a whole, been fully recognised, understood and implemented?

In exploring this theme, the essay begins by considering the intention of the drafters who included Article 28 in the Universal Declaration. The Declaration was of course not a legally binding treaty when it was adopted in 1948; its preamble describes it as ‘a common standard of achievement for all peoples and all nations’. However, its enormous significance as a human rights instrument is almost

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unrivalled. In light of its stature, the essay goes on to see if Article 28 has been utilised since 1948 as a means to challenge structural barriers preventing the fulfilment of human rights, or whether it remains a forgotten right, forgotten concept, a laudable but unrealised aim in an otherwise celebrated document. In the process, wider linkages between the aims of Article 28 and the requirements of other related expressions of international law, such as the Declaration on the Right to Development and Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, will be addressed. The central importance here of the concept of international cooperation becomes apparent. The last part of the essay will take a closer look at the meaning of this concept, both as an organisational principle of international law and as a crucial aspect of human rights law. The latter context requires greater specificity and definition of the legal content of this concept than currently exists. Such defined legal content should lead to concrete obligations for states (and possibly other bodies) that could lead to the implementation of the promise of Article 28.

1. The drafting history of Article 28

The Universal Declaration itself was seen as part of a larger human rights project at the United Nations. Eleanor Roosevelt, who had presided over the Commission on Human Rights, stated prior to the Declaration's adoption, that although it was a great step forward in the protection and promotion of human rights, it was "only the first step in the elaboration of the human rights programme of the Charter; it was essential that it should be followed by a covenant on human rights, drafted in the form of a treaty and containing provisions for implementation."¹ The Declaration itself was adopted by the General Assembly by 48 votes in favour and 8 abstentions; a voting statistic that was most closely followed by the previous vote on Article 28 itself (then Article 29) during voting on the preamble and individual articles.²

With regard to the origins of Article 28, the distinguished Lebanese member of the Commission, Charles Malik, had proposed the provision in order to resolve the debate surrounding the so-called 'old rights' – the civil and political – and the 'new rights' – economic, social and cultural rights. Progress on the drafting of the Universal Declaration had been delayed for several days while these rights were discussed in debates described as being "amongst the most emotional in the Commission's history."³ According to Mary Ann Glendon, the debate was largely between the United States and the Soviet Union; and "[f]or the two superpowers it was a face-off between central planning and programs that left substantial room for the free operation of the market."⁴ Malik's proposal was seen as an attempt to

contextualize the relationship between the new rights and the old: a provision for the right to a social and political order in which all the Declaration's rights and freedoms could be realized. This proposal met with general approval and eventually became the Declaration's Article 28, but it did not resolve the impasse.⁵

The original proposal by Charles Malik had been for 'the right to a good social and international order'. This was disfavoured by several participants: Mr. Pavlov of the

¹ Yearbook of the United Nations, 1948-49, V. Social, Humanitarian and Cultural Questions, p. 527.

² *Ibid.*, pp. 534-535.

³ Mary Ann Glendon, *A World Made New; Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York: Random House, 2001, p. 116.

⁴ *Ibid.*

⁵ *Ibid.*

USSR felt that ‘a “good” social order could not be achieved except through a socialistic society in which there was real equality’.⁶ The proposal of substituting ‘such’ for ‘good’ was rejected when put to a vote,⁷ and the Article was adopted with the inclusion of the phrase ‘good social and international order’.⁸ ‘Good’ remained in Article 26 of the Draft International Declaration of the Commission of Human Rights of June 1948,⁹ but was dropped in the Third Committee’s draft.

The rationale for the inclusion of Article 28 seems to have been to emphasise that no particular existing national order could be favoured, and that the full realisation of rights and freedoms was also dependent on a certain international order. Malik himself later explained his understanding of the provision that ‘the Declaration should clearly set forth the right of mankind to have a United Nations a world organization, as well as a social order, in which the rights and freedoms could be realized’.¹⁰ The organisation was already in existence while the Declaration was being drafted, and perhaps the idea was that it would have a more prominent role in the protection of human rights. René Cassin, the French member of the Commission, had proposed a similar provision, but addressed specifically at socio-economic rights, the fulfilment of which ‘should be made possible by the State separately or by international collaboration’.¹¹ This became Article 22 of the Universal Declaration:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

This article illustrates the thinking that an effective international order must be based on international cooperation, and it complements Charles Malik’s more general article which was included as Article 28 of the Universal Declaration:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

It may be asked whether the language of Article 28 connotes a human right to a social and international order or an entitlement to such. During the drafting process, the original phrase used had been that ‘everyone has a right’, although this was replaced by ‘everyone is entitled’, upon the suggestion of Mr Chang of China. His view was that this was a necessary stylistic alteration because ‘the terminology of rights occurred twice in the article’.¹² There seems not to have been any opposition or indeed substance to this change. If understood as a right in and of itself, Article 28 prompts consideration as to where the corresponding duty may lie, bearing in mind the declaratory and aspirational nature of the Universal Declaration itself.

⁶ United Nations, Economic and Social Council, Commission on Human Rights, Third Session, Summary Record of the 78th Meeting, 24 June 1948, E/CN.4/SR.78, p. 9.

⁷ *Ibid.*, p. 10.

⁸ *Ibid.*, pp. 10-11.

⁹ United Nations, Economic and Social Council, Report of the Third Session of the Commission on Human Rights, 28 June 1948, E/800, p. 13.

¹⁰ United Nations, Economic and Social Council, Commission on Human Rights, Third Session, Summary Record of the 78th Meeting, 24 June 1948, E/CN.4/SR.78, p. 9.

¹¹ Mary Ann Glendon, *A World Made New*, p. 116.

¹² Johanes Morsink, *The Universal Declaration of Human Rights; Origins, Drafting and Intent*, University of Pennsylvania Press, 1999, p. 232.

2. Exploring Article 28

From the Universal Declaration's drafting history, the text of the instrument itself and subsequent references to Article 28 in other United Nations instruments, it is possible to develop an understanding of the content of the right to a social and international order for the realisation of human rights. 'Social order' is seen as referring to national regimes¹³ and Article 28 as a whole 'emphasises the political, legal and economic relations within ... and between states'.¹⁴ Both the social and international order should be founded on the rule of law, mention of which is made in the Universal Declaration's preamble. The preamble of the 1993 Vienna Declaration elaborated on the requirements of an international order, which it described as an aspiration of all peoples:

an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity.¹⁵

It can also be concluded that an order for the realisation of rights necessarily entails corresponding duties.¹⁶ Some of the general duties of states are clear under the present international order – refraining from the use of force or intervening in the domestic affairs of other states. Article 28 can be said to encapsulate these more general duties; it is seen as echoing 'the main Preamble's insistence on the rule of law and friendly relations among nations.'¹⁷ Notably, General Assembly Resolution 60/163 (2005) on the 'Promotion of peace as a vital requirement for the full enjoyment of human rights by all' specifically invokes Article 28:

Recalling that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized.

Specifically in the context of the realisation of human rights, the duties of states internationally, as opposed to within their own domestic spheres, are perhaps not as clearly enunciated. This is particularly so when one considers State action, either individually or collectively, which harms human rights extraterritorially. This essay accordingly focuses on the nature of the international order, as opposed to domestic orders, and its impact on the realisation of human rights. International cooperation with regard to human rights should clearly be embedded in such an international order.

A number of United Nations instruments have emphasised that it is not only states that have a role to play with regard to the fulfilment of Article 28, in keeping with the Universal Declaration's reference to 'every individual and organ of society'

¹³ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2008), p. 130.

¹⁴ Emily Logan, 'Article 28', in Donncha O'Connell (ed.), *60 Years, 30 Perspectives: Ireland and the Universal Declaration*, Amnesty International/New Island, 2009, 184.

¹⁵ World Conference on Human Rights, UN Doc. A/CONF.157/23, 12 July 1993.

¹⁶ Mary Ann Glendon, 'Propter Honoris Respectum: Knowing the Universal Declaration of Human Rights', 73 *Notre Dame Law Review* (1998) 1153, p. 1169: "Two features of the order are spelt out in Article 29 and 30 – duties and limitations".

¹⁷ Mary Ann Glendon, *A World Made New*, p. 190.

in its preamble. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms states that:

individuals, groups, institutions and non-governmental organizations also have an important role and responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.¹⁸

Interestingly, these instruments refer to everyone's right to a social and international order and also extend the scope of that right to other rights and freedoms beyond those set out in the Universal Declaration.¹⁹

A key aspect of the international order envisaged by Article 28, which Malik himself recognised, was the presence of supranational organisations that could exercise oversight of states in relation to human rights. There had been some debate during the drafting of the Universal Declaration on the question of international enforceability of the rights in the document, as well as the supremacy of an international body over the jurisdiction of individual nations.²⁰ Although issues of enforcement were put aside in the end, the delegates did generally agree that national authority is supreme and will remain so, yet it is to 'no longer be exclusive'.²¹ Since 1948, highly developed human rights machinery has been put in place at the international, regional and, depending on the individual State, the national level. Various bodies exercise oversight of a state's human rights record via state reporting, individual complaints, litigation and now Universal Periodic Reviews before the United Nations Human Rights Council. Accountability for the most serious human rights abuses, those designated as international crimes, has developed significantly in the past two decades, with a permanent International Criminal Court now in place and operational. It has been observed that these human rights treaties and monitoring systems have helped to shape the existing international order.²² It is argued that:

more has been achieved by the existence of international standards and monitoring mechanisms than could have been achieved by domestic pressure alone. International human rights standards provide objective benchmarks around which criticism of the state can be framed.²³

It must be conceded, however, that the human rights machinery currently in place is generally neither universal nor consistent. The numerous human rights courts and bodies having varying jurisdictions, limited by geographic reach and the types of rights they can adjudicate on, and differing enforcement powers. Asia, most notoriously, lacks a regional human rights mechanism, and the recent sub-regional

¹⁸ General Assembly Resolution 53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, 8 March 1999.

¹⁹ See also *Draft Declaration on Human Social Responsibilities* (2003), Article 11, Human rights and responsibilities, *Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission*, E/CN.4/2003/105, 17 March 2003, referring to the duty of individuals to contribute to the creation of an international and social order.

²⁰ Mary Ann Glendon, *A World Made New*, p. 95.

²¹ *Ibid*, p. 114.

²² Emily Logan, 'Article 28', p. 185.

²³ *Ibid*, p. 186.

body set up under ASEAN is considered to be weak and flawed from the outset.²⁴ Substantively, it is only in the past couple of years that an individual complaints mechanism has been put in place under the International Covenant on Economic, Social and Cultural Rights, and it was only in 2010 that the General Assembly explicitly acknowledged the right to water as a fundamental human right. In general, it can be stated that human rights bodies lack the effective enforcement of other international bodies, such as the World Trade Organization and the International Centre for the Settlement of Investment Disputes. Of particular note is that the human rights bodies almost exclusively focus on the conduct of states themselves, usually to the exclusion of other actors whose actions and policies impact on human rights, specifically multinational corporations and international financial and trade institutions. Such bodies play a significant role in the shaping of the present international order.

Discussions at the international level regarding business, trade and human rights have seen reference made to the need for an acceptable international order respectful of human rights. In his Report to the General Assembly in 2000 on 'Globalization and its impact on the full enjoyment of all human rights', the Secretary-General considered that 'an international and social order is one that promotes the inherent dignity of the human person, respects the right of people to self-determination and seeks social progress through participatory development and by promoting equality and non-discrimination in a peaceful, interdependent and accountable world'.²⁵ He specifically identified the Global Compact, the corporate social responsibility model put forward by the United Nations, as a way of bringing trade, business and human rights together to realise the promise of Article 28.²⁶ In response to this report, the High Commissioner for Human Rights commented that:

Achieving fair and equitable trade liberalization by adopting human rights approaches to WTO rules will be an important step in establishing a just international and social order and a failure to do so could perpetuate or even exacerbate existing inequalities.²⁷

The High Commissioner felt specifically that 'the reduction and eventual elimination of export subsidies will be an important step in achieving a just international and social order as envisaged under article 28 of the Universal Declaration.'²⁸

Business interests have underpinned the development of the international trade system, with transnational corporations and related bodies instrumental in determining the direction of developments. Moreover, it can be said that they have played a role in stifling more effective regulation of corporate activities affecting human rights. A UN Report from 1978 stated that:

The effective regulation of multinational corporations which could make them more acceptable instruments of international prosperity and cooperation has yet to be devised.²⁹

²⁴ See generally Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights*, Cambridge University Press, 2011.

²⁵ United Nations Secretary General Report to General Assembly, A/55/342, 'Preliminary Report', 2000, para. 7.

²⁶ *Ibid*, para. 8.

²⁷ Globalisation and its impact on the full enjoyment of human rights, *Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32*, E/CN.4/2002/54, 15 January 2002, para. 9.

²⁸ *Ibid*.

Little seems to have changed in the last 33 years. From the perspective of business and human rights, efforts aimed at holding corporate entities to account for human rights abuses have been piecemeal to date: some prosecutions of individual company officers (as happened after the Second World War), various civil claims against companies in national courts (such as under the Alien Torts Claims Statute in the United States), and occasional criticism by human rights bodies of states for failing to control corporate activities (for example, the African Commission on Human Rights in relation to Shell's operations in Nigeria). The United Nations has focused more on this issue in recent years and the Secretary General appointed a Special Representative, John Ruggie to examine the question of business and human rights. Ruggie left behind the broad brush approach of the 2003 *Draft Norms on the Responsibilities of Transnational Corporations & Other Business Entities with regard to Human Rights*, and prepared a framework which emphasises the State duty to protect human rights, the business obligation to respect human rights and the need for effective remedies.³⁰

In an address to the General Assembly, Ruggie stated that 'the era of declaratory [corporate social responsibility] is over'.³¹ Nevertheless, what remains lacking is a United Nations framework for business and human rights with a binding legal basis, clearly necessary for curbing corporate abuses. Recent economic turmoil seems to provide proof that the existing international and national orders have failed to place meaningful regulation on corporate actors. Such entities enjoy rights within national legal systems and under international law, but without sufficient responsibilities, and given the record of corporate complicity in human rights abuses, the international order as demanded by Article 28 is notably wanting in this respect.

Article 28 of the Universal Declaration has been described as an 'enabling' right, 'one that is necessary so that the other rights can be attained'.³² Richard Falk has commented on the 'normative promise' of the provision, which, in his view, embraces 'a commitment to establish a just world order premised on humane governance'.³³ Stephen Marks takes this even further, referring to the 'revolutionary proposition in Article 28, according to which everyone has a 'right' to a social and

²⁹ United Nations Committee for Development Planning, Official Records of the Economic and Social Council, 1978, Supplement No. 6, para. 27 cited in Report of the Secretary General, *The International Dimensions of the Right to Development as a Human Right in Relations with Other Human Rights based on International Co-operation, including the Right to Peace, taking into account the requirements of the New International Economic Order and the Fundamental Human Needs*, E/CN.4/1334, 2 January 1979, p. 145.

³⁰ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 21 March 2011.

³¹ Statement by Professor John Ruggie, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities, 65th Session of the United Nations General Assembly, 26 October 2010, p. 3, available at: <http://www.business-humanrights.org/media/documents/ruggie-statement-to-un-gen-assembly-26-oct-2010.pdf>

³² Victor W. Sidel. 'The Right to a Just and Peaceful Social and International Order', 3 *Health and Human Rights* 2 (1998) 110, p. 111.

³³ Richard Falk, *On Humane Governance: Toward a New Global Politics* (Pennsylvania University Press, 1995), cited in Sidel, 'The Right to a Just and Peaceful Social and International Order', p. 111.

international order in which all human rights can be assured'.³⁴ If this is taken seriously he writes,

then everyone has a right to a *radical change in power relations both domestically and internationally*, for no political economy or legal system on earth today adequately ensures all human rights for everyone, and the structures of international relations often inhibit their full enjoyment. After the great ideological battles of the twentieth century, we are confronted in this century with the same unjust structures that contribute to world poverty, exacerbated by the negative impacts of globalization.³⁵

In describing this right as one which requires certain changes for the realisation of all rights, the echoes with the right to development are striking and it is in relation to this right that Article 28 has provided noticeable traction. Asbjørn Eide described Article 28 as the embryo for the 1986 Declaration on the Right to Development.³⁶ Indeed in 1979, this provision was referred to in a Report of the Secretary General on the Right to Development as one of the legal norms relevant to this right, specifically in connection with the issue of international cooperation.³⁷ The preamble of the Declaration on the Right to Development states:

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized.³⁸

Margot Salomon notes that an earlier draft and the work of the drafting committee reveal that 'the right to development is *'based upon Article 28 of the Universal Declaration of Human Rights.'*'³⁹ Alongside Articles 55 and 56 of the UN Charter, Article 28 is seen as providing 'the intellectual origins and legal claims' of the Declaration on the Right to Development.⁴⁰ The right to development itself can be viewed as 'a commitment to Article 28'.⁴¹

The Declaration on the Right to Development lays the primary responsibility upon states for the creation of national and international conditions favourable to the realization of the right to development. Moreover, it recognises that the realisation of this right requires changes to the existing international order. In particular, Article 3, paragraph 3 of the Declaration sets out the importance of international cooperation:

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

³⁴ Stephen Marks, *Foreword*, in Margot E. Salomon, *Global Responsibility for Human Rights- World Poverty and the Development of International Law*, Oxford University Press, 2007, p. x.

³⁵ *Ibid.*, [emphasis added].

³⁶ Asbjørn Eide, 'Human Rights requirements to social and economic development' 21 *Food Policy* 1 (1996) 23, p. 25.

³⁷ Report of the Secretary General, *The International Dimensions of the Right to Development as a Human Right in Relations with Other Human Rights based on International Co-operation, including the Right to Peace, taking into account the requirements of the New International Economic Order and the Fundamental Human Needs*, E/CN.4/1334, 2 January 1979, p. 145.

³⁸ General Assembly Resolution 41/128, Declaration on the Right to Development, 4 December 1986.

³⁹ Margot E. Salomon, *Global Responsibility for Human Rights*, p. 50, footnote 215.

⁴⁰ *Ibid.*, p. 4.

⁴¹ Daniel Aguirre, *The Human Right to Development in a Globalized World*, Ashgate, 2008, p. 68.

The United Nations Special Rapporteur on Human Rights and Responsibilities, Miguel Alfonso Martínez has stated that:

Directly linked with the achievement of that more just and humane international and social order to which the world aspires, the Declaration on the Right to Development proclaims, in so many words, the duty of States to cooperate among themselves so as to realize this extremely important and inalienable human right, which is both individual and collective in essence.⁴²

The idea that the realisation of human rights is not solely within developing States' own control was also recognised by the Committee on Economic, Social and Cultural Rights in the context of poverty reduction. The Committee has stated that it is 'deeply aware' of the 'structural obstacles to the eradication of poverty in developing countries', some of which 'lie beyond their control in the contemporary international order'.⁴³ In its view:

...it is imperative that measures be urgently taken to remove these global structural obstacles, such as unsustainable foreign debt, the widening gap between rich and poor, and the absence of an equitable multilateral trade, investment and financial system, otherwise the national anti-poverty strategies of some States have limited chance of sustainable success. In this regard, the Committee notes article 28 of the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, in particular article 3.3.⁴⁴

Exploration of the right set down in Article 28 of the Universal Declaration and its application by various United Nations bodies and scholars very quickly demonstrates the significant structural barriers within the present international order that hinder the realisation of human rights globally. The next section tentatively examines means for the possible realisation of this article.

3. Realising Article 28

To realise the right set out in Article 28 of the Universal Declaration, two key approaches have been identified: improving international cooperation amongst states for the realisation of human rights and reforming the existing international order itself, particularly those institutions and laws regarding trade and finance. Both of these are complementary and, as will be shown, if international cooperation is to be taken seriously to the extent of affecting power relations, then reform of the existing order clearly becomes imperative.

⁴² Human rights and responsibilities, *Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission*, E/CN.4/2003/105, 17 March 2003, para. 57.

⁴³ Statement adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001, *Poverty and the International Covenant on Economic, Social and Cultural Rights*: 10/05/2001/10, E/C.12/2001/10, para. 21.

⁴⁴ *Ibid.* See also *Millennium Development Goals*, 'Goal 8 – Develop a Global Partnership for Development': Target 8.A: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system; Target 8.D: Deal comprehensively with the debt problems of developing countries; Target 8.E: In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries.' On the relationship between the MDGs and human rights see Philip Alston, 'Ships Passing in the Night: The Current State of Human Rights and Development as Seen Through the Lens of the Millennium Development Goals', 27 *Human Rights Quarterly* 3 (2005).

3.1 International Cooperation in Human Rights Law

International cooperation has of course been seen as an essential element of the international human rights system since its inception. However, the concept already had a pedigree in public international law, with a general shift having taken place from an international politico-legal system founded on the principles of states' independence and coexistence, to one currently based on the principles of interdependence and cooperation.⁴⁵ Edward McWhinney traces the origins of what was termed the 'new International Law of Cooperation' to the end of the 19th and beginning of the 20th centuries.⁴⁶ The effects of the industrial revolution, colonialism, an international division of labor, increasing complexity and sophistication of technology, and the resultant standards of living, have all meant that the well-being and security of one State is increasingly dependent and reliant on the actions of other states, individually and collectively.⁴⁷ The fundamental purpose of the League of Nations was 'to promote international cooperation and to achieve international peace and security.'⁴⁸ A commentator at the time wrote that 'a shifting of emphasis from rights of States to responsibilities of States is the fundamental change which the Covenant will make in international law.'⁴⁹ The new assumption underlying international law and motivating the move towards responsibilities can be seen in the principle of international cooperation.

The Charter of the United Nations similarly sets this principle at the heart of the organisation, which has the stated purpose of seeking:

to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.⁵⁰

Chapter IX of the Charter obliges states to take 'joint and separate action in co-operation with the Organization for the achievement of ... universal respect for, and observance of, human rights and fundamental freedoms for all'.⁵¹ The constitutional document of the organisation recognises that international cooperation is essential to address human rights, amongst the other goals of the United Nations.

International human rights law also gives detailed legal expression to the requirement of international cooperation. Article 28 of the Universal Declaration preceded a number of human rights treaties which expressly include international cooperation as a necessary component. Margot Salomon has observed that:

The steadily-emerging international law of cooperation is rooted in Article 28—an early formal expression by the international community that human rights involve

⁴⁵ See Wolfgang Friedmann, *The Changing Structure of International Law*, Columbia University Press, 1964.

⁴⁶ Edward McWhinney, 'The Concept of Cooperation', in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers, 1991, pp. 425-436.

⁴⁷ See David Held and Anthony McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, Polity Press, 2003.

⁴⁸ League of Nations, *Covenant of the League of Nations*, 28 April 1919, Preamble.

⁴⁹ Quincy Wright, 'Effects of the League of Nations Covenant', 13 *American Political Science Review* 4 (1919) 556, pp. 556-558.

⁵⁰ United Nations Charter, Art 1(3).

⁵¹ United Nations Charter, Arts 55 and 56.

claims on our global order; that our global order is to be assessed, developed and reformed principally by reference to its relative impact on human rights fulfilment.⁵²

The concept of international cooperation was elaborated upon in documents such as the 1968 Tehran Declaration⁵³ and the 1993 Vienna Declaration and Programme of Action,⁵⁴ and has also been included in binding treaties,⁵⁵ particularly in relation to economic, social and cultural rights. That said, the concept of cooperation as a legal requirement under international law, as opposed to a political aspiration, remains relatively novel and not well understood or implemented in practice. While its place in politics is well established, its place in international law has remained embryonic.⁵⁶

It is instructive to consider Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the general implementation article applying to all the Covenant rights which obliges:

Each State Party to the present Covenant, to take steps, individually and *through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁵⁷

The incorporation of international cooperation into Article 2(1) could be said to give expression in treaty law to Article 28's vision of a collaborative international order for the realisation of human rights, albeit limited to economic, social and cultural rights. The inclusion of the phrase 'and through international assistance and cooperation' in the Covenant was a recognition that developing countries would be unable to fulfil their primary obligations on their own. During the drafting of the Covenant the representatives from Egypt and India stated respectively, that 'the available resources of the smallest countries, even if utilised to the maximum, would be insufficient, [and] as a result, those countries would have to fall back on international cooperation', and that 'international cooperation [was] a point which

⁵² Margot E. Salomon, *Global Responsibility for Human Rights*, p. 75.

⁵³ Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).

⁵⁴ Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

⁵⁵ See for example International Covenant on Economic, Social and Cultural Rights; Declaration on the Right to Development; Convention on the Rights of the Child; Convention on the Elimination of Discrimination Against Women; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador".

⁵⁶ Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Intersentia, 2006, pp. 4 and 13. Though the legal content of international cooperation has long been overlooked in this context it is now receiving far more attention. See for example; Fons Coomans and Menno Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004); Wouter Vandenhoe, "Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy", *Nordic Journal of International Law* 76 (2007); International Council on Human Rights Policy, *Duties sans Frontières: Human Rights and Global Social Justice* (ICHRP, Geneva, 2003); Mark Gibney et al, "Transnational State Responsibility for Violations of Human Rights", *Harvard Human Rights Journal* 12 (1999); Sigrun Skogly and Mark Gibney, "Transnational Human Rights Obligations", *Human Rights Quarterly* 24 (2002); Smita Narula, "The Right to Food: Holding Global Actors Accountable Under International Law", *Columbia Journal of Transnational Law* 44 (2005-2006).

⁵⁷ General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [emphasis added].

was of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights'.⁵⁸

On the basis of their analysis of the drafting history of Article 2(1), Philip Alston and Gerard Quinn suggest an understanding of the meaning of international cooperation based on a requirement that wealthy states should:

... conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation; in the legitimate exercise of their economic sovereignty, they should seek to avoid any measure which causes substantial injury to other States, in particular to those interests of developing States and their peoples.⁵⁹

An acceptable legal understanding of the requirement of Article 2(1) cannot be limited to simply providing assistance to poorer countries to offset the negative effects of an unjust international order. It is necessary to address the nature of the order itself, and the concept of international cooperation is fundamental to this deeper analysis. In this respect, it mandates an analysis of the power disequilibrium existing at the level of state interaction in the formulation of the international order. As was stated on several occasions in the drafting process,⁶⁰ the policies and actions of the wealthy developed states have a substantial impact on the economic and financial wellbeing of developing states, and thus on their ability to realise the socio-economic rights of their people. As such, international cooperation can be characterised as a means of addressing the power differential between wealthy influential states and those states unable to realise the rights of their people. The concept of cooperation would then be fundamentally linked to this power differential, and obligations to cooperate would be based on any given State's relative power to effect the realisation of rights in any other given State. This necessitates the removal of structural obstacles to the realisation of rights that are themselves a manifestation of the existing power imbalance.

The Committee on Economic, Social and Cultural Rights has made some attempt in its work to address the phrase 'international assistance and cooperation'. In General Comment 3, the Committee confirmed that available resources 'refer to both the resources existing within a State and those available from the international community'.⁶¹ It emphasised the 'essential role of such cooperation in facilitating the full realization of the relevant rights'⁶² and went further to state that international cooperation 'is an obligation of all States' grounded in the United Nations Charter and 'well-established principles of international law'.⁶³ The Committee's General Comment 12 contains a section on international obligations, addressed at states

⁵⁸ Sigrun Skogly, *Beyond National Borders*, p. 85.

⁵⁹ Philip Alston and Gerard Quinn, "The Nature of States' Parties Obligations Under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, 9 (1987), pp. 191-192, quoting from the "Draft declaration on the progressive development of principles of public international law relating to a new international economic order," submitted by the Committee on the Legal Aspects of the New International Order to the 62nd Conference of the International Law Association, Seoul, August 1986.

⁶⁰ For example, the Chilean representative argued that, "the economic development of the less developed countries was bound up with the factors over which the highly industrialised countries had more control than the developing countries themselves." UN Doc. A/C.3/SR.1203, para 12, as quoted in Philip Alston and Gerard Quinn, "The Nature of States' Parties Obligations", p. 189.

⁶¹ General Comment 3, para. 13.

⁶² *Ibid.*

⁶³ *Ibid.*, para. 14.

parties acting individually and through international organisations, such as the United Nations and associated institutions. In General Comment 15 on the right to water, the Committee states:

To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.⁶⁴

Due diligence is urged in the negotiation and structuring of international agreements:

With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.⁶⁵

The same can be seen to apply to the operations of those organisations formulating the structure of the international economic order:

States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.⁶⁶

Taking into account the drafting history of the International Covenant on Economic, Social and Cultural Rights and the deliberations of the Committee, it is possible to set out the legal parameters of international cooperation. It is based on the need for addressing the global power and resources imbalance amongst states, which is fundamental for the universal realisation of socio-economic rights, as is the removal of structural obstacles within the international order hindering such realisation. Most significantly, and controversially, the resources of wealthy developed countries must be considered as part of those which should be available for the realisation of socio-economic rights in developing countries. As a minimum, states must respect the human rights of persons in other countries, while also seeking to protect their violation from third parties.⁶⁷ Furthermore, socio-economic rights should be respected and protected in the formulation of international agreements and in the operations of international financial and economic institutions of which states are members, both in their individual actions as well as in the policies and activities of the given institution as a whole. The provision of humanitarian assistance and development aid is also incumbent on those states with the resources to do so.

3.2 Further Theoretical Development and Practical Application

⁶⁴ General Comment 15, para. 31.

⁶⁵ *Ibid*, para. 35.

⁶⁶ *Ibid*, para. 36.

⁶⁷ This can be distinguished from situations where States exercise effective control over individuals or the territory of another State and can thus directly violate human rights, triggering their international human rights obligations. See generally Fons Coomans and Menno Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004).

The emerging legal definition of international cooperation is somewhat short on clearly binding obligations, although certain requirements have been enunciated, albeit in the language of best practice. These would include the requirement that States *should take steps* to ensure that international agreements do not cause rights violations.⁶⁸ It seems clear that the way forward is to at least strengthen those already outlined requirements into binding obligations. For example, if it were a binding obligation that states *must ensure* that socio-economic rights are not violated by the negotiation, creation and implementation of agreements forming the structure of the international economic order, then a number of procedural mechanisms would have to be put in place to ensure compliance. Possible mechanisms could assess particular negotiating positions and the proposed agreements as a whole for possible negative effects on human rights. Equally important would be procedures to create and disseminate information, increase transparency and facilitate genuine consultation and participation. The fundamental process of negotiating and creating the structure of the international order would have to be changed dramatically. These procedural mechanisms would inevitably coalesce to act as checks and balances, ensuring that the exercise of power in the formulation of the international economic order, at the least, does not inhibit another State's capacity to realise the Covenant rights of its people.

If international cooperation necessarily involves an analysis of power relations and their impact on human rights, then reform of the international order will clearly become imperative. Given the ever increasing weight of evidence that structural obstacles are the root cause of the failure of 60 years of 'development', and given the clear fact that the wealthy states have far greater influence over this structure, the increasing differential in the wealth and power of the world's nations is hard to justify. The disparity is remarkably clear in a simple balance-sheet comparison of financial flows between developed and developing countries. For example, in 2008 total Official Development Assistance amounted to US\$100 billion,⁶⁹ yet overall there was a net financial transfer of US\$900 billion from developing to developed countries.⁷⁰ The current regime of international trade, finance and investment arrangements in effect moulds a reality where 44% of the world's population, living on less than US\$2 a day, benefit from only 1.3% of the global product; while those living in high income countries have an 81% share of that product.⁷¹ The former 2,735 million people would need an increase of only 1% share to lift them over this poverty threshold as defined by the World Bank.⁷² As Thomas Pogge notes, some have attempted to justify this differential by allusion to 'explanatory nationalism.'⁷³ This argument attempts to locate the differing levels and rates of development of the

⁶⁸ See footnote 65, and accompanying text.

⁶⁹ See Eckhard Deutscher, *Development Co-operation Report 2010*, OECD, 2010, Figure 8.2, p. 98. On the practice and effectiveness of aid, see Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Relations – The Lessons of Cancun*, Zed Books, 2004, P. 149; UNDP, *Human Development Report 2005: International Cooperation at a Crossroads – Aid, Trade, and Security in an Unequal World*, UNDP-New York, 2005, pp. 73-110; Gilles Carbonnier, "Official Development Assistance Once More Under Fire From Critics", *International Development Policy Series*, 1 (2010); Dambisa Moyo, *Dead Aid: Why Aid is not Working and How there is a Better Way for Africa*, Penguin, 2009.

⁷⁰ See United Nations, *World Economic Situation and Prospects: 2010*, UN-New York, 2010, p. ix.

⁷¹ Thomas Pogge, "World Poverty and Human Rights", *Ethics and International Affairs*, 19, No. 1 (2005), p. 1.

⁷² *Ibid.*

⁷³ *Ibid.*, p 6.

world's nations in factors internal to those nations. In this way it explains the underdevelopment of poor nations by reference primarily to domestic corruption, governmental incompetence and the oppression of ruling elites. Yet once it is recognised that these factors certainly play a part it also becomes obvious that they do not tell the whole story. To complete the story, Pogge points back to this growing weight of evidence regarding structural obstacles. For example:

In the WTO negotiations, the affluent countries insisted on continued and asymmetrical protections of their markets through tariffs, quotas, anti-dumping duties, export credits, and huge subsidies to domestic producers. Such protectionism provides a compelling illustration of the hypocrisy of the rich states that insist and command that their own exports be received with open markets. And it greatly impairs export opportunities for the very poorest countries and regions. If the rich countries scrapped their protectionist barriers against imports from poor countries, the populations of the latter would benefit greatly: hundreds of millions would escape unemployment, wage levels would rise substantially, and incoming export revenues would be higher by hundreds of billions of dollars each year.⁷⁴

The unbalanced outcome of these negotiations reflects the imbalance in power between the negotiating states and the bias in decision-making procedures. The United Nations Development Programme has stated that the WTO system perpetuates mass poverty and deepening inequality and concluded that its rules are based on a foundation of hypocrisy and double standards between wealthy and poor nations.⁷⁵ The WTO is said to operate by consensus, however the process by which this 'consensus' is reached is one of exclusion, arm-twisting and side-line bilateral deals aimed at destroying the coherence of developing country interests and preventing them from acting as a bloc.⁷⁶ Collectively, 'the Quad' (US, EU, Canada and Japan) determine the agenda for negotiations and draft the texts of future WTO Declarations behind closed doors at interim meetings with a small number of other countries present by invitation only. Known as 'mini-Ministerials',⁷⁷ these meetings are not a part of the *modus operandi* set out in the original constitutional document of the organisation.⁷⁸ The imbalance is also crucially reflected in the number of staff making up each country's permanent trade mission in Geneva; the US has 14 staff devoted solely to WTO meetings (around 1,000 per year, many held in parallel), most developing countries have between 2 and 5 staff which must cover the WTO and the activities of twenty other international agencies based in Geneva, and 20 of the

⁷⁴ *Ibid.*

⁷⁵ UNDP, *Human Development Report 2005: International Cooperation at a Crossroads – Aid, Trade, and Security in an Unequal World*, UNDP-New York, 2005, pp. 9-11.

⁷⁶ See Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Relations – The Lessons of Cancun*, Zed Books, 2004; Aileen Kwa, *Rethinking the Trading System*, Dialogue on Globalisation – Occasional Papers, No. 32, Friedrich-Ebert-Stiftung, Geneva, 2007; Eric Burt, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organisation", *American University Journal of International Law and Policy*, 12 (1997); Ernst-Ulrich Petersman (ed), *Developing Countries in the Doha Round: WTO Decision-making Procedures and Negotiations on Trade in Agriculture and Services*, Robert Schuman Centre for Advanced Studies - European University Institute, 2005.

⁷⁷ Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO*, pp. 50-79. On the substantive as well as the procedural aspects of imbalance see Bernard Hoekman, "Operationalising the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", in Ernst-Ulrich Petersman (ed), *Developing Countries in the Doha Round*.

⁷⁸ Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol), Concluded at Marrakesh on 15 April 1994, UNTS Vol. 1867, No. 31874.

poorest nations have no permanent mission at all.⁷⁹ The imbalance of power becomes even more acute when regional trade negotiations are considered, as is the case in past efforts to establish a Free Trade Area of the Americas⁸⁰ and current negotiations on a Trans Pacific Partnership, both involving the US and a group of other, by far economically weaker nations. In the latter case the Special Rapporteur on the right to health has been asked to intervene in the negotiations by a group of civil society organisations and individuals, stressing a lack of transparency and the exploitation of uneven bargaining power.⁸¹

Completing what are sometimes referred to as the three pillars of the international economic order, the IMF and the World Bank are in many ways far more obviously biased in favour of the wealthy nations of the North. Within these institutions there is not even a pretence of egalitarianism in the process of decision-making, as is at least partially defended by the formal notion of consensus in the WTO. As constitutionally determined, the decision-making power of states in both these institutions is based on their relative wealth. Voting power is effectively assigned according to the size of the state's share in the global economy, which is related directly to its wealth. Within the World Bank, for instance, the US holds the greatest share of the vote, at 17%, followed by Japan, Germany, the United Kingdom and France. Together these five members control 40% of the vote. At the other end the poorest 48 African countries control 5.5%.⁸² Such disparities are exacerbated by disconnection and unaccountability, as the wealthiest nations are not dependent on these institutions and so the policies and conditions which they set do not apply to them. This demonstrates clearly that any legal theory of international obligations towards the realisation of human rights must focus on inter-State power relations and the structural obstacles to eliminating poverty and guaranteeing human rights.

Margot Salomon has developed such a theory on the legal content of international cooperation in light of economic global governance and the power and influence which wealthy states exercise. She echoes Pogge in stating that 'it is also the very *design* of the economic order, which contributes to the perpetuation of world poverty',⁸³ and that poverty is 'a product of a system that repeated findings demonstrate benefits some by virtue of its *structure* while disadvantaging others.'⁸⁴ For Salomon the process of developing the legal content of international cooperation must be pursued by

⁷⁹ Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO*, pp. 20-21.

⁸⁰ Maude Barlow, *The Free Trade Area of the Americas and the Threat to Social Programs, Environmental Sustainability and Social Justice in Canada and the Americas*, The Council of Canadians, 2001.

⁸¹ International Centre for Trade and Sustainable Development, "IP Provisions in Trans-Pacific Partnership Negotiations Raise Public Health Concerns", *Bridges Weekly Trade News Digest*, 15(10) (23 March 2011). See also Knowledge Ecology International, Letter to Anand Grover and Basis for Request that the Special Rapporteur for the United Nations on the right of everyone to the enjoyment of the highest attainable standard of health Issue an Urgent Appeal with Regard to the Trans-Pacific Partnership Agreement Negotiation, 22 March 2011, available at <http://haieurope.org/wp-content/uploads/2011/03/22-Mar-2011-KEI-Complaint-to-UN-Rapporteur-Trans-Pacific-Partnership-Agreement-HAI-Endorsed.pdf>, accessed 17 August 2011.

⁸² See Margot Salomon, *International Economic Governance and Human Rights Accountability*, London School of Economics, Law, Society and Economy Working Papers – 9/2007, p. 20.

⁸³ Resulting in the death of around 18 million people worldwide every year (Thomas Pogge, 'World Poverty and Human Rights', p. 1).

⁸⁴ Margot E. Salomon, *Global Responsibility for Human Rights*, p. 9 [original emphasis].

facilitating methods of determining state responsibility for global structural impediments to the exercise of basic socio-economic rights of people in far off places ... since this is essential to establishing a process of remedying existing violations manifested in world poverty, and preventing further ones.⁸⁵

Salomon notes in particular the ‘concentration of power among certain states that design, and give effect to, this economic system.’⁸⁶ She seeks to address this power differential within her theory of how responsibility should be assigned to individual state actors under an obligation to cooperate internationally, and proposes an allocation based on

the state's weight and capacity in the world economy; its relative power and influence over the direction of finance, trade, and development; and the degree to which it benefits from the existing distribution of global wealth and resources.⁸⁷

Applying this theory in practice would obviously need to overcome the hostility of those wealthy states who would seek to protect their self-interest.

This problem is substantial as there are a wide variety of circumstances in which the legal requirements of international cooperation could be practically applied, meaning that a broad spectrum of state's actions could be affected. Sigrun Skogly identifies at least four main areas of states' foreign policy in which the legal obligation to cooperate could apply: trade, development cooperation, participation in intergovernmental institutions, and security cooperation.⁸⁸ Specific circumstances where the distinct aspects of an obligation to cooperate would create legal requirements on states are many, and only a few can be mentioned here. Reform of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights may be mandated given the problem of HIV anti-retroviral drugs in sub-Saharan Africa.⁸⁹ Disproportionate agricultural subsidies in the EU and the US may not be legally sustainable given their effects on the living standards of small-scale producers in the South.⁹⁰ Loans for development projects via state banks or the World Bank itself may be restricted given the proven detrimental effects of certain projects on human rights, notably those of indigenous peoples.⁹¹ International investment law may need to be redesigned given its clear prioritisation of the property rights of foreign companies over the socio-economic rights of local communities and individuals.⁹²

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, p. 45.

⁸⁷ *Ibid.*, p. 200. Elsewhere Salomon has noted that “the independence and autonomy formally afforded states as sovereign equals under international law does not endow them with functional equality in the shaping or enforcement of the rules of the game. Disparities in size, population, and particularly, wealth create power differentials between and among states that mock notions of substantive sovereign equality.” Margot Salomon, ‘Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism’, 51 *German Yearbook of International Law* (2008) 39, p. 41.

⁸⁸ Sigrun Skogly, *Beyond National Borders*, pp. 189-201.

⁸⁹ Emily Mok, ‘International Assistance and Cooperation for Access to Essential Medicines’, 12 *Health and Human Rights* 1 (2010).

⁹⁰ Wouter Vandenhoe, ‘Third State Obligations Under the ICESCR’, 73-100.

⁹¹ FIAN, *Globalising Economic and Social Human Rights by Strengthening Extraterritorial State Obligations: Seven Case Studies on the Effects of German Policies on Human Rights in the South*, March 2005.

⁹² Luke Peterson, *Human Rights And Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration*, Rights and Democracy, 2009.

As alluded to above, one potentially far reaching application that is worth mentioning in particular could be the development of a set of guidelines based on the legal parameters of international cooperation that would frame and legitimise the process of negotiations on international economic agreements. The current international economic order is the result of power dominance. A set of guidelines informed by a concept of cooperation based on an accurate assessment of the power disequilibrium at the level of the international order, and aimed at creating a balance through certain procedures, could ground the negotiations and the agreements in human rights concerns. General principles of transparency, equality of arms and participation could be applied, and negotiating positions could be assessed by a prior human rights impact analysis. The guidelines could operate through mandatory procedural mechanisms and deliberative feedback. Certain positions that could foreseeably result in rights violations would be deemed illegitimate and discarded, and only an agreement that was a product of a negotiating process that adhered to the guidelines and the procedures would be taken as legitimate and legally enforceable under international law. Though this would not immediately change the current order, it would ensure that at least that order would degenerate no further from a human rights standpoint.

3.3 Concrete Obligations to Cooperate as Implementation of Article 28

In these and other ways, implementing concrete requirements for states that could be derived from the international obligation to cooperate in human rights law can be seen as a form of implementation of the entitlement of Article 28. That entitlement to a rights-enabling social and international order is worded simply and is vast in its scope. The work that has been and remains to be done on delineating the legal content of international cooperation, in a sense breaks down that entitlement into a number of more manageable requirements to be implemented, which, taken together, can be viewed as delivering on the promise of Article 28.

It is argued, by Thomas Pogge, in particular, that much could be achieved in terms of poverty reduction and development, if States simply corrected the existing inequalities in the international economic order. According to Pogge we are living in a world where

current global institutional arrangements as codified in international law constitute a collective human rights violation of enormous proportions to which most of the world's affluent are making uncompensated contributions.⁹³

He sees Article 28 as forming a 'moral plank' to underscore the need for change:

Article 28 should be read as holding that the moral quality, or justice, of any institutional order depends primarily on the extent to which it affords all its participants secure access to the objects of their human rights; any institutional order is to be assessed and reformed principally by reference to its relative impact on the realization of the human rights of those on whom it is imposed.⁹⁴

The author proposes various solutions, such as the elimination of affluent country protectionism (quotas, tariffs, subsidies, export credits etc.) and more symmetrical rules of free and open competition, as a means of correcting the inequalities in the

⁹³ Thomas Pogge, 'Recognized and Violated by International Law', p. 721.

⁹⁴ *Ibid*, (footnote omitted).

existing international order.⁹⁵ This would certainly go towards the implementation of Article 28.

While Article 28 may provide the moral plank, the obligation to cooperate internationally could provide the practical and legal planks. Pogge's analysis could be built upon to show how international institutions could be restricted or redirected such that they do not contribute to human rights violations, and then remain that way. Article 28 prompts many questions for which answers may not easily be gleaned. Even if we can identify now some aspects of the international order that should be changed, and we change them without a principled basis and a clear procedure for doing so, how do we ensure the same inequities are not reverted to again in the future? What would stop power dominance from reasserting itself? This is where it becomes obvious that it is not sufficient to simply change the law, we must also change the way the law is made. For this we need principled guidelines and a procedural mechanism for framing the legitimacy of negotiations. The concept of international cooperation, with the leverage of its position in positive law, can help to provide them.

Conclusion

Article 28 is not a forgotten right and its demand has been reiterated in other United Nations declarations and has provided an impetus for scholarly critique of the existing global order. That being said, it is important that its plain message is not forgotten, that everyone has a right to a social and international order in which their rights can be realised continues to be highlighted. Article 28 should act as a reminder to human rights advocates and scholars that the realisation of specific human rights requires consideration of the national and international contexts. As Margaret Salomon has observed, 'Article 28 reflects a view that is now widely endorsed—that methods for the meaningful protection and promotion of human rights cannot be disassociated from the wider global environment'.⁹⁶

There is no doubt that considerable advances have been made in the human rights machinery since 1948. But if we use Article 28 as a lens, we can see that considerable structural problems remain. Some of the current debate carries echoes of the proposed New International Economic Order of the 1970s, referred to in the Declaration on the Right to Development, given the continued problems for human rights associated with protectionist barriers, such as export credits, debt and structural adjustment policies.⁹⁷ The Secretary General of the UN acknowledged in 2000 that '[t]he challenge of article 28 of the Universal Declaration of Human Rights...remains'.⁹⁸ Article 28 has taken on a life outside of this document, which although aspirational in 1948, has become the authoritative statement of principles for human rights. The concept of an international and social order for the realisation of human rights is explicit in various other human rights documents and implicit throughout the system as a whole.

Any discussion involving Article 28 focuses much needed attention on the existing inequalities in the international order, where competition often seems the

⁹⁵ *Ibid.*, p. 725.

⁹⁶ Margot E. Salomon, *Global Responsibility for Human Rights*, p. 73.

⁹⁷ Victor W. Sidel. 'The Right to a Just and Peaceful Social and International Order', 3 *Health and Human Rights* 2 (1998) 110, p. 119.

⁹⁸ United Nations Secretary General Report to General Assembly, A/55/342, 'Preliminary Report', 2000, para. 48.

order of the day rather than cooperation. It prompts difficult questions of how to restructure or redirect international institutions such that they do not contribute to human rights violations, and how to assess the international order according to human rights norms. It is argued here that the concept of international cooperation and the further development of its legal content can provide some answers. It clarifies certain steps and delineates certain procedures that could help pave the way to the implementation of a just international order. International cooperation is an essential element for realising Article 28. It demands not only a change in existing international law that perpetuates inequality, but also in the process by which that law, and thus the international order itself, is created.