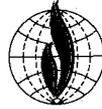


For the Rule of Law



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***Globalisation,
Human Rights and the Rule of Law***

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The Rule of Law in a Changing World

*Adama Dieng**

The ICJ has always worked towards the goal of integration, mutual understanding, and even a blending, of judicial conceptions, whatever the civilisations and philosophies from which they are derived. That is why, after the dissemination and discussion of the Bangalore Declaration and Plan of Action which has been underway since the last triennial conference¹, we thought it a natural progression to call upon jurists from each continent and urge them to discuss their ideas and experiences and to allow us to profit from their knowledge and interaction. This project started in earnest, and now has become a reality. However, such an ambitious undertaking as that of exploring the various issues around "Globalisation and the Rule of Law" would have remained but a dream, had the ICJ not received so much encouragement, assistance and support.²

In proposing the theme of "Globalisation and the Rule of Law" we knew that we would be leading into dangerous waters. Paraphrasing our former President, Judge Kéba Mbaye, it is up to jurists to consolidate and identify the issues so as to allow international and national legislators to build on them with confidence.

On the eve of the third millennium, there is both hope and doubt about the future of the human race. We have been witness to gross, massive and systematic violations of human rights, often finding ourselves in a position too powerless to do anything. Not one continent has been spared. If the eighteenth century was the century of enlightenment, then the twentieth century has, unfortunately, been the century of genocide. Despite the fact that there has been more

* Adama Dieng, Secretary-General of the International Commission of Jurists. This paper has been adapted from a speech he gave at the opening of the ICJ Cape Town Conference on « The Rule of Law in a Changing World », July 1998.

1 Held in Bangalore, India, in October 1995.

2 The ICJ Conference on « Globalisation and the Rule of Law » was organised in Cape Town, South Africa, from 20-22 July 1998. It preceded the ICJ Triennial Meeting which was held at the same venue. Mr. Dieng expressed his gratitude, in particular, to the organising committee of the Conference which was comprised of the South African bar associations, under the guidance of ICJ affiliate NADEL. He also thanked Judge Arthur Chaskalson, President of the Constitutional Court of the Republic of South Africa, who invested much of his time and energy to ensure the success of this meeting. He recalled the generous contribution of the Government of Sweden to the Conference, made through the Swedish International Development Agency. Mr. Dieng also thanked Barney Pitanya, President of the South African Commission for Human Rights, for the close relationship that he has established between the two organisations.

progress in science and technology than ever before, the cries of suffering of millions of men and women are never-ending and resonate louder and more desperately than ever. Extreme poverty and social and economic inequality bring us back to the grim reality which is far from the hopes and wishes for economic and social prosperity. The extreme misery of ordinary people and the barbarity of governments are more oppressive each day and our unbelieving eyes are continually confronted with such images.

The international community has become powerless and frozen in a position where it has sadly failed to stem the tide of human suffering that is gnawing at two thirds of the planet. If we want a world where human dignity is no longer ignored, it is important to implement Article 28 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 this Declaration can be fully realised.

Will this world order come with the 21st century, whose arrival is being welcomed in the name of globalisation? Nothing is more uncertain! Gérard Ramseyer, President of the State Council of the Republic and Canton of Geneva had good reason to note:

With the emergence of economic globalisation, we are gambling with the fate of humanity. If we are not careful, we will find

ourselves in a society that increasingly isolates the individual and promotes the growth of all kinds of fundamentalism as well as inequality.

In emphasising the progress that has been made towards a "humanisation" or an "individualisation" of international law, Alain Pellet³ recently claimed that we are also witnessing the "legalisation" of "humanity" or of the "international community of States, on the whole", in relying on the concept of the "common heritage of humanity" applied to the depths of the ocean, to space, to culture, to the environment or even to the human genome. He also referred to our reliance on the idea of "peremptory norms of general international law" defined as "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted" (Article 53 of the Vienna Convention, 1969) - the *jus cogens*. It seems clear that at the dawn of the 21st century we are witnessing, if not the "globalisation" of international law, at least its "destatalisation". Nevertheless, this eminent member of the international community of jurists is of the opinion that the question still remains as to what degree globalisation should be supported and encouraged.

A commonly held opinion is that globalisation is irreversible. Among other things, globalisation extends to finance, economics, culture, communication and production. In short, the tentacles of globalisation extend everywhere. Some even go so far as to say

3 French academic and jurist, Member of the UN International Law Commission.

that globalisation is the negation of all the principles and values to which Europe is committed. Even though the world defines itself as an organised holistic entity, the global market assumes the absence of organisation (at least theoretically) and functions in a kind of panic mode, particularly in terms of its financial situation. The development of financial markets and the power given to certain economic, monetary and financial organisations demonstrate the absence of democratic control that is implicit in market ideology. In the opinion of Bertrand Renouvain⁴, market ideology claims to provide global solutions, but these solutions ignore the historic, cultural and psychological elements which give global economic movement its distinctive local and national features. Moreover, employing purely financial logic can often result in the destruction of industries, agricultural production and commercial relationships. All one has to do is consider the menace that hangs over thousands of small scale cacao and coffee farmers in Côte d'Ivoire who risk being pushed out of the market due to agricultural liberalisation. At this very moment, as I am talking to you, unsold coffee and cacao beans are rotting in villages. These beans are unsold because the intermediaries and exporters (who themselves are in fierce competition) offer an unacceptably low price. This situation exists with equal anguish in many other countries.

Even the desire for personal security and well being, which would seem to justify economic and financial liberal-

ism, is no longer respected since the logic of the market results in unemployment, poverty and misery. When all is said and done, it is the ordinary human being who is denied her ideals, rights and dignity. A few years ago, I gave a conference in Sweden on the theme of "reinforcing the rule of law from a human rights perspective". I was taken aback when I heard a jurist claiming in a peremptory manner that that "the rule of law equals market ideology". Today, globalisation is regarded as a necessity and an irreversible reality. It is said that as jurists, we are being called upon by this new concept, (one could say phenomenon) that could threaten the respect for the rule of law.

If we truly want to make the 21st century the century of human dignity, we must redefine the terms of the deal. A few months ago, President Bill Clinton made a trip to Africa. At the time, he gave the impression of adopting a politics of varying geometry, it being about the demand for the respect of the principles of democracy. Increasingly, economics take precedence over the concern of respecting human rights. Powerful countries escape criticism. In all of this, the spectre of globalisation haunts the poor countries of the South. The anguish of one Senegalese man who confided in a journalist from *Libération* is, without a doubt, shared by all oppressed people on this Earth. This is what he said:

When the United States suggests reducing aid to Africa in exchange for the removal of

4 Member of the French *Conseil économique et social* (Economic and Social Council), best known for his work and report to the Council on cultural relations between France and central and eastern Europe.

trade barriers as a means of conducting business on an equal footing, it is a little like Carl Lewis suggesting that it would be possible to have a fair race between himself and a legless person.

Lets not forget that economic and social progress of a people is not possible

today without also the establishment of the rule of law and democratic values. A dangerous situation will arise if human beings are not placed back at the centre of the development process, not only in regard to the improvement of living conditions and economic concerns, but also in terms of the broader concepts of human dignity, justice and equity.

WIPO and the Rule of Law in a Changing World

*Kamil Idris**

WIPO is an international organisation based on law. We are keepers of the international agreements which regulate the operation of intellectual property, and we assist in developing good administrative practice, good legal practice, and, indeed, good legislation *per se*, in countries that request such assistance.

In the intellectual property field, as in others, the goal of ensuring that the rule of law is observed implies, in my view, two preconditions. The first is good law, and the second is strong and integrated enforcement mechanisms. I shall deal with each in turn.

Change

But first, let us examine the context in which the issue is put, that of the changing world. While the world has never been static, I must stress that what we are seeing in the intellectual property field presently is *unprecedented* change.

Globalisation, new digital technologies, the Internet and radical developments in biotechnology, are just a few of the revolutionary protagonists of late twentieth century change. The potential of all these developments to

contribute to economic, educational and cultural progress across the globe is vast, almost unimaginably so. Take the Internet for example: this innovation alone, the latest estimates suggest, may be generating as much as an annual 1,200 billion dollars worth of commerce by 2002. Its success has thrown up several new issues for the intellectual property community. For example, suddenly, the distribution of copyright materials such as software, music, books and images, has been revolutionised. How, then, to continue to protect copyright, but at the same time not strangle the phenomenal educational opportunities implicit in this medium? And moreover, how to do so when national borders have lost much of their relevance? What action to take, to lessen the increasing gap between rich and poor countries vis-à-vis the information revolution? Consider also the increased importance of the protectability of trademarks and domain names. How should these areas best be regulated, when a press of a button can send, perhaps innocently, a trademark to thousands of people in dozens of countries, some with protection, some not?

Similar conundrums apply to the equally new and challenging areas of biotechnology now emerging, including

* Dr. Kamil Idris, Director-General of the World Intellectual Property Organisation (WIPO). This paper is an adaptation of his statement to the ICJ Conference on "Globalisation and the Rule of Law", Cape Town, South Africa, 20-22 July 1998.

genetical engineering. The patenting of genes, for example, may encourage huge resources to be spent on research and development, and the outcome to be, for example, a revolutionary genetically modified crop. But the potential profits are also revolutionary, and what of the implications for those who cannot afford - or who are even not permitted - to license the new crop and who are driven out of business?

These issues, and many others, face us each morning, and they demand workable policies towards swift resolution. The potential of the current changes, as I said, is vast, but so consequently is the burden of responsibility to ensure, to the extent possible, that the international laws developed within the competence of WIPO are correspondingly comprehensive, enlightened and agreeable to all parties.

Law

The most important international treaties in the intellectual property field are the Conventions of Paris - in industrial property - and Berne - in copyright, which date back to 1883 and 1886, respectively. These two treaties remain, to this day, the foundation stones of international intellectual property law.

The longevity and continued pre-eminence of Paris and Berne might seem like a valid argument for not rushing to introduce new laws with every new innovation in technology, or twist in the social consciousness. But this argument would be invalid. Paris and Berne have both been periodically

updated to take into account new developments, with new elements being added to their existing strong structures.

In addition, many new conventions, which are complementary yet distinct, have been introduced in the years since. Some of the most specific include the Budapest treaty on deposit of micro-organisms of 1977, and the Washington Treaty on integrated circuits of 1989.

More recently still, in 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were concluded in Geneva. These add new strength to existing statutes, particularly taking into account gaps in existing coverage, with regard to the new information technologies I mentioned earlier.

Currently, a patent law treaty is in elaboration, and discussions have taken place on the question of a database treaty and an audio-visual protocol to the WIPO Performances and Phonograms Treaty.

Enforcement

But WIPO's work does not end with the introduction of a new text. Far from it. An increasingly important part of our work involves our cooperation for development sector, which provides, upon demand,

- input in the modernisation and computerisation of intellectual property administration;

- training of human resources - which includes lawyers and judges, as well as policy makers, administrators and customs officials; and
- assistance in the drafting of national legislation.

Resources for this sector were increased by 35 per cent in the current WIPO biennial program and budget, to a total of over 60 million Swiss francs out of a total budget of some 383 million.

In 1997, a total of 124 developing countries, two territories and 16 inter-governmental organisations benefited from WIPO's cooperation for development program. In that year, WIPO contributed to over 150 courses and seminars and provided study visits for 168 persons. In this way, we have made, and will continue to make, a real and significant contribution to global efforts to introduce the rule of law in the intellectual property domain.

The Rule of Law and the Current Situation

But for all that WIPO has produced what I believe are good laws, and that we have substantial resources devoted to training for enforcement, it would be ignoring the heart of the issue if I was to say that there was not still a long way to go.

Recent estimates released by the International Planning and Research Corporation indicate that 11.4 billion US dollars worth of software were not

earned in 1997, because of piracy. While there is no question that in most areas there has been a decline in piracy since 1994, complacency is certainly not an option. First, we must not forget that mediums such as the Internet promise to massively increase the quantity of international trade in copyright items, including software, recorded music, video and text. In 1997, Web-based sales were estimated to have been worth some 21.8 billion US dollars. As I said earlier, some predict Internet revenues exceeding 1, 200 billion by 2002. And second, we must bear in mind that the act of piracy has become as simple as pressing a few buttons. This shows the scale of the challenge.

Policies and Strategy

So what should WIPO do, in terms of helping to install the rule of law? My answer is, first, it must accept that, in the field of intellectual property at least, we have entered an era where change is so rapid, and so significant, that it has had thrust upon it a new importance and a new responsibility. The potential of the new developments is remarkable; but so, too, are the perils. Complacency is our worst enemy.

Second, it must strive to produce good and timely laws. Only good law will provide the necessary framework within which the amazing potential of the new technologies can be realised. I have already indicated my belief that laws must evolve to meet developments in this rapidly changing world, but we need, nonetheless, a foundation, a baseline on which to build such law.

In my view, the ideal foundation is the simple and elegant synthesis of Article 27 of the Universal Declaration of Human Rights, which states:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits.

and

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In short, *all* people, without exception, have the right to freely share in cultural life, and share in scientific advancement, as well as to enjoy appropriate reward for creation or invention. A balance must be struck, harmonising the potentially conflicting desires, of the creator to maximise his profit, and of the rest of the community to minimise its expenditure. It is essential that all parties benefit from the massive potential of the new technologies, and that the gap between rich and poor is not permitted to widen into an abyss, in the spirit of Article 27.

Third, WIPO can increase resources for cooperation for development, as indeed it regularly has done, with a view to developing effective and credible enforcement mechanisms and well-trained human resources. At the same time, it can, and I take this opportunity to state that as Director General of WIPO I do, reach out to

other organisations concerned with the monitoring and enforcement of the rule of law, key among which is the ICJ. We must forge closer bonds between us, which are not only mutually strengthening, but which should also lead to synergies in the common goal of realisation of rights, and enforcement of the rule of law.

And fourth, I would say that much depends on information dissemination. In short, we have to spread the good word of the importance of protection of intellectual property rights, and explain to ordinary people why the low-priced attractions of pirated goods are in the long term illusory. To achieve this, we must utilise the information technologies we are hoping to protect, and exploit them to the full.

This is a brief exposition of the essential situation of intellectual property *vis-à-vis* the rule of law, but I have, inevitably in view of limited time, omitted many areas which would undoubtedly be of interest. For example, in the interests of reaching out to all members of the international community, WIPO has initiated efforts to explore the needs, rights and expectations of groups which have had, hitherto, little or incomplete exposure to the intellectual property system. The initial focus is upon holders of indigenous and traditional knowledge and culture, including folklore. Fact-finding missions have commenced, and one possible outcome will be the exploration of whether a new treaty on expressions of folklore would be viable.

Whatever the outcome of this endeavour, I remain convinced of one

thing. This is, that in a world where change points more and more towards globalisation, international cooperation will become ever more important. On the one hand, this means more cooperation between countries to devise law

which is comprehensive, enlightened and agreeable to all parties; and on the other it means closer relations between international organisations with common interests, such as WIPO and the ICJ.

Globalisation and the Rule of Law

Andrew Clapham*

Introduction

The International Commission of Jurists (ICJ) has chosen to consider the issue of *globalisation* and its implications for the enjoyment of human rights. This paper is designed to stimulate discussion about what role the ICJ can play in this context, and how to use the strength of its Members, Sections and Affiliates to adapt to the new global dynamics at the local level. In addition to provoking discussion, the paper aims to outline choices that could be acted on, so that formal decisions might be adopted in Cape Town committing the ICJ to a number of concrete priorities for the coming years. We take our inspiration from the ICJ's work on the Rule of Law, and building on the 'Act of Athens', the 'Declaration of Delhi', the 'Law of Lagos' and the 'Resolution of Rio', intend to go 'Beyond Bangalore', and hope to provide some ideas for a 'Cape Town Commitment'.

The term 'globalisation' has become a buzzword to encapsulate some of our amazement and apprehension as we enter the next millennium. The fascination with the term seems to stem from the fact that it means all things to all people. For some it symbolises the increasing influence of global corpora-

tions, communications, and consumerism; all facilitated through increasing liberalisation of markets and regulations governing capital flows and overseas investment. For others it encapsulates the sense that decisions are no longer taken at the local or national level but in some supranational global gathering. But perhaps most importantly for the ICJ, it reminds us that citizens are forming new networks and that the human rights movement is now increasingly connected and capable of exerting global influence. But these three dimensions are not the end of the story. Our individual awareness of these changes is often vague but sometimes concrete. As Anthony Giddens points out:

Globalisation is not just an "out there" phenomena. It refers not only to the emergence of large-scale world systems, but to transformations in the very texture of everyday life. It is an "in here" phenomenon, affecting even intimacies of personal identity. To live in a world where the image of Nelson Mandela is more familiar than the face of one's next door neighbour is to move in quite different contexts of social action from those that prevailed previously.¹

* Dr. Andrew Clapham, Associate Professor of Public International Law, Graduate Institute of International Studies, Geneva, Switzerland.

1 Giddens, A. 'Affluence, poverty and the idea of a post scarcity society' in 27 *Development and Change*, April 1996, 365-378, quoted in Final Report prepared by Mr. José Bengoa E/CN.4/Sub. 2 /1997/9 at 13.

For our purposes we can concentrate on the fact this term reminds us that people are increasingly connected throughout the world; and that trade liberalisation, new technology, and localised activity aimed at global markets, all mean that the role of the state, and the fora where states 'do business', are changing. New actors such as global media corporations, regional organisations and non-governmental organisations are considered by some commentators to be the new global players². And the WTO, rather than the United Nations, is seen as the fulcrum of international interaction.³ Of course the shift by sociologists from looking at societies, or nation states, towards looking at connections across time and space does not necessarily imply a weakening of the nation state - merely a change in emphasis. Whether globalisation will lead to a demise of the nation state or an even stronger global polity based on international law are still open questions. But the technological and organisational changes in the non-governmental sector are indeed taking place, and many of these changes are taking place at a rate of change that has made it difficult for lawyers and legislators to keep up. For example: old norms about the free transnational flow of information and data have yet to be rethought in order to regulate access to pornography of child prostitution through the Internet. Wages and working conditions are increasingly determined by actors that are sometimes difficult to locate and hold accountable either at the national or the international level. A question we have to ask is: what steps are being

taken in the world of human rights and international law to hold some of these forces accountable to international standards, and to assist states to fulfil their international obligations to everyone in their jurisdictions? Although the concept of a multinational company operating transnationally is nothing new, the term globalisation helps to remind us that new communications technology means that companies really can have global reach and local operations without actually establishing themselves with regional or national headquarters. The fact that human rights groups cannot easily fix such non-state actors in a certain place has led us to believe that some of these global actors are everywhere and nowhere at the same time.

In addition to this increase in the reach of certain transnational powerful actors we are witnessing a redistribution of tasks by states at the international level. Some functions which used to be carried out through inter-state cooperation have been taken over by global/regional/privatised actors that are difficult to hold accountable under international procedures in general, and traditional human rights procedures in particular. For example: mercenaries and private armies have been employed by the governments of Sierra Leone and Papua New Guinea to keep the peace; asylum law is determined in closed meetings of the Ministers of the European Union, and private organisations can keep personal data on people in such a way that it may elude national or international legislation.

2 Ramonet, I. (1997) 'La mutation du monde' *Le Monde Diplomatique*, Oct. 1997.

3 *Ibid.*

The tendency to tender out functions that used to be carried out by actors with some international legitimacy and accountability is clearly demonstrated by the new models of peace-keeping and peace-enforcement. The United Nations now relies on interested parties to carry out tasks which used to be predicated on the imperative that the participants be disinterested and impartial in the execution of their mandate. Global actors such as the United States, Russia and France have been authorised to carry out lead operations in Somalia, Haiti, Georgia, and Rwanda. Regional forces have been encouraged and contracted to do peace-keeping in Liberia, Central African Republic, Sierra Leone, and Burundi. In his programme for reform, issued in 1997, Secretary-General Kofi Annan clearly states that the UN is surrendering any role it might have had in this area:

The United Nations does not have, at this point in its history, the institutional capacity to conduct military enforcement measures under Chapter VII. Under present conditions, ad hoc coalitions of willing Member States offer the most effective deterrent to aggression or to the escalation or spread of an ongoing conflict. As in the past, a mandate from the Security Council authorising such a course of action is essential if the enforcement operation is to have broad international support and legitimacy.⁴

We can see, therefore, that there remains some sense that respect for international legitimacy (the international rule of law) remains a goal - even if the main actors are now better described as global or regional rather than international. These introductory thoughts on some of the ways we think about globalisation are designed to set the scene for a more selective discussion of a number of topics. This paper remains focused and selective. It will tackle three topics:

- 1) Threats to universality and emerging concepts of responsibility.
- 2) The emerging supranational judiciary and new challenges for the rule of law.
- 3) Trade and investment liberalisation and their impact on respect for human rights.

We will situate these in this new globalised/regionalised context and examine them through the prism of some of the ICJ's 'principles of the rule of law.' In particular three aspects of these principles seem worth highlighting:

- (a) the importance of a judicial system which respects fundamental rights and human dignity;
- (b) the need for a government responsible to the people;
- (c) public participation in designing and publicising legal solutions to human rights problems.

4 'Renewing the United Nations: A Programme for Reform' UN Doc. A/51/950, 14 July 1997, para. 107.

1. Questions of Universality and Responsibility

The assault on universality is much talked about but little analysed. One might discuss three different aspects of this issue. First, human rights situations are dealt with selectively according to political and ideological dispositions; even if the Cold War is now over, new splits have ensured that some situations get ignored while others are bombarded with attention. Such selectivity has always permeated political action over human rights, but in its new forms it is further threatening the credibility and universality of the human rights message. Again *regionalisation* has come to the fore and we now have 'African peacekeepers for African problems', a presumption that European Union member states 'shall be regarded as safe countries of origin' for asylum matters, 'Asian values' in the field of human rights, and new concepts of 'constructive engagement' and non-interference in the context of Association of South East Asian Nations (ASEAN).

Second, the balance between attention to civil and political rights on the one hand, and economic and social rights on the other, used to be ensured by the bloc politics at the United Nations. Now the universality of the human rights catalogue is seriously under fire as the ideological supporters of economic and social rights no longer find this a useful stick with which to beat their opponents. However there are new possibilities for sowing the

seeds of economic and social rights as international financial institutions, including regional development banks, start to pay attention to the 'social dimension' of their policies. Regional policies with regard to Asia, the Americas, Europe, Africa, the Middle East and North Africa, could provide meaningful progress on economic and social rights if ways can be found to combine these with dialogue with the relevant international financial institutions.

Third, the attempt to reorientate the human rights message around the concepts of community, family and individual responsibility (as exemplified by the proposed Universal Declaration of Human Responsibilities) is presented as reflecting an 'Asian' approach, but has the potential to undermine the primary notions of state responsibility for the protection of all human rights and the *inalienability* of human rights. Human rights are in danger of being seen as something that is earned through good behaviour. The ICJ is already heavily involved in a number of fields where governments are seeking to reorientate a human rights discussion by establishing international responsibilities for individuals and human rights organisations.⁵ A formal position taken by such an international body as the ICJ could help to bring some conceptual clarity and sense to a debate which is in danger of clouding the waters rather than adding to human rights protection.

5 The full title of the 'human rights defenders' text is 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote Universally Recognised Human Rights and Fundamental Freedoms.'

Let us take a look at some of the issues through our rule of law prism. First we have to conclude that, despite the insistence that international financial institutions exist in order to help ensure greater respect for economic, social and cultural rights, the mechanisms for judicial review of the activities in order to ensure that there is no violation of those same rights is sadly lacking. Our conclusion is that this is not due to any fundamental legal obstacle. It is rather a result of inadequate attention by human rights activists and lawyers to finding ways to remind these institutions that: not only do they have promotional duties - but they must also operate with the rule of law. In this context the environmental movement has had considerable success by achieving the establishment of the World Bank Inspection Panel to rule on actions taken by the Bank which might affect people's environmental rights. Again because these global actors operate outside the established international human rights law framework we find that no particular judicial or other instance can hold them accountable. This of course has implications for the principles of governmental accountability and public participation in decision making. There seems to be enormous potential for civil society and non-governmental organisations to work with the governments and the different regional and international financial institutions in order to improve the planing and execution of projects around the world. A strategy which focused on the justiciability of the actions of the institutions, the account-

ability of the governments, and the participation of the people could go a long way to exploiting the possibilities in this sphere.

The International Commission of Jurists, as part of their follow up to the 1995 Bangalore Conference organised a regional seminar on economic, social and cultural rights, in collaboration with the African Development Bank (ADB), in Abidjan. The Conclusions from that meeting provide a useful springboard for the development of a universal approach to some of the problems discussed. By calling on the ADB to play a leading role in supporting projects aimed at the realisation of economic, social and cultural rights the ICJ clearly makes the case for globalisation with a human face⁶. But the conclusions go further and assert that:

Corruption and impunity for perpetrators of this menace exist side by side with the quest for good governance and the enjoyment of economic, social and cultural rights ...Corruption and impunity legitimise the misuse of national resources in the public and private sectors and reduces the chances of any meaningful development.

The Abidjan Recommendations state that participants had agreed "To begin a campaign against corruption and [the] impunity of its perpetrators by developing normative strategies along the lines of the struggle against

6 International Commission of Jurists (1998) *Report of the Regional Seminar on Economic, Social and Cultural Rights Organized by the International Commission of Jurists in Collaboration with the African Development Bank* Abidjan, Côte d'Ivoire, 9-12 March 1998.

drug trafficking. In this regard it is recommended that the process towards the drafting of an African Convention against Corruption should be initiated with the assistance of the ICJ and a monitoring system put in place in the form of an "observatoire."

By linking corruption to the enjoyment of economic, social and cultural rights the ICJ has made an important conceptual leap forward which has implications with respect to the sorts of partnerships they form in this area. Although it may be useful to concentrate efforts in Africa in the short term, corruption is also being subjected to normative codes and treaties in other regions and now represents something of a global phenomenon demanding global solutions.

Peter Eigen, Chairman of Transparency International - a Berlin-based public interest group that hopes to do for corruption what Amnesty International does for human rights - says that its not just a Third World problem anymore. Multinational corporations that indulge in corrupt practices abroad bring that culture back home like a virus.

In the past many have felt that this is a necessary way of doing business, that you could isolate the practices of a company outside the country. We feel that in the global village this is a global illusion. That culture is coming back like a boomerang.⁷

By making the link that fighting corruption is part of the fight for human rights the ICJ has opened up the chance to use its expertise in the rule of law and the enforcement of economic, social and cultural rights, in new spheres. Not only is there a chance to build new alliances with those NGOs working to monitor corruption, but the ICJ might become involved in some of the legislative inter-governmental exercises taking place in Africa, the Organization for Economic Cooperation and Development, and the Council of Europe.

Before leaving the issue of ensuring universal respect for human rights by reinforcing respect for economic, social and cultural rights we must mention the successful adoption and signing of the new Protocol on an African Court on Human and Peoples Rights. The ICJ must take a great deal of the credit for the speed with which this text has been elaborated and for the subtle ways in which the treaty allows for complaints from NGOs and individuals. This new Court represents one of the best hopes for reinforcing and concretising the assertion that economic, social and cultural rights are justiciable, and for promulgating the message that governments have internationally legally binding obligations with regard to these rights. It would seem worthwhile already considering what sort of cases might be brought before the Court in order to ensure that this message is heard loud and clear.

7 Hirsh, M. (1996) 'Graft Busters' *Newsweek* 25 December 1996, at p. 57.

Let us now consider the third aspect of the universality debate. In recent times it has become commonplace to associate the question of universality with the assertion that human rights do not reflect 'Asian values', and that the time has come to review the Universal Declaration of Human Rights. Yash Ghai has presented one theory as to why the end of the Cold War and the accompanying resurgence of rights has been met with a challenge to universality.

The emphasis on rights was not welcomed by all States, however. Those states which had felt immune from international scrutiny of their authoritarian political systems (which in East and South East Asia had been justified on the basis of the menace of communism) found themselves a little like the emperor without clothes. They were anxious at what were considered to be the likely consequences of this new stress on human rights for their political systems. They were also resentful of conditionalities that derogated from their political and economic sovereignty. The universalisation of rights was seen as the imposition of Western norms. They were anxious because of the effects of these rights on their competitiveness in the framework of international trade that was ushered in by globalization, and they

claimed to detect in this emphasis a Western conspiracy to undermine newly growing economies.⁸

One of the most recent, and widely reported, challenges to the Universal Declaration of Human Rights came in 1997 from Tun Daim Zainuddin, Economic Adviser to the Malaysian government. He stated that when the Declaration was proclaimed 'there were only about 40 Members of the UN. Today there are more than 180 Members.' And that there was a need to make the Declaration 'relevant for present times and to make it acceptable to all nations and peoples'.⁹ The response of human rights scholars and activists has been to reassert the relevance and legitimacy of the Universal Declaration. We might differentiate three approaches. The first asserts that the Universal Declaration draws on different cultural perspectives even if not all the States that exist today were actually represented as such. Ramcharan, for example, has researched the actual contribution of Asian, African and Latin American leaders at the time of the drafting of the Declaration and concludes

It is true that at this time large parts of the developing world were under colonial tutelage. But they had their champions and spokespersons among the drafters of the Universal Declaration, who did them

8 Ghai, Y. (4.9. 1997) 'Rights, Duties and Responsibilities' in *Human Rights Solidarity* - AHRC Newsletter, 7 (4) Human Rights in the Asian Context, 9, at p.10.

9 Cumaraswamy, Dato' P. (1997) 'The Universal Declaration of Human Rights - Is it Universal?' in *The Review of the International Commission of Jurists* Dec. 1997, at p.118.

proud. The Universal Declaration, beyond a doubt, drew on the intellectual patrimony of the peoples of the world.¹⁰

A second approach stresses that the adoption of the Vienna Declaration and Programme of Action in 1993 leaves no 'doubt or ambiguity about the universality of human rights.'¹¹ Francis Deng has detailed a third approach. He reminds us that 'It is important to bear in mind that it is never the victims, but the violators of human rights principles and their advocates who invoke the relativist argument against the principle of universality'¹². He goes on to stress the importance of affirming the

normative principle that cultural relativity cannot be used as a pretext for violating international humanitarian and human rights standards. On the contrary, diverse cultures and heritages should be perceived as unique opportunities for reinforcing human rights standards with culturally-specific principles and methods of promoting human dignity above any difference of race, ethnicity, culture or religion¹³.

There is now an attempt to go beyond the Universal Declaration of 1948 and the Vienna Declaration of 1993 and find ideas and texts that respond to the values that link us together as well as to perceived new challenges to human dignity. Justice Richard Goldstone has categorised those involved in this debate as coming from four different quarters. First those proponents who see this 'as a complement to the well-established precepts of the individual human rights as embodied in the Universal Declaration of Human Rights', second, those who argue that 'the notion of human duties and responsibilities should take precedence if collective interests and societal life are to be sustained', and third, those who 'suggest that the breathtaking events in globalisation and technological advancement - be it in biology, medicine or information or communications - necessitate a fresh approach with a view to defining new norms and, where appropriate, international instruments. Lastly, another school of thought holds that any discussion of human duties and responsibilities is tantamount to an infringement of the existing body of international human rights norms and declarations'¹⁴. These comments were made in the run up to the Valencia Human Duties and Responsibilities

10 Ramcharan B.G. (1997) 'The Universality of Human Rights' in *The Review of the International Commission of Jurists* Dec. 1997, 105, at p.111.

11 *Op.Cit* Cumaraswamy at p.120.

12 Deng, F. (1997) 'Universal Implementation' in *Österreichische außenpolitische Dokumentation*, Special Issue 'The universal protection of human rights: Translating international commitments into national action' 40th International Seminar for Diplomats, Helbrunn Castle, Salzburg, Austria, 28 July - 1 August 1997, 56-81.

13 *Ibid.* at p. 79.

14 Goldstone, R. (1997) 'Note' to the High-level Group on Human Duties and Responsibilities in the Third Millennium - Towards a Pax Planetaria. (On file with the author).

Project and came on the eve of the adoption by the General Conference of UNESCO of the Declaration of the Responsibilities of the Present Generations Towards Future Generations (12 November 1997). Whether or not one embraces such initiatives really depends primarily on one's confidence in the existing normative system and whether one considers that more human rights texts inevitably erode the concreteness of the existing obligations. We might look at one such attempt in a little detail.

On the 1st of September 1997, the InterAction Council launched a 'Universal Declaration of Human Responsibilities.' The InterAction Council under the Chairmanship of Helmut Schmidt, has achieved endorsement from a number of former heads of state or government for the text and hopes to have the document adopted at the 1998 regular session of the UN General Assembly at the time of the commemoration of the 50th anniversary of the adoption and proclamation of the Universal Declaration of Human Rights. Instead of setting out rights, duties, rules and principles which would be *binding in international law* the drafters have sought to enumerate 'global ethical standards.' They assert that the Universal Declaration of Human Rights reflects the philosophical and cultural background of the victorious Western powers at the end of the Second World War. The new Declaration of Human Responsibilities is supposed to rescue notions of respon-

sibility and community which are said to have prevailed in the East.

But the emphasis on responsibility and community does not mirror the approach taken to international human rights law - whereby the state owes the individual certain rights which are to be respected within the jurisdiction of the state. The new notions stress transnational solidarity and the injection of an ethical dimension into international relations.

The InterAction Council believes that globalisation of the world economy is matched by globalisation of the world's problems. Because global interdependence demands that we must live with each other in harmony, human beings need rules and constraints. Ethics are the minimum standards that make a collective life possible. Without ethics and self-restraint that are their result, humankind would revert to survival of the fittest. The world is in need of an ethical base on which to stand.¹⁵

In drafting the Declaration, the InterAction Council sought to represent the major religions of the world. An earlier draft Article 3 states:

No human being, no social class, group, or corporation, no state, no army or police stands above good and evil; all are subject to moral judgement. Everyone should strive to do good and avoid evil at all times.

15 Report on the Conclusions and Recommendations by a High level Group on A Universal Declaration of Human Responsibilities, 20-22 April 1997, Vienna Austria at p. 8.

The final draft has replaced the idea of moral judgement with a more secular appeal to ethical standards. So that the phrase in the middle of the article now reads 'all are subject to ethical standards'. There is a further reminder in Article 13 that:

No politicians, public servants, business leaders, scientists, writers or artists are exempt from general ethical standards, nor are physicians, lawyers and other professionals who have special duties to clients. Professional and other codes of ethics should reflect the priority of general standards such as those of truthfulness and fairness.

What is the international human rights lawyer to make of this initiative and reorientation? Are we *leaving law* and *escaping to ethics*? And what does it tell us about the state of human rights in international relations? On the one hand, the shift away from clearly stating governmental responsibilities in law could lead to a dilution of the human rights message. Human rights would become part of 'creative writing', something to be accommodated into one's personal morality. Breaches could be labelled 'unethical' but would escape the opprobrium of being termed 'violations of international law'. Efforts to enforce international human rights at the international level through the use of international criminal tribunals, complaints procedures, creating crimes of universal jurisdiction, and incorporating rules in treaties into national law, could unravel, and the human rights project could start to lose the sort of concrete normativity which enables it

to be seen as the sort of law which can be enforced by judges.

On the other hand, the draft Universal Declaration of Human Responsibilities responds to an ideological vacuum. The driving competing ideologies which sought to prioritise freedom and equality are no longer locked in combat at the United Nations and elsewhere. The human rights movement has lost some of its momentum as the Western and Socialist blocs have run out of steam. But the movement has not run aground - it is still grinding on. I should like to suggest here that the life source of its continuation is *solidarity*. Because the draft Universal Declaration on Human Responsibilities appeals to that sense of cross-border solidarity it responds to a phenomena which is more real than imagined. One only has to attend one of the global conferences organised in the last decade to sense the potential of 'global networking'. The fact that this normative code is more *transnational* than *international* poses challenges for international lawyers. But any common lawyer familiar with the concepts of reasonableness, fairness and equity should not have too much difficulty accepting the normative content of something described as 'general ethical standards.' The fact that these standards do not fit comfortably in the traditional triptych of international law sources should not dissuade us from according them some legal value.

But the last word on this issue should go to Theo van Boven:

In all good conscience one may wonder whether the challenges of globalisation, and in particular

the current weakening of the global human rights system, are effectively responded to by a Universal Declaration of Human Responsibilities as proposed. The text undoubtedly comprises a number of commendable notions. It is organised in sections which respectively cover fundamental principles of humanity, non-violence and respect for life, justice and solidarity, truthfulness and tolerance, and mutual respect and partnership. It entrusts people, individually and collectively, with the responsibility and the task to enhance these excellent and essential ideals. How can one disagree with the principles and concerns outlined in the proposed document. However, the text is regrettably deficient where it fails to point to the economic and financial actors which in the process of globalisation of the economy have become increasingly powerful and which should carry their due and proportional share when responsibilities and duties in the area of human rights are at stake. The recognition of human rights and the attribution of human responsibilities and duties can only be realised if political and economic powers and their leadership are made to understand and accept their responsibilities for the general welfare, and moreover, if their policies and practices are reviewed and adjusted accordingly. This essential dimension of

corporate responsibility is largely overlooked in the proposed document, except insofar as it states that economic and political power must not be handled as an instrument of domination but in the service of economic justice and of the social order (Article 11). If the initiative of the InterAction Council is actually meant as a response to the globalization of the world economy, its orientation and thrust should have put a much sharper focus on the effects of the market on rights, in particular the right of the vulnerable, and on the accountability of non-state entities.¹⁶

This author concurs with van Boven that those who are interested in tackling the effects of globalisation on the vulnerable should concentrate on enforcing the rule of law against non-state actors. We now turn to look at new challenges and possibilities for monitoring various non-state actors and for holding them accountable.

2. The Emerging International Judiciary

The ICJ Cape Town meeting took place in the wake of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which was held in Rome, June-July 1998. Again the ICJ has to take some of the credit for mobilising opinion to ensure that the creation

16 van Boven, T. (1998) 'A Universal Declaration of Human Responsibilities?' paper prepared for a meeting at the University of Brabant (KUB) in Tilburg, (on file with the author).

of this Court became a political priority. Having contributed at all stages to the drafting of the Statute and the global NGO movement to ensure the most effective court, the ICJ is now faced with a plethora of questions. What sort of cases to bring to the attention of states, the Security Council, and the prosecutor? What sort of standards to hold the Court in terms of ensuring that defendants are guaranteed a fair trial? And how to ensure that the Court and its organs develop in such a way that they represent a beacon of human rights practices.

The creation of such a Court has been at the heart of the ICJ's recent international campaign for the rule of law and an end to impunity. However, the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda have alerted the ICJ to new issues concerning independence, accountability and participation in these new international fora. The ICJ has enjoyed a special relationship with the Yugoslavia and Rwanda Tribunals due to its administration of the legal assistants programme and its trial observation in the *Tadic* case. It seems to the casual observer that the question 'who judges the judges?' remains unanswered. Allegations of unfair procedures at the international level risk going unanswered and eventually undermining the drive for international criminal trials. The ICJ could draw on some of this experience to examine in some detail the sorts of

practical and legal issues which have arisen in the last two and half years. The fight against impunity deserves to be situated in a debate about the rule of law and the independence of the judiciary.

At the regional level we are witnessing the increasing importance of regional courts both in the human rights field and in the commercial field. On occasion these sectors will overlap. As part of the ICJ's commitment to ensuring that international justice respects principles of the rule of law, it is suggested that the ICJ could explore ideas for bringing together Members, Sections and Affiliates (as well as members of the national judiciary) in the different regions to scrutinise the work of regional international tribunals.¹⁷ We have already alluded to the imminent creation of a new African Court of Human and Peoples' Rights. The growth of resort to international arbitration in Africa as well as the prospect of regional Courts dealing with disputes arising out of sub-regional customs unions have considerable implications for the protection of human rights and respect for the rule of law.

The moves towards the *regionalisation* of legal dispute resolution do not contradict the *globalisation* dynamic but, rather, are a necessary reaction. The fact that regional courts in Africa and the Americas allow for the interpretation of international texts rather than merely regional ones, presents interesting

17 The experience of the Standing Committee of the European Sections in elaborating a 'Position of the International Commission of Jurists on the Intergovernmental Conference of the European Union' which tackles issues of accountability and the competence of the European Court of Justice of the European Community could be built on so as to create a network of interested actors studying the effects of this sort of regionalisation.

possibilities for the ICJ to explore. Some issues of international concern might be explored in regional contexts with greater success than at the international level (for example the African Charter offers interesting possibilities to develop the meaning and scope of the right to development or the right to self-determination).

But, the creation of regional legal regimes can undermine the universality project. Inter-governmental regional integration has given rise not only to a resurgence in regional identities but also to new forms of decision making and inter-governmental action. For example, following the entry into force of the 1997 Amsterdam Treaty on the European Union, we have to consider the effect of the new 'Protocol on Asylum for Nationals of Member States of the European Union.' The 'sole article' starts:

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.

The article then goes on to outline a number of exceptional cases where the application for asylum made by a national of a Member State may be considered by another Member State.¹⁸ This Protocol, even though not fully endorsed by all 15 Member States, creates a precedent that is obviously extremely dangerous. It suggests that other regions might one day decide that their adherence to human rights treaties similarly allowed them to suspend existing international law on asylum. In order to dispel the impression that the European Union is undermining the application of the Geneva Convention the preamble states: 'WHEREAS this protocol respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees'. Nevertheless, the Protocol has been criticised by UNHCR:

We are very concerned at the EU decision. If the EU applies limitations to the Convention, others can follow and could weaken the universality of the instrument for the international protection of refugees. We do not, therefore, share the position taken in the preamble stating that the protocol respects the Convention.¹⁹

18 Where the State of which the applicant is a national has declared a state of emergency in accordance with article 15 of ECHR; where the Council is considering whether there exists a serious and persistent breach of human rights by the member state of which the asylum seeker is a national under the procedure in the new Article 7 of TEU; and where a member State has decided unilaterally in which case the application is to be dealt with on the basis of the presumption that it is manifestly unfounded. The actual implementation of these exceptions is not of real importance. Here the issue is the message which the general geographical exclusion sends.

19 'UNHCR concerned about restricted access to asylum in Europe', 20 June 1997 'Update on Europe'.

The question now arises: what are the implications for the rule of law and in particular the principle of enforcement of respect for human rights through an independent judiciary. There are two dimensions to the absence of the rule of law in this context. First, we have the issue of whether such an apparent derogation from existing human rights can be challenged at the level of the regional Courts charged with the oversight of respect for international and regional law. The answer is probably no. Neither the European Court of Justice nor the European Court of Human Rights would be likely to entertain a claim against the Member States that their action in concluding the Protocol violated international human rights law. We are faced with a paradox. The European Union invokes a commitment to the rule of law, and the effectiveness of the European Court of Human Rights, in order to derogate from international practice; whilst that same derogation cannot be challenged in any Court.

Second, we have the issue of diminishing respect for the rule of law in the context of the national decisions taken in order to comply with demands made under regional law. For example, a decision taken by a governmental authority in an EU member state in order to comply with their obligations under EU law can probably not be judged for conformity with human rights standards either by the national judges or the judges in the European Court of Human Rights. The logic is

that the national authorities had no discretion in the matter, and the European Community/Union is not a party to the European Convention on Human Rights (ECHR). Although the International Commission of Jurists has been active in promoting the accession by the EC to the ECHR,²⁰ such a solution seems less and less likely.

This European example has been used to illustrate the point that as different customs or security unions/pacts are established in the Americas and Africa, little action has been taken to ensure that the new types of decision-making are subjected to judicial scrutiny, not only for conformity with the international treaties establishing the various Unions, but also for conformity with international human rights law which has been established after so much suffering and struggle. Furthermore the forces of regional integration have so far left inadequate space to develop respect for the two other principles of the rule of law referred to above. The inter-governmental decision-making process at the regional level leaves little room for ensuring that the governmental decisionmakers are responsible to the people. (The new government becomes an irresponsible entity accountable to no particularly civil society.) And little effort is made to include people in the design and elaboration of legal solutions to human rights problems.

20 International Commission of Jurists (1993) *The Accession of the European Communities to the European Convention on Human Rights* Position Paper.

3. Trade and Investment Liberalisation

On the eve of the Third Millennium there is considerable anxiety and excitement about the effects of an ever-more global economy and the speed with which technological progress can transform whole sectors. Employers and investors now operate on a plane over and above national frontiers. There is a fear that they are also operating outside the rule of law. In devising new regulations to tackle this phenomenon legislators are confronted with a twofold opposition. First, there is a distrust of legal solutions as representing the sort of red tape that trade liberalization ideology is seeking to triumph over. Second, there are fears in the developing world and elsewhere that human rights or environmental issues are simply being used as smokescreens for the pursuit of a protectionist agenda. The issue of fair trading and respect for core labour standards is currently being developed within the corridors of the International Labour Organisation and the World Trade Organisation in Geneva, but the solutions will probably lie at the national level around the world.

The new agreement on protecting foreign investors highlights the way in which states are readjusting notions of state sovereignty in an increasingly integrated world. Renato Ruggiero, Director of the WTO has called the OECD's draft Multilateral Agreement on Investment (MAI) 'the Constitution

for a single global economy'. The ICJ must surely have a role in ensuring that such a constitution is permeated with principles of the rule of law such as (i) judicially enforceable respect for human rights; (ii) accountable governmental decision-making; and (iii) public participation in the production of legal solutions to human rights problems. So far human rights organisations have treated issues of trade and investment liberalisation as belonging to another world. Kothari and Krause have sounded the alarm:

After news about the MAI was leaked, environmental, social justice, labour and development groups rallied all the forces they could muster. It was clear to this coalition that the new trend of corporate globalisation embodied in the MAI would routinely brush aside the international law obligations states had assumed over the past years, especially in the areas of human rights and the environment. This expanding NGO coalition has not, however, included many human rights groups.... By its failure to act in concert with other progressive forces, the human rights movement is marginalising itself. The ease with which the MAI has reached such an advanced stage of preparation, and the power of para-statal agencies that this symbolises, should act as a wake up call for human rights NGOs.²¹

21 Kothari, M and T. Krause (1998) 'Human Rights or Corporate Rights? The MAI Challenge' 5(1-2) *Human Rights Tribune* 16.

The issue for human rights NGOs ought to be twofold: first how to ensure that the multilateral treaties concluded by states in the context of trade and investment liberalisation do not prevent those same states from fulfilling their international human rights obligations. For example, any proposed investment treaty which forces States to allow foreign investment in an area which might otherwise remain protected for the purposes of preserving an indigenous people's culture should be amended to ensure that the state retains the power to ensure the protection of human rights. Secondly, human rights organisations might start to develop existing human rights instruments and codes so that they can be used to ensure that corporations realise they too have responsibilities under human rights law. As recently pointed out by Pierre Sané²² the introduction to the Universal Declaration of Human Rights proclaimed the Declaration

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms....

There is certainly a movement to rethink the obligations of corporations as organs of society and transform some

of them 'into dedicated servants of the common good'²³. The question arises for the ICJ as to whether to treat corporations (including the large multinational corporations) as large para-state entities to be held accountable under the same sort of regime as states themselves, or whether to start to look at the different sorts of codes that are promulgated by consumer groups and the corporations themselves and see whether these are in fact better suited to ensuring respect for human rights.

One aspect of corporate responsibility which may yet develop is the growing acceptance that corporations may be criminally liable for violating the emerging international criminal law on genocide, other crimes against humanity and war crimes. At the time of writing the draft statute for an International Criminal Court contains bracketed language asserting the jurisdiction of the Court over legal persons (*personnes morales*). In the first two weeks of negotiations this was further defined to mean 'a corporation whose concrete and real objective is private ends, and not a State or other public body in the exercise of State authority, or a public international body.'²⁴ Throughout the debate no one challenged the notion that corporations had these international duties. The disputes arose about how to ensure that the corporation would be properly represented in procedural terms. Whether or not the eventual Court will have jurisdiction

22 Sané, P. (1998) 'Indivisibles droits humains' *Le Monde Diplomatique* May 1998, at p. 32.

23 Grossman, R.L. and F. Adams (1996) 'Exercising Power Over Corporations Through State Charters' in *The Case Against the Global Economy: and for a turn toward the local* J. Mander and E. Goldsmith (eds), 374, at p. 389.

24 UN Doc. A/CONF.183/C.1/WGPP/L.5/Rev.1.

over corporations, these corporations must now surely be seen as subjects of international human rights and humanitarian law.

Conclusions

The forces described in this paper have the potential not only to erode our human rights but also to unleash new energies in order to form new global and regional alliances. In some ways it is fair to see the globalization dynamic as creating new constellations not only 'up there' but also 'down here.' Referred to by Bengoa as 'top down' and 'bottom up' globalisations these forces can even be seen in a complex symbiotic relationship.

The "globalisation of standards" is the most important consequence of "bottom up" globalisation. Local communities as well as being subject to the impacts of international trade are also feeling the impacts of new conceptions of justice and equity that are intercommunicated throughout the world. This means that old ways of life that were bearable in isolation and in ignorance

of alternatives are beginning to be called into question locally.²⁵

But in closing we have to remind ourselves that the effects of globalisation can also bring fragmentation and disintegration.

The diminishing power of the State and its capacity for control in economic and not infrequently also political matters is producing a shift of culture. Economic markets, markets for goods, systems for interchange of technology and knowledge are very rapidly becoming global. Cultures, however, are taking a different and sometimes opposite path.²⁶

We have to admit that some of the retreat to ethnic or other identities seems to come as a counter-reaction to the diminishing role of the nation state and the search for one's own culture in an increasingly homogenised world. The challenge for the ICJ would seem to be to find ways to tap into the forces which are shaping the world and ensure that these entities are both aware of their human rights responsibilities, and also made accountable under the rule of law for any violations they commit.

25 Bengoa, J. (1997) Final report, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution*. E/CN.4/Sub.2/1997/9, at p. 23.

26 *Ibid*, at p. 21.

The Direct Application of Human Rights Standards to, and by, Transnational Corporations

Laurence Dubin *

In recent years, considerable attention has been given to transnational corporations and their contribution or failure to respect human rights in countries where they carry out their operations.

Transnational corporations (TNCs) have often been the focus of notable controversy because of their economic and - in some cases- political power, the mobility and complexity of their operations, and the difficulties they create for States - both home State and host State - which seek to exercise legal authority over them¹.

However, the link between the protection of human rights and activities of TNCs through private mechanisms, such as private codes of conduct or product labelling, is a new phenomenon.

Firstly, it seems useful to define the legal reality of the TNC.

Also called "transnational" or "multinational" corporations, the typical global economic actor is well known: "it comprises a group of companies operating under common ownership or control, usually (though not always) for a common purpose or in related economic sectors, usually (though again not always) employing a common trade mark, sometimes with local variations"².

Most of the global economic actors are incorporated in developed countries. Their names are known all over the world. Shell and Exxon (Esso), Nestlé and Philip Morris, General Electrics, Mercedes-Benz, Fiat, General Motors, Philips, Nike, Reebok...

These entities are characterised by the multiplicity of their subsidiaries. "In some instances, the subsidiaries' conduct truly separate businesses, and outsiders may not even know that they

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- 1 Louis Henkins, Richard Crawford Pugh, Oscar Schachter, Hans Smit, *International Law*, cases and materials second edition, ed. West publishing co. p. 344.
- 2 Institute of International Law, *Yearbook*, vol.65, Part1, Session of Milan 1993, Preparatory work, ed. Pedone, Paris, p. 28.

belong to a particular group; in most instances, however, the subsidiary is a part of an integrated activity conducted under direction of common management³.

To the public, the parent company is usually identified with a single country. The TNC does not need to be linked to a particular State in which the parent company has its headquarters and, it may be operated under a hierarchical or decentralised system of management. As Robert Reich states, "Today, corporation's decisions ... are driven by the dictates of global competition, not by national allegiance"⁴. It must be recognised that while the holding of shares of subsidiaries by non members is not excluded, an essential characteristic of the multinational enterprise is that shares of subsidiaries are not dispersed. Furthermore, management of such subsidiaries is exercised by the parent company, either through controlling share holding, directly or indirectly, or by other means⁵.

It is well-known that TNC activities have beneficial global impacts on the State in which their subsidiaries are incorporated. Usually, the working conditions prevailing in TNC subsidiaries are better than those of the local enterprises. However, a problem arises when TNCs profit from the situation by taking advantage of the use of

the poor living conditions of countries in which they sub-contract or establish their subsidiaries.

In this particular hypothesis, the TNC does not make an illegal profit, in so far as its sub-contractors or subsidiaries respect the local law. On the other hand, it can be argued that it makes an immoral profit if it does not respect human rights. There is no doubt that the moral analysis of multinational corporations is particularly important, since TNCs, unlike national entities, exist under diverse legal systems with conflicting demands. It is far from clear that the law can be relied upon to set the moral parameters, for the simple reason that many of the national laws themselves are in conflict. This lack of clarity can be rectified by reference to human rights, a uniform international body of law.

Human rights form part of national and international law. In the international law of human rights, States are always seen as the principal actors for the purpose of enforcement. However, the Universal Declaration of Human Rights (UDHR) states in its preamble that "every individual and every organ of society, keeping [the] Declaration constantly in mind, shall strive (...) to promote respect for these rights and freedoms and (...) to secure their universal and effective recognition

3 Institute of International Law, *op cit*, p. 248.

4 R. Reich, "Who is them?", in *Harvard Business Review*, 1991, n° 69, at p. 77.

5 The control is the power to exercise decisive influence over the activities of a company, whether by appointment of its directors or principal managers or otherwise; a controlling entity is a company or other entity that has or exercises control over another member of the group of company that constitutes the multinational enterprises. A controlling entity may, but need not, be the parent company of the multinational enterprises.

and observance". Thereafter, the Declaration specifically states in Article 29 (1) that everyone has duties to the community. The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) state in their preamble that the individual, having duties to other individuals and to the Community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

However, whereas the international instruments related to human rights attempt to oblige individuals to respect human rights, there is no international mechanism which allows TNCs to be held directly accountable in this respect. Ultimately, it is always the State which is held accountable for the violation of human rights. Therefore, in order to apply human rights directly to the activities of TNCs, an inter-state mechanism or forum involving States, with a common purpose to regulate these activities, is required.

A considerable effort has already been made by the UN, although its efforts have failed so far. It might be possible to think in other terms by introducing the concept of shared responsibility between the State and the TNC. Such co-responsibility needs the consent of TNCs to ensure that they implement human rights. Therefore, it seems particularly appropriate to use investment law to implement this concept.

Investment law is the *only* branch of international law in which TNCs, act-

ing as investors, are given international rights. They are rarely subjected to obligations towards the international community but rather owe obligations to the host State in which they localise their activities. Yet, the OECD Guidelines for Multinational Enterprises, which are part of the Declaration on Investment and Multilateral Enterprises, refer to TNC's particular duties towards their employees. Moreover, the OECD is negotiating the revision of these guidelines and is attempting to integrate human rights standards into its new corpus. Furthermore, international investment law is to be discussed by the WTO in the next ministerial conference in December 1999.

In parallel to the question of the direct application of human rights to TNCs, there is a second issue: the direct application of human rights by TNCs themselves. According to this point of view, TNCs are no longer merely subjected to human rights obligations but become involved in their protection.

The business ethics movement, which emerged in the United States three decades ago, promoted TNCs as new actors interested in the protection of human rights. This movement has since grown, and now a considerable body of literature exists regarding codes of conduct and social responsibility of TNCs. Unfortunately, there is no human rights based analysis of the codes. Accordingly, it is important to analyse the various private codes of conduct which apply to TNCs, in order to determine whether they are based on the same standards of human rights.

As such, private codes are voluntary, and therefore not legally binding. They cannot require mandatory and direct application of human rights. Nonetheless, it is possible to link public international law guidelines for TNCs to the private codes of conduct, as long as they refer to the same human rights. To enable this link to be made, it is essential to establish a set of human rights standards that a majority of TNCs agree to implement in their international activities. To achieve this, one must begin by synthesising the private mechanisms which TNCs are using to implement human rights standards.

In the light of these remarks, the present study attempts to answer two questions. Firstly, on what legal basis may TNCs apply human rights? Secondly, what are the concepts and mechanisms, if any, which may place legally binding obligations to respect human rights on TNCs?

I Is Direct Application of Human Rights Standards to, and by, TNCs Legally Possible?

For most purposes, international law considers TNCs as nationals of a particular State, either the State of incorporation, the State in which the corporation maintains its home office, or the State in which it conducts its principal business.

Therefore, and at first glance, expectations of direct application of human rights standards on TNCs could be considered to be an altruistic, yet unrealisable objective. It is one that

could only be realised if all the nation-States in which TNCs carry out their operations agree to impose international obligations on them. However, the initiatives taken by TNCs, party to the business ethics movement, provide a new legal source for the direct application of human rights standards by TNCs.

Given that the TNC itself is not a legal entity, but a group of legal persons subject to the national law of the countries in which they operate, the first legal question facing these initiatives is to determine whether they promote human rights standards equivalent to those enumerated in the International Bill of Human Rights (constituted by the UDHR and the two Covenants on human rights; i.e., the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)).

This question addresses the legal existence of an international consensus, among nation-States, based on certain human rights standards suitable to the activities of TNCs. In the situation in which the host State has not yet implemented human rights in its legislation, such a consensus would allow TNCs to implement human rights independently, without reference to the national laws of the State in which they operate.

Therefore, we must explore which human rights standards can be legally applied to and by TNCs and whether the private sector initiatives are based on these same standards, so as to determine their legality.

A. Which Human Rights Standards Can Be Legally Applied to, and by, TNCs?

It has been argued that "the universal nature of [human] rights and [fundamental] freedoms is beyond question"⁶, and that States must incorporate all human rights into their national law. In reality, the implementation of State obligations regarding human rights is more complicated. Although the State must promote and protect all human rights, the significance of national and regional legal particularities and various historical, cultural, and religious factors prevent human rights standards from being incorporated in the same manner in all countries.

Regarding the present purpose of direct application of human rights to and by TNCs, the connection between the particularities of each State and the national protection of human rights is extremely important. Indeed, because of an important diversity of States, in which TNCs are localised (developed vs. developing, dualist vs. monist⁷), TNCs cannot implement all human rights, in all countries, in the same way.

However, since the respect of human rights is an international concern, some important changes have

occurred, especially with regard to the legal status of these rights. Some human rights are internationally recognised in the sense that their implementation must be identical in all countries and cannot depend on the particularities of each State. The practical effect of such classification is to render the internationally recognised human rights directly applicable to TNCs operating in any country.

Among these internationally recognised human rights, inalienable human rights (that is to say the human rights that may not be suspended, even in times of national emergency), such as the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the right to freedom of thought, conscience and religion, can be considered as directly applicable to and by TNCs. Besides, it is worth noting that, in the European law of human rights provided by the European Convention on Human Rights, it is recognised that the inalienable human rights may be applied horizontally (that is to say that the rights are applicable between individuals themselves, and not only between the State and individual). These particular rights are the right to life⁸, the freedom from torture or cruel, inhuman or degrading treatment⁹ and

6 World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23, § 1, at p. 5.

7 A dualist legal system maintains a distinction between national law and international law. In order to be applied, an international law rule must be adopted by the national law of the State. Monism maintains no such distinction, and regards national law and international law as manifestations of a single conception of law.

8 Article 2 European Convention on Human Rights.

9 Article 3 European Convention on Human Rights.

the freedom from slavery and slave trade¹⁰. Furthermore, some economic and social human rights, which are central to TNC activities, have also been considered as internationally recognised and non dependant on State particularities.

Although the United Nations Vienna Conference on human rights distinguished between the legal status of civil and political rights, on the one hand, and the economic and social rights, on the other, it is no longer relevant. Even if the latter rights used to be considered as not directly enforceable in contrast to civil and political rights, the indivisibility of human rights means that economic and social rights are placed on a par with civil and political rights.

Yet, some argue that, despite the principle of indivisibility, the implementation of economic and social human rights is problematic, because the content of the rights is not clearly defined. This problem can, however, be resolved by focusing on the core obligations of State parties. This is precisely the method which the international community has opted to take since the beginning of the 90s.

For instance, a particular core set of workers rights was adopted and recognised by the Declaration and Programme of Action of the World Summit for Social Development, Copenhagen, March 1995, which provides for the elimination of forced and child labour, non-discrimination, freedom of association and collective

bargaining. Moreover, member-States of the WTO have already recognised that these core labour standards have to be promoted, with special reference to trade liberalisation in the WTO Ministerial Declaration of Singapore. The relevant part of the Declaration states: "we renew our commitment to the observance of internationally recognised labour standards". More recently, in June 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. The four fundamental rights contained in the Declaration are identical to those which are recognised in the Declaration and Programme of Action of the Copenhagen Summit.

Therefore, via this process of accretion, the repeated articulation and assertion of certain human rights plays an important role in the development of an international consensus among States. Through this consensus, each State recognises that the respect of fundamental economic and social human rights is not a function of the State's level of economic development. Yet, the disparities between States mean that each State applies fundamental economic and social rights in a manner corresponding to its particular situation.

However, differences in methods of implementation may not necessarily jeopardise the desired effect of the human rights standard. It has been argued that fundamental worker's rights do not oblige States to adhere to certain norms of conduct, but rather to attain certain results which ensure that

10 Article 4§1 European Convention on Human Rights.

fundamental economic and social rights are not violated.

A similar approach may be taken regarding inalienable rights that are express prohibitions, such as the right not to be subjected to torture or to cruel, inhuman or degrading treatment. These prohibitions may concomitantly be addressed to both States and private entities or individuals. It is thus submitted that TNCs have a legal obligation to respect these prohibitions, but they are given scope regarding the methods they choose to use to implement them. TNCs can therefore implement the core human rights standards by finding a practice suitable to them, regardless of the particularities of the States in which they are localised.

Other human rights require positive action on the behalf of States, notably the right to nationality, to leave any country, to seek asylum, to marry and found a family, to take part in government, to rest and leisure, to social security, to education, which at elementary levels must be free and compulsory. At first glance, these rights do not seem relevant to TNCs. They have to be reformulated to be suitable. For instance, the right to free elementary education can be reformulated in order to urge TNCs to abolish child labour and promote the right to education. Moreover, TNCs can implement the right to education by providing their employees with training relevant to their activities. The right to leave any country may also require a TNC to allow its employees to leave the country in which a particular subsidiary is localised to work for one incorporated in an other country. The right to rest

and leisure may be directly applied by TNCs regarding the provision of holidays for their employees. The right to found a family can also be applied by TNCs if they provide maternity leave for women. The right to a social security is more problematic and TNCs have to find a method of implementing suitable criteria for each country in which their subsidiaries are localised.

However, it must be added that the right to asylum, the right to take part in government, and the right to a nationality cannot be reformulated so as to produce legal effects in the context of TNCs.

To sum up, the internationally recognised human rights standards which do not need to be reformulated to be legally implemented by TNCs are the following: the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, nor to be held in slavery or servitude, the elimination of forced and child labour, non-discrimination and the freedom of association and collective bargaining. Human rights standards which do need to be reformulated so as to be directly applied by TNCs include the following : the right to found a family, to leave a country, to education, to rest and leisure and to a social security. Via a thorough analysis of the rights guaranteed by the UDHR and the two Covenants, human rights may be reformulated to ensure that they are appropriate and relevant to TNCs.

With the above remarks in mind, we shall now consider the compliance of the private sector initiatives with these

human rights standards. Moreover, we shall also determine if these private sector initiatives provide further protection than the current human rights standards.

B. Is Auto-definition / Auto-implementation of Human Rights Standards by TNCs Legal?

According to the ILO, the term "private sector initiatives" refers to action which, while not enforced by law, may seek to enhance or supplement behaviour required by law¹¹. It can be said that these private sector initiatives express a new source of international law specific to the economic reality of TNCs itself, and allow them to be considered as legal entities. Although a uniform conception of this legal reality is difficult to construct, various private sector initiatives attempt to do so.

These initiatives come in a variety of forms, varying from codes of conduct, to social labelling or investment initiatives. Codes of conduct are written policies, or statements of principles, intending to serve as the basis for a commitment to a particular conduct¹². Social labelling, on the other hand, is a

mechanism where information is communicated via an identifiable label which explains the social conditions surrounding the manufacture of the product, or the rendering of a service¹³. Furthermore, we must note the existence of socially responsible investment (SRI) which takes the form of either investment fund screening or shareholder initiatives.

These private sector initiatives can emanate from a partnership between private actors such as investors, consumers, sub-contractors, enterprises, associations, labour unions, non-governmental organisations, professional consultants and auditors. They can also be initiated by public entities such as governments, the International Organisation for Standardisation (ISO) or other international organisations. Once set up, they may be implemented in a variety of ways. For instance, the codes of conduct may operate at different levels, either at the level of the subsidiaries or of the sub-contractors. Moreover, some of these codes may be used as model codes and serve as the basis for developing further instruments.

Despite ambitious programmes, the effects of these initiatives remain difficult to assess. Nevertheless, it has been

11 ILO, Governing Body, "Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues", 273rd Session, Geneva, November, 1998, § 6.

12 ILO, Governing Body, "Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues", *op cit*, §26.

13 ILO, Governing Body, "Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues", *op cit*, §68 de ILO.

argued that social labelling provides a mechanism that allows consumers and all parties to monitor the degree to which human rights are respected in the particular manufacturing process. Alternatively, investment initiatives may have an impact on human rights by determining the level of compliance necessary in a host country before it qualifies, and by discouraging investment in host countries with low levels of compliance. Also, based on the human rights performance of the company, they can exclude publicly traded corporate securities from investment portfolios. Therefore, those private mechanisms can implement a boycott approach which ultimately has an adverse effect on the companies involved.

These private sector initiatives usually auto-define their human rights standards.

Hence, it is necessary to examine whether TNCs formulate the internationally recognised human rights standards in equivalent terms or according to the spirit of their formulation in the UDHR. Secondly, it is necessary to assess whether the implementation of these initiatives are legal. This question is crucial because it addresses the additional issue of the potential economic

effects of the private sector initiatives. In other words, whether these initiatives provide a new private form of protectionism, at the expense of the developing countries, or whether they prejudice TNCs so as to hinder their proliferation?

i) Legal nature of business ethics

We are concerned here with the codes of conduct that address human rights standards. Sectors that deal directly in consumer products, such as textiles, clothing, leather and footwear, commerce (retailers and home manufacturers of consumer products), food and beverage, and chemical and toy industries, seem most conducive to the development of private sector initiatives related to human rights¹⁴. The world's largest TNCs, and in particular US-based TNCs in the textile, clothing and footwear (TCF) and related sectors, have spearheaded the trend of codes as a means of responsible sourcing. Frequently, TNCs working in these sectors cooperate with worker's organisations and human rights organisations to negotiate and implement the codes. In the United States these hybrid codes deal almost exclusively with workers rights. This is due to a particular sensitivity on the behalf of

14 ILO, Governing Body, "Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues", *op cit*, § 32.

the American public opinion with regard to sweatshop issues¹⁵.

Various codes of conduct are also being developed in Europe. For example, the Ethical Trading Initiative in the United Kingdom recently adopted a model code - "The ETI Base Code" - for its member companies to adopt and incorporate into their own codes.

In addition, governments are getting involved in the regulation of TNCs through private codes of conduct. For instance, the Clinton Administration supervises the Apparel Industry Partnership (AIP) which associates Nike, Reebok, Liz Clairbonne, L.L. Bean, Patagonia, and Philips-Van Heusen with American NGOs and labour unions¹⁶. In Europe, initiatives have also become more commonplace, such as the British government's Ethical Trading Initiative, which incorporates the financing and monitoring of the Board. Other governments have opted for the development of guides or guidelines relating to codes of conduct such as the Canadian government with its Voluntary Codes Guide, or the

Australian government which published a Guide to Fair Trading Codes of Conduct or the Government of New Zealand with its Guidelines on Developing a Code of Practice.

Social labels appear primarily in export markets involving retail trade. Some labels apply only to highly specific sectors such as hand-knotted rugs, soccer balls or clothes. These labels were created as a result of pressure arising from organised campaigns and consumers. However, company/government partnerships, or single companies engaged in production, exports or retail sales have also developed independent social labels. According to the ILO, social labelling programmes run by NGOs or hybrid partnership tend to be dominated by organisations in developed countries, either led by single company associations or public/private partnerships. In developing countries these programmes tend to be the result of coalitions. Social labels can be attached to the product itself, such as the carpet label "Rugmark", or can consist of a trade name used by certified companies, as for instance Responsible Care.

15 Indeed, we must note that sweatshops are not exclusively an international issue but rather a national one specific to the American society. The codes of conduct originates from the discovery of a sweatshop in El Monte, in California where 72 Thai immigrants were imprisoned and forced to labour in slavlike conditions for seven years. In response, Labour Secretary Robert Reich launched a campaign against sweatshops, emphasising pressure on retailers and manufacturers to take responsibility for who they do business with. Since this campaign, human rights NGOs and labour organisations have begun to deal with the international responsibility of the TNCs towards the sweatshop issue. For instance, after an intensive campaign against the Gap, led by the National Labour Committee and Unite, for selling products made in central American sweatshops, the retailer agreed to explore the feasibility of independent monitoring, translate its code of conduct into languages of the 47 countries in which they produce goods and post them prominently in each factory; recognise and respect union rights, and strive to return production to El Salvador under non-sweatshop conditions.

16 Business for social responsibility, the interfaith centre on corporate responsibility, International Labour Rights Fund, Lawyers Committee for Human Rights, and Unite are the principal NGOs which are parties to the sweatshop initiatives.

The legal nature of those private sector mechanisms is, in general terms, linked to human rights standards, since human rights NGOs or labour unions are associated with TNCs. In many ways, however, the codes do not clearly mention international human rights standards in terms equivalent to the UDHR but prefer to auto-define the rights. However, auto-defined standards can set goals implicating human rights standards equivalent to the spirit of the UDHR.

The main and present purpose is to determine whether the human rights for which the present study demonstrated that they can be applied by TNCs are efficiently taken into account by the private sector initiatives.

i.a) Economic and Social Human Rights

Freedom from discrimination

According to the ILO, freedom from discrimination in employment is frequently dealt with in private sector mechanisms. It represents the second most frequently raised economic right, after health and safety. Many of the codes treat freedom from discrimination generally by referring to respect for the dignity of workers. This is illustrated in the WMC Mining company code of conduct which states that "everyone is entitled to be treated with respect as a person, regardless of role or individual differences"¹⁷. One business in the TCF sector is a rare exception

in that it refers directly to international standards, as it holds that : "any workers producing products manufactured for and sold by KappAhl must be provided with fair wages and decent working conditions and the international labour standards according to ILO conventions n°29, 87, 98, 100, 105, 111, and 138 must be observed"¹⁸. Some of the codes reformulate the freedom from discrimination with a specific standard of equal opportunity for advancement, such as Reynolds Metals Company which states that the company is " ... fully committed to a policy of non-discrimination in employment and to the cause of equal employment and advancement opportunity for all"¹⁹.

Other codes, refer to the standard of equal pay for work of equal value in identical terms to article 23 §2 of the UDHR. For instance, KappAhl, the French Clean Clothes Campaign, SA 8000 and the International Code of Conduct for the Production of Cut-flowers proposed by IUF, several local trade unions and a few NGOs, include this human right standard in their codes or on their labels.

Yet all codes, which deal with the non-discrimination principle refer to the national legislation of the countries in which they operate. Therefore, it may be argued that they provide a private implementation of this internationally recognised right without changing its substantial meaning resulting from its formulation in the UDHR.

¹⁷ *WMC Mining Company- Code of Conduct.*

¹⁸ *Code of Conduct, Labour relations of KappAhl.*

¹⁹ *Reynolds Metals Company- Business conduct guide.*

Child labour

According to the ILO, about 45 per cent of all codes of conduct highlight child labour as an issue. The main issue regarding child labour is the minimum age requirement. Most of the codes do not define child labour and usually auto-determine a minimum age of about 14 or 15 years. Even if the ages of 14 or 15 are compatible with the ILO Convention n°138, codes of conduct do not necessarily pay attention to the conditions and safeguards provided for by the latter convention. Moreover, the autodetermining of the minimum age can create compatibility problems with national laws. Hence, some codes of conduct have opted to defer determination of standards to the State where they are incorporated. For example, the agreement between IKEA and IFBWW states that "child labour must not occur. Only workers aged 15 and over, or over the age of compulsory education if higher, may be employed. Exceptions to this rule may only be made if national legislation provides otherwise". While the first part of this commitment refers to the provisions of the ILO convention n° 138 and extends de facto its legal scope, the second part cancels any commitment with regard to the ILO convention if the national legislation is different as a result of the state of incorporation having not ratified or having derogations to the convention. However, it must be said that by fully implementing its commitment, IKEA would not violate the sovereignty of the State in which it is localised as far as the latter has the legal obligation to abolish child labour.

Nevertheless, it is probably easier and more relevant for TNCs to commit themselves in general terms to not interfere with compulsory education. For instance, the framework of Starbuck's Code of Conduct states that the company "believes that children should not be unlawfully employed as labourers ... [and] that if children work, it should not interfere with mandated education"²⁰.

Therefore, it can be argued that the most effective form of commitment on the behalf of TNCs towards child labour is one which is formulated in negative terms, such as *ensuring that children do not work below a certain age*. Such a formulation would prevent TNCs from interfering with State sovereignty.

Forced labour

According to the ILO, roughly one-quarter of the codes prohibit forced labour, with the overwhelming focus of those references on the TCF, commerce, and toy sectors. The ILO seems to regret that these codes incorporate self-defining terms, particularly prohibiting "forced labour" without defining it further. An example is the International Council of Toy Industries which states that "no forced or prison labour is employed, that workers are free to leave once their shift ends". According to this disposition, it can be said that the international human rights standard of elimination of forced labour can be completed by this particular right to leave one's shift when it has ended.

²⁰ ILO, Governing Body, "Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues", note 58.

Such a right isn't incorporated in the UDHR and the two Covenants. However, it seems particularly relevant to TNC activities, and especially those of the industrial sector. One code expressly refers to ILO convention by stating that the Empire Stores Group-Redoute Group "will avoid sourcing from manufacturers where labour is deemed to be exploited contrary to the rules and guidelines of the [ILO]".

Despite the lack of definitions in the codes, which is irrelevant as far as this human right is well-defined in international law, the way by which TNCs commit themselves to avoid forced labour is all the more satisfying as far as none of the codes refer to national law. By implementing the freedom from forced labour, without referring to national law, the TNCs indirectly recognise the imperative characteristic of this human right.

Yet, what is regrettable is the fact that only a minority of codes of conduct incorporate prohibitions of forced labour.

Freedom of association and collective bargaining

The ILO identifies approximately 15 per cent of the codes as containing references to freedom of association and/or collective bargaining. The paucity of treatment of this issue points out that these international standards do not automatically influence the private sector.

Yet, commitment towards the freedom of association and collective bargaining can be found principally in the TCF and commerce sectors, and to a lesser extent in the food and drink, forestry, utilities, chemicals, basic metal production, agriculture, mining and hotel sectors²¹. This plurality of sectors points out that the freedom of association and collective bargaining is relevant to all the sectors of TNCs' activities.

It must also be noted that the unilateral initiatives do not make references to this particular human right standard. This can be explained by the fact that freedom of association and collective bargaining allow workers to negotiate their wages, which often has an impact on production costs. With the exception of KappAhl, the codes of conduct that refer to the freedom of association are those which associate NGOs and labour unions. Nevertheless, the way in which the codes refer to freedom of association show a certain deference *vis-à-vis* nation-States in which the TNCs are localised. For instance, the hybrid code, SA 8000, opted for an international approach to the issue except in situations where national law restricts freedom of association and collective bargaining. Although TNCs who take this position appear to apply the standard whilst respecting the confines of their national legislation, in reality this approach leads to the application of minimum standards. Thus, TNCs should be encouraged to implement this international human right to

21 ILO, Governing Body, "Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues", § 56.

its fullest, obviously within the confines of national legal constraints.

Wages

Less than half of all codes of conduct incorporate the right to a fair wage. The international standard of fair wages is extremely controversial, notably as a result of the fact that interpretation of what is "fair" varies widely. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy has already advised TNCs operating in developing countries to provide wages, benefits and conditions of work at a level that is "at least adequate to satisfy basic needs of workers and their families". However, this declaration is not legally binding. Therefore, it is necessary to explore whether codes of conduct are a more appropriate and effective method of implementing the right to a fair wage.

Codes of conduct which deal with wage levels refer either to national laws or to an auto-defined and appropriated formula. Those auto-defined standards for wage levels often invoke the principle of fairness in setting a general standard. More precisely, the vague concept of fairness points out that the wage level cannot be imposed using a concept of a minimum wage determined in absolute terms. Therefore, many codes provide clauses such as: "the compensation must be fair and adequate"²², that "wages and benefits levels should address the basic needs of workers"²³.

Involving TNCs in determining the minimum wage is completely irrelevant to human rights standards. Indeed, the minimum wage has to be negotiated within the right to freedom of association. Therefore, it is crucial to include the right to freedom of association and collective bargaining in the codes of conduct.

Health and safety

The right to health and safety in the workplace is stated in the Covenant on Economic, Social and Cultural Rights at Article 7 paragraph b. This right does not appear in the ILO Declaration on Fundamental Principles and Rights at Work. However, according to the ILO, roughly three-quarters of all codes contain provisions on occupational safety and health. Among the most active sectors are the chemical industry and the TCF, transport, mining, commerce, postal and toy manufacturing sectors. Most of the codes of conduct autodefine the right to health and safety at work. It seems significant that these standards are autodefined as their implementation depends on the particular sector. Most importantly, such autodefinition is aimed at pursuing a general goal relevant to the ICE-SCR. Hence, Shell states that it has to promote "good and safe conditions at work", UNOCAL states that it has to "maintain a safe and healthy workplace". By referring to this general goal, the codes of conduct do not refer to the national law where their activities are located. However, despite the fact that

²² *Johnson and Johnson our Credo*.

²³ Dayton Hudson Corporation, standards of vendor engagement.

the right to health and safety is not interpreted in the ILO Declaration, it is easy to understand that by implementing these rights, TNCs are not interfering with State sovereignty. Indeed, since TNCs use exactly the same formulation as that used by the ICESCR, there appears to be no conflict of interest.

Moreover, by being involved in the implementation of this human right, TNCs may be involved in the potential widening of its scope. If it is, the right to health and security at work may be considered as an inalienable human right directly applicable by TNCs.

i. b) Civil and political human rights

There are not many codes of conduct dealing with civil and political human rights standards. The right to freedom of conscience and freedom of expression appear in some codes. For instance, the Maquiladora standards for business states that companies "will not engage in employment discrimination based on [...] political belief". The right to participate in public affairs is provided by the Principles of Caux which state that the companies have to "respect the democratic institutions as much as possible and promote them everywhere".

At first glance, the paucity of the private sector initiatives relating to political and civil human rights indicates that TNCs tend to be uninterested in their implementation. In fact, it is more likely that TNCs are used to being urged not to get involved in political issues, particularly since it may interfere with domestic affairs. Moreover and from a legal point of

view, the international formulation of these rights is not directly suitable to TNCs. Hence, these rights need to be reformulated to be relevant to the activities of TNCs. However, this reformulating standards must be realised with circumspection to ensure adherence to the spirit of the UDHR, and avoid replacing State initiatives.

However, TNCs can implement the right to leave a country and the right to found a family via private programmes. The formulation of these rights may be integrated into their initiatives so as to reinforce the direct application of human rights. Yet, it remains to be determined whether these initiatives will comply with international law. Thus, a problematic question to bear in mind is whether the WTO legal system will apply to these private initiatives, and if so, whether they may lead to possible trade distortions.

ii) The legality of business ethics

It has been argued that social labelling mechanisms may lead to private protectionism, since the social label distinguishes between labelled and non-labelled products. The same risk faces codes of conduct, since a company which publicises its code might be discriminating against, positively or negatively, in contrast to one which does not. This potential risk is subject to the growing sensitivity of consumers towards conditions of production. For example, a recent study undertaken in the United Kingdom points out that more than 30 % of consumers agree to support the boycotting of a company which has been denounced for its inadequate human

rights practices²⁴. In many ways, protectionism is prohibited by the WTO legal system as a result of the fundamental non-discrimination principle. Therefore, a further issue to be addressed here is whether the scope of the non-discrimination principle provides a legal basis on which to control the trend of protectionism perceived to be present in the private sector codes. A final issue to consider is whether these initiatives are addressed by the new WTO Agreement on Technical Barriers to Trade.

With these legal issues in mind, we shall explore how social labelling mechanisms and codes of conduct comply with the WTO legal system, particularly with regard to the non-discrimination principle. Also, we shall consider how private sector initiatives can be linked to the WTO Agreement on Technical Barriers to Trade

ii. a) Compliance with the WTO principle of non discrimination

To begin with, it is necessary to bear in mind that the GATT/WTO Agreements draw a distinction between measures affecting the importation of products and those affecting imported products themselves.

Private sector initiatives do not affect the importation of products, that is, the actual reception of products into the importing countries. However, private initiatives do affect internal sale. This

distinction is purposely foreseen by the national treatment clause of Article III of the General Agreement, which is one of the manifestations of the non-discrimination principle.

The first sentence of Article III, § 4 reads as follows:

the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than the one accorded to like products of national origins in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Regarding the concept of like products, the private sector initiatives apply not to the final product but to the processing of the product. This distinction has already been made in the Tuna GATT Case, in which the GATT panel purposely stated that the principle of national treatment "calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation"²⁵. There are two ways of distinguishing products on the basis of their conditions of production : either their entitlement to the social label or their production within the criteria of a code of

24 Hines C. Worcester, R.M Mory Business in the Community, UK, 1998, Report of survey of attitudes of UK public and business managers to the need for corporate social responsibility and ethical standards in business.

conduct. However, this distinction cannot infringe the application of the WTO principle of national treatment. Of course, this assumption is no longer valid if the social labelling programme, or code of conduct, is regulated, directly or indirectly, by governments.

Indeed, social labelling programmes or codes of conduct, regulated by governments, infringe WTO rules if they discriminate between producers who have a certificate which proves that their production respects human rights standards, and those who do not. WTO Member States may not bring complaints against other Member States on the basis that their increased competitiveness is due to a lack of strict labour rights. However, one could argue that business ethics provides a medium for retaliation, whereby standards set by western TNCs enables them to compete with developing countries that cannot match the same level of human rights protection. Human rights standards are therefore accused of providing a disguise for post-colonial protectionism. This is one of the main fears of developing countries. These concerns have influenced the WTO to consider private initiatives as potentially incompatible with their international trade rules.

Therefore, to avoid initiatives being rejected altogether, it has been argued that including them into the Agreement on Technical Barriers to Trade (TBT) would allow them to continue, whilst ensuring that they avoid becoming private forms of protectionism.

ii. b) Compliance with the Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement, which replaces the Tokyo Round on Technical Barriers, covers two different types of potential barriers to trade: technical regulations and standards. As laid down in the Preamble to the Agreement, labelling requirements are considered to be an example of regulations or standards. A technical regulation is defined as a "document which lays down product characteristics or their related process and production methods, including the applicable administrative provisions, with which compliance is mandatory". Therefore, if the codes of conduct or the social labelling mechanisms are supervised by governments themselves and are compulsory, they could be subject to these technical regulations.

A standard, on the other hand, refers to a "document approved by a recognised body, that provides for common and repeated use, rules, guidelines or characteristics for products or related process and production methods, with which compliance is not mandatory". The bodies relevant to this disposition are not necessarily governmental institutions, as private institutions can also be appointed to regulate standards. Thus, in its definition of standards, the TBT Agreement may allow NGOs to have a legal role under WTO regulations.

A second distinction drawn by the TBT Agreement is worth noting: only

25 GATT Panel Report, United States: Restrictions on Imports of Tuna, Tuna II, GATT. Doc.DS29/R, §5-§8.

standards referring to "characteristics for products or related process and production methods" are covered by the Agreement. Consequently, as far as human rights standards are concerned, those which are related to work conditions can be considered to be part of production methods. Social labelling mechanisms thus appear, at first glance, to be relevant to the concerns of the TBT Agreement. According to Article 2.2, in order to avoid unnecessary obstacles to international trade :

Technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; the protection of human health or safety, animal or plant life or health, of the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products.

With regard to social labelling initiatives, the question arises whether the non-fulfilment of the requirements of products would actually create a risk to importing countries. Excepting the controversial rise in unemployment of the importing countries, there is no particular risk presented by the non-fulfilment of the international human rights standards. Therefore, it cannot be said that the TBT Agreement is clearly applicable to private sector initiatives.

The involvement of the Dispute Settlement Body in a legal interpretation of the scope of the TBT is therefore required in order to determine if the inclusion of the private sector initiatives into the TBT Agreement is possible or not. By interpreting the scope of the TBT Agreement to include the social labelling mechanisms, the Dispute Settlement Panels would not be creating new legal obligations for the WTO members. This is crucial as long as the process of creating new obligations for States through interpretation is forbidden by the WTO Agreement.

Moreover, the inclusion of the social labelling mechanisms within the scope of the TBT Agreement would not oblige TNCs to implement international human rights, but it would encourage them to do so. Such an inclusion would preclude the possibility of TNCs from being accused of protectionism at the expense of the developing countries, which WTO rules and guidelines would not tolerate. The TBT agreement anticipates that labelling programs refer primarily to those international standards which are applicable to the domain envisaged by such programs. Therefore, the inclusion of the private social initiatives in the TBT agreement would encourage the private enterprises involved in such initiatives to implement international human rights standards.

Having established that the inclusion of social labelling in the scope of TBT would prevent private sector initiatives from developing a new form of private protectionism, this study has to now determine which mechanisms allow NGOs and TNCs to comment on

the WTO. This question will be answered in part two, which attempts an analysis of the legal mechanisms which allow those private sector initiatives to be considered as legally binding.

Therefore, legally binding international mechanisms - if they exist - permitting the direct application of human rights to and by TNCs must be identified.

II. How Is Direct Application of Human Rights Standards to, and by, TNCs Legally Binding

As was noted in the introduction, the law of foreign investments is the only domain where the legal reality of the TNCs can be regulated.

The concept of foreign investment (FI) is linked to the production process. In simple terms, FI means that capital, which is one of the factors of production, is located in certain countries and owned by entities from a different country. The involvement of various States, developed and developing countries, explains why the regulation of investments was extremely controversial. Developing countries saw investments as a term of neo-imperialism, whereas the developed countries' conception of investment law was that it served essentially to protect their investors.

These days, FI is being seen as beneficial for economic development and thus, the controversy surrounding it

is being reduced by a common economic interest. While developing countries see FI as a means of obtaining capital to advance their aspirations of a better standard of living, developed countries seek to encourage the former to provide some insurance against the inherent economic and political risks of FI.

Increasingly, the political risks include the respect of core labour standards by the host State. For instance, the United States mechanism of insurance and guarantee of the American investments (which is conducted by the Overseas Private Investment Corporation, hereafter referred to as OPIC) requires *inter alia* the involvement of the host State in the protection of internationally recognised workers' rights.

Currently, no real consensus has emerged, especially at the multilateral level, on a new policy with respect to foreign direct investment.

Within the WTO, it is yet to be decided whether investment law - which is in a formative period - will be included in multilateral trade regulations. Therefore, the link between human rights and the activities of TNCs has to be considered as a priority in the investment law field.

However, international investment law does not cover all the TNCs activities. For instance, the relations between TNCs and their sub-contractors has traditionally been excluded from its scope.

Private sector initiatives are different from investment law because their

scope is broader than that of investment law. Indeed, codes of conduct and social labelling concerns affect the parent company, subsidiaries and the subcontractors. Therefore, investment law and business ethics have to be considered as complementary since they can produce legally binding obligations on the TNCs, which are regarded as global economic actors.

Accordingly, it is to be determined firstly whether and if so, how investment law can provide a legal framework of direct and legally binding application of human rights standards to TNCs. Secondly, how may private initiatives be synthesised so as to produce a new legally binding and private implementation of human rights standards?

A. Legal Mechanisms of Direct Application of Human Rights Standards to TNCs

Before studying the legal possibilities of linking human rights standards to the multilateral regulation of FI, it is useful to explore how bilateral and regional FI regulation integrates the protection of human rights standards. To the extent that multilateral FI regulation would certainly be inspired in many ways by FI bilateral and regional regulation, this question is particularly relevant.

Inclusion of general human rights standards in bilateral investment treaties

Bilateral investments treaties (BITs) used to be considered important largely because of the lack of a multilateral treaty aimed at the FI regulation.

According to data collected by the International Centre for Settlement of Investment Disputes, over 700 bilateral investment treaties have been concluded since 1959 by some 140 countries²⁶. These treaties now cover all the major geographic regions of the world, dealing with such matters as the treatment and expropriation of investment flowing between the two parties to the treaty, currency transfers and the settlement of disputes arising out of such investment, as well as the admission of FI into the respective States²⁷.

Moreover, BITs have exerted great influence over the approach that the international community is taking towards the issue of FI admission.

Virtually all the BITs contain provisions on the standard of national treatment. The national treatment standard means that host State have to accord to each investor the same treatment as they accord to their own national enterprises. Therefore, if the host State does not incorporate human rights standards in its national legislation, investors, consequently, do not have to implement them.

26 Stevens and de Alwis, "References on Bilateral Investment Treaties", in *International Centre for Settlement of Investment Disputes Review, Foreign Investment law Journal*, 1992, at p. 229.

27 Ibrahim F.I Shihata, "Recent trends relating to entry of foreign investment, in *International Centre for Settlement of Investment Disputes Review, Foreign Investment law Journal*, 1994, at p. 55.

However, BITs used to state that the national treatment standard may be applied by host countries without prejudice to its right to maintain public order and protect its essential security interests.

Thus, general human rights standards may be analysed in relation to the concept of public order. In other terms, the host country can subject national treatment to the condition that the FI respect human rights standards, based on public order. However, this assumption is not pertinent if the host State requires foreign enterprises to respect human rights standards when its national enterprises are not obliged to implement them.

Moreover, it might be argued that even if each State must inevitably be the judge of what is necessary for the protection of its public order, the protection of core human rights standards can be seen as an international public order commonly accepted by many States.

However, the *World Bank Group Guidelines on the Legal Treatment of Foreign Direct Investment* make it clear that public order should not be lightly invoked to bar admission to foreign investment.

In fact, the concept of international public order can be used in more positive terms by asking FI to respect national legislation as well as the international human rights standards they have to respect in their parent compa-

ny's country. Unfortunately, this kind of provision made by host countries is very rare in practice.

The only example we have found of such one exception, framed in such broad terms as relating to national security and public order, is stated in the Foreign Investment law of Moldova:

[FIs] may be made in all branches of the economy of Moldova provided they do not violate State security interests, norms of antimonopoly legislation, norms for the protection of the environment and moral norms²⁸.

Inclusion of human rights standards in bilateral investment law may also come from the home country's FI.

For instance, the Overseas Private Investment Corporation is an important precedent of the link between the FI and the protection of human rights standards, and more precisely of the internationally recognised workers rights.

The main purpose of the OPIC is to enhance US development assistance programs by insuring US investors against political risks in developing countries. Since the OPIC Amendment Act of 1985, OPIC's ability to operate in foreign countries is determined by the workers' rights situation in the host countries. Thus, the new amended

28 Moldova, Law on Foreign Investment of July 24, 1992, at Art.4(1).

act states that

the corporation may insure, re-insure, guarantee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that extend internationally recognised workers rights... to workers in that country.

The US Committee on Foreign Affairs specified that it does not expect developing nations immediately to attain the prevailing labour standards of the United States and other highly developed countries. It is recognised that acceptable minimum standards may vary from country to country. However, the Committee is concerned that the lack of basic rights for workers in many developing countries can be a significant inducement for capital flight and overseas production by US industries²⁹.

Practically, OPIC has already indefinitely suspended insurance, reinsurance, loan guarantee, and direct loan programs for American Investments in Nicaragua, Paraguay, Romania, Chile, and the Central African Republic.

However, the implementation of the OPIC Act is not entirely satisfactory for several reasons.

First, OPIC procedure allows the American executive to suspend OPIC programmes at its entire discretion. Therefore, political considerations can be added to the purpose of promoting workers rights through FI development.

Second, a loss of OPIC assistance as a result of a country's workers rights violations has forced a number of investors to suspend their proposed overseas investments. For instance, when OPIC decided to cease its programs in Chile as a result of that country's labour practices, almost five hundred million dollars of US investment were abandoned by OPIC. This loss of assistance to projects in countries found not to implement the core workers rights may also lead to less protection. Notwithstanding the practices of a foreign country, an exception could be created for investors who voluntarily agree to fulfil the workers' rights referred to in the OPIC statute³⁰. Rather than an outright prohibition of OPIC assistance to FI in countries with poor workers rights records, an oversight process should be developed which ensures that US investors maintain employment standards which fulfil the legislative intent. In this view, the burden should be placed on the American investor to certify that its operation has adopted and implemented internationally recognised workers rights in the workplace. Through such a process, US investors

29 Committee on Foreign Affairs, *Report to Accompany*, H.R 3166, House Report 99-285 at United States Code Congressional and Administrative News, 99th Congress, 1st Session, ed. St Paul West Publishing Company, 1986, vol.3, at p. 2577.

30 James M. Zimmerman, "The Overseas Private Investment and Corporations and Workers Rights; the loss of role models for employment standards in the foreign workplace, in *Hastings International and Comparative Law Review*, 1991, at p. 16.

would become instruments of social change while at the same time enabling domestic industries to expand into the global market.

Yet, OPIC is not directly aimed at the American investors.

Therefore, the OPIC system creates a new form of conditionality aimed at the establishment of the American investors in developing countries. However, OPIC's practice is now evolving towards a tripartite relation between the investor, the host country and the home country. For instance, resulting from effective lobbying by the AFL-CIO, OPIC concluded a trilateral FI guarantee treaty between Hungary, Poland, USA and investors involved in FI. The relevant clause of this treaty reads as follows:

the investors agree not to take action to prevent employees of the foreign enterprise from lawfully exercising their right of association and their right to organise and bargain collectively. The investor further agrees to observe applicable conditions of work with respect to minimum wages, hours of works, and occupational health and safety, and not to utilise forced and compulsory labour. The investor is not responsible under this paragraph for the actions of a government.³¹

It may be argued, however, that the investor is responsible for its *own* actions.

Moreover, the OPIC is required to conduct annual public hearings to afford any person whatsoever, the opportunity to present views as to whether OPIC is complying with the Amendment Act. Several human rights organisations and labour unions have testified before OPIC's board of directors, alleging violations of workers rights and requesting OPIC to cease its activities in offending nations.

Therefore, human rights organisations and labour unions should be urged to use their participation right to ask to OPIC's board to force American investors to respect internationally recognised workers rights, even if the State in which they plan to invest does not perfectly fulfil its legal obligation to respect and insure core workers rights standards.

Apart from the OPIC system, there is no legal mechanism linked to the bilateral investment law which allows investors to participate to the development of human rights standards in their overseas investments.

Therefore, it seems relevant to explore whether regional investment law is more conducive to the direct application of human rights to TNCs.

Inclusion of general human rights standards in regional investment law:
the question of the OECD guidelines

The 1974 UN Charter of Economic Rights and Duties of States provides that each State has the right to regulate

31 Congressional Record, Senate, November 16, 1989, pS15843.

and exercise authority over foreign investment within its national jurisdiction, in accordance with its laws and regulations and in conformity with its national objectives and priorities. It has recently become clear that regional investment law have entailed a reduction of the freedom of host States.

Indeed, in the last couple of years, new regional instruments have emerged that mark a significant change in the multilateral approach to FIs. These new instruments include the North American Free Trade Agreement (NAFTA) and the European Community Statement on Investment Protection Principles in ACP States (EC Statement).

These two regional instruments are characterised by a strong liberal approach towards the question of FI admission. None of them contain human rights provisions related to the conduct of investors.

Despite the lack of any link between regional instruments dealing with the admission of FI and the protection of human rights standards, there is a strong movement towards the human rights protection inclusion in the regional forum related to FI. According to the pending revision of the OECD Guidelines for the Multinational Enterprises, which is part of the Declaration on International Investment and Multinational enterprises, the OECD member countries are undertaking a review process in which human rights are specifically addressed.

According to the present version of the OECD guidelines, TNCs should,

within the framework of the law, regulations and prevailing labour relations and employment practice, in each country in which they operate:

1. Respect the right of their employees to be represented by trade unions and other *bona fide* organisations of employees, and engage in constructive negotiations, either individually or through employer'associations, with such employees organisations with a view to reaching agreements on employment conditions, which should include provisions for dealing with disputes arising over the interpretation of such agreements, and for ensuring mutually respected rights and responsibilities.
2. a) Provide such facilities to representatives of the employees as may be necessary to assist in the development of effective collective agreements;
b) Provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment,
3. Provide to representatives of employees where this accords with local law and practice, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole;
4. Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;

5. In their operations, to the greatest extent practicable, utilise, train and prepare for upgrading members of the local labour force in cooperation with representatives of their employees and, where appropriate, the relevant governmental authorities;
6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects;
7. Implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity;
8. In the context of *bona fide* negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise ;
9. Enable authorised representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorised to take decisions on the matters under negotiation.

Some of these guidelines refer directly to economic and social human rights such as the freedom from discrimination or the freedom to be represented by a trade Union. As regards this latter right, it is worth noting that the first guideline does not refer to the national legislation of the host country. However, it is far from clear whether the OECD agrees on the legality of the direct application by TNCs of the freedom to be represented in trade union even if the host country prohibits its implementation. Indeed, the preamble specifies that the guidelines have to be implemented within the framework of the law of each country in which they operate.

Moreover, concerning the normative value of the guidelines, the fact that each chapter starts with words such as "enterprises should" shows that there is no legally binding effect of the guidelines.

Furthermore, it is expressly stated that the guidelines are voluntary and not legally enforceable.

Therefore, the guidelines have never been as effective as they could have been.

The Conference on the OECD Guidelines for Multinational Enterprises, held in Budapest from 16-18 November 1998, determined the main

areas for revision³². These include: raising awareness of the Guidelines, promoting their use and understanding, improving follow-up procedures and updating the text where necessary. Among the chapters which may need revision, labour and industrial relations, as well as the environment, were most frequently mentioned, but new issues such as human rights were also examined. As regards the legally binding character of the guidelines, it was observed that the voluntary character did not imply a freedom to ignore the Guidelines and that legally binding rules exist in differing degrees. The point was also made that there is a need for internationally accepted standards for corporate conduct. Therefore, from this point of view, the internationally recognised human rights relevant to TNC activities can be considered as an important element of the internationally accepted standards for corporate conduct.

In this light, the participants in the Budapest Conference established that the main function of the Guidelines could be that of a code of codes : a standard to be used as a basis for other instruments. Therefore, it seems particularly relevant to incorporate in this code of codes the human rights standards identified as the core human rights suitable to TNCs and those that TNCs have already integrated in their own initiatives.

Moreover, the revision foresees the reinforcement of the powers of the Committee on International Investment and Multinational Enterprises (hereafter called "the Committee"). The present guidelines simply invite it to hold, periodically or at the request of a member country, an exchange of views on matters related to the guidelines.

The revision also proposes to oblige the State of establishment of the TNC to bring its legislation into conformity with the OECD guidelines. Moreover, the revision aims to widen the role of NGOs by granting them a legal right to object to the TNC conduct. Thus, the revision of the OECD guidelines foresees the establishment of a shared responsibility between the State and the TNC in which NGOs have a role to play.

Therefore, it is crucial for NGOs and TNCs to cooperate with the OECD so as to incorporate the human rights standards identified by the present study in the scope of this shared responsibility.

In addition, it seems particularly relevant for TNCs and NGOs to find other mechanisms which may allow the direct application of human rights to TNCs, if FI regulation is included in the WTO legal system. Indeed, as the OECD is a regional organisation, such inclusion would reinforce the outcome achieved by the revision of the Guidelines.

32 OECD, *Conference on the OECD Guidelines for Multinational Enterprises*, Budapest, Hungary, 16-18 november 1998, Summary of Proceedings, DAF/IME(98)18.

Inclusion of human rights standards into the WTO law

within the WTO in a way which would permit the integration of human rights standards and force the investors to implement them through their overseas instruments.

WTO Members States will decide at the next ministerial conference if the Foreign Investments should be regulated within the WTO. If they agree that WTO is competent to regulate this question, undoubtedly, the WTO fundamental principles, such as national treatment and Most Favoured Treatment (MFT), would be extended to FI.

However, NGOs can influence the negotiations indirectly through their consultative statute within UNCTAD. Indeed, UNCTAD maintains good cooperative relations with the WTO. For instance, the International Trade Center, which is based in Geneva, has been created and supervised by the GATT and UNCTAD since 1964.³⁴ Moreover, UNCTAD is particularly competent on the question of the TNCs regulation.

As we said, the national treatment requires States to allow to investors the same treatment as that which prevails for local enterprises. Moreover, the MFT principle signifies that if a country allows to an investor X a favourable treatment, it must extend equivalent treatment to other investors. The standardisation of these principles would be of great benefit to TNCs and reduce the State's ability to control any negative aspects of the FI. Moreover, it is foreseeable that developing countries would not contest the application of these two principles as they want to obtain as many FIs as possible. Besides, NGOs have no legal status within the WTO, except for the implementation of the TBT Agreement.

Therefore, NGOs and TNCs should cooperate with UNCTAD in order to submit a legal framework to the WTO which allows a direct application of human rights standards to the investors.

Such a legal framework could be based on the concept of *equitable and fair treatment* already applied to FI by certain BITs. According to this standard, States have to complement national treatment by international law when the rules of national law fall short of the requirements of international law. If this standard were to be applied to the hypothetical WTO Agreement on FI,

Therefore, it would be difficult for them to directly influence the negotiations of the future Multilateral Agreement on Investments (MAI)³³

33 The Multilateral Agreement on Investment (MAI) was negotiated within the Organisation for Economic Cooperation and Development (OECD). Ultimately, the Government of French Prime Minister Lionel Jospin announced that France would withdraw from the negotiations within the OECD and prefer to negotiate the MAI within the WTO and in cooperation with the developing countries. On 3 December 1998, there was an OECD official announcement of the end of the negotiations on the MIA.

34 For instance, the International Centre of Commerce published an interesting report on *Strengthening the participation of developing countries in world trade and the multilateral trading system* which illustrates the cooperation between the UNCTAD and the WTO on the subject.

investors would be protected from discriminating measures since host States must accord investors the same treatment than that given to national enterprises. However, they would be obliged to implement general human rights standards relevant to their activities to the extent that national legislation does not incorporate them. It is worth noting that the general human rights standards relevant to the activities of TNCs and that the States have to implement are the ones that do not have to be reformulated to be directly applied to TNCs. Therefore, the relevant human rights are the core ones on which the study focus in its first part (the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the elimination of forced and child labour, non-discrimination and the freedom of association and collective bargaining).

This proposal would allow direct application of human rights standards to and by TNCs which would be satisfactory for TNCs themselves (as they are protected from any governmental measures which threaten the economic success of their overseas operations, and from private boycott), for host countries (as they would not be deprived of benefits following from the FI), and for home countries (as they would protect their investors from the risks) .

Therefore, given that the WTO is an organisation based on the comparative advantages theory and the consensus method for the adoption of multilateral agreements, there is no particular rea-

son why the relevant proposal could not be adopted.

Accordingly, NGOs and TNCs should collaborate with UNCTAD in order to influence the future negotiation of the WTO Agreement on FI, if the WTO decides to work on the FI question at the next interministerial conference.

Apart from this specific proposal, there is an other way to render the direct application of human rights to and by TNCs legally binding. Indeed, instead of linking the human rights with State mechanisms or State fora, a mechanism could focus directly on the TNCs themselves.

B. The codification of private sector initiatives, towards a private and legally binding implementation of human rights standards

There are two major ways to conceive of the business ethics in legal duties for TNCs.

Firstly, codes of conduct and social labelling mechanisms may be taken up by TNCs as unilateral commitments, with or without monitoring procedures guaranteeing correct implementation.

In this case, the binding effect of the TNC commitment is provided by public opinion, i.e. by consumers who would no longer buy products made in conditions not complying with human rights standards.

Secondly, codes of conduct and social labelling can be considered as a global movement providing a core of human rights which are suitable to TNC activities. From this point of view, private sector initiatives must be codified among TNCs so as to create a common commitment.

It is easy to understand that, in the context of globalisation, it is very difficult for a TNCs to commit themselves to implement human rights standards as long as such implementation would raise production costs, and hence put them in a non-competitive position in relation to TNCs which do not implement human rights standards in their overseas activities. The competitive situation thus makes it unfair and perhaps impossible for a company to do morally appropriate things. Only common rules that require all companies to implement human rights standards will be fair and effective.

Therefore, the study will first explore the various forms of implementation of private sector initiatives. The relevant legal question in the case of private sector initiatives is to determine whether the implementation allows third party monitoring. By providing such outside intervention, the private sector initiatives can be considered as legally binding as far as the non-fulfilment by enterprises can produce negatives effects on the sales or the good name of the enterprise as long as consumers are kept informed.

Secondly, the study wishes to determine if it is possible or not to codify all the private sector initiatives to the extent that they contain common provisions.

Such codification would protect TNCs from the negative effects of public denunciation of their productions methods and offer them an opportunity to link human rights concerns to the international competition which occurs between them.

Monitoring of the codes of conduct and social labelling

Most codes of conduct and social labelling mechanisms are monitored by the TNCs themselves. TNCs seem to be very reluctant to allow third parties to inspect or monitor their implementation. The principal monitoring method used for codes of conduct is thus provided by internal management systems. Usually, these systems range from the self-certification of code compliance by subsidiaries or subcontractors, to active monitoring and evaluating processes. According to an ILO study, self-certification can be achieved through written acknowledgements by contractors, suppliers or buying agents, or simply through a contractual provision. In contractual relationships, some enterprises require buyers, or others brokers in a commodity chain, to certify compliance by suppliers.

Active monitoring is undoubtedly more effective than the self-certification. It can be conducted by the enterprise's personnel or consultants, or externally by third parties. However, the involvement of third parties is quite uncommon as TNCs prefer to keep the results of monitoring confidential.

External monitoring is, however, becoming more common, but care must be taken to ensure that third parties are not linked to TNC interests.

Considering the extreme diversity of methods of monitoring, it is important to explore whether standardisation of criteria and procedures relevant to the monitoring of private sector initiatives implementation is realisable.

As the private sector initiatives are not all involved in the same areas, the existent codes of conduct must first be harmonised with a view to a common purpose.

Codification of private sector initiatives
and good faith implementation

Business ethics constitute a subset of conduct and may be defined as customary practices and standards relevant to the private conduct of TNCs.

There are two main levels for these customary practices. First, we can say that there are practices commonly accepted by all TNCs, and second that there is a set of customary practices which depends on the individual TNC's sector activity.

Concerning the first level, it is certain, as we have already demonstrated, that the freedom from slavery or the slave trade, the prohibition of murder and the disappearance, the freedom from torture and other cruel or degrading treatment or punishment, the elimination of forced labour, the elimination of child labour, non-discrimination and the freedom of association and collective bargaining, can be considered as generally accepted principles that all the enterprises can implement. Moreover, the reformulation of these human rights is not required to be suitable to TNCs activities. Furthermore, it

may be added to the list of human rights suitable to TNCs activities, the ones for which a specific formulation is required to be directly applied to and by TNCs (i.e., the right to found a family, the right to leave a country, the right to education, the right to the right to rest and leisure and the right to social security).

Moreover, given the numerous private sector initiatives which deal with the right to health and safety and the right to a fair wage, we can also add these rights to the first level of human rights which do not need to be reformulated. We must repeat that that the concept of a fair wage is different from that of the minimum wage.

Parallel to these human rights, there is a second level of particular human rights relevant to TNCs according to their sector of activities.

For instance, TNCs which are involved in scientific activities may commit themselves to implement the human right to benefit from the protection of the moral and material interests resulting from any scientific production. It is worth-noting that such commitment does not interfere with the sovereignty of the State in which TNCs are localised if the State is member of the WTO. Indeed, such commitment based on Article 15 of the ICESCR complies with the WTO trade-related intellectual property.

To convince TNCs they have an economic interest in human rights implementation, a detailed cost/benefit analysis could be made.

There is a strong presumption among TNCs that an act should not be undertaken unless its benefits outweigh its costs. Therefore, it is desirable to attempt to express all benefits and costs in a common scale or denominator between TNCs.

However, such cost-benefit calculations presume that everything can be expressed in a common measure including things not normally brought and sold on markets. The best illustration is the workers (and their rights) which the ILO has judged not to be exchangeable commodities, even if economic reality points out everyday that labour markets, and hence workers, suffer from the international competition.

Therefore, instead of using cost-benefit calculations, which are not appropriate to human rights, it seems more relevant to link human rights standards to the concept of risk.

Given that the zero-risks level is the only aim, TNCs can implement human rights standards so as to reduce the risk peculiar to their overseas activities. For instance, the common statement that workers have a right to safety and health which is stated in the majority of private sector initiatives can be explained by the concept of risk.

Concerning the other human rights standards, it can be said that, since the development of campaigns by NGOs informing consumers of violations of human rights, the scope for risk has become greater. Indeed, the growing attention given by public opinion to the human rights practices of TNCs constitutes a new issue with which TNCs must deal.

Accordingly, instead of incurring the risk of public denunciation which produces irremediable effects on their profits, and instead of adopting unilateral code of conduct which may put themselves in a non competitive position, it seems relevant for TNCs to commit themselves, but together, to implement human rights standards in countries where they operate.

Moreover, it may be argued, in more positive terms and concerning the internationally recognised human rights standards for which the formulation is suitable to TNCs, that the implementation of these rights, could also help TNCs in the efficient functioning of markets. This is an argument used by the NGOs which participated in the Budapest Conference and also by the OECD experts who conducted a wide study about the connection between the application of core workers rights and the private competitiveness of TNCs.

The TNCs commitment towards the application of human rights standards can take the legal form of a treaty concluded between as many TNCs as possible, which could integrate two levels of provisions.

The first level would be aimed at the direct application of the general human rights which are relevant to any enterprise, whereas the second level would be aimed at the respect of human rights standards particularly relevant to specific sectors of activity.

This treaty would oblige TNCs, due to the good faith principle, to implement their commitments in a manner consistent with the treaty to which they are parties.

Conclusion

- 1 There is a set of core human rights standards that TNCs can legally implement, without reformulating them. These human rights standards are :

the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the elimination of forced labour, the elimination of child labour, non-discrimination and the freedom for association and collective bargaining.

It is possible to add other human rights, for which a reformulation is required before they can be applied by TNCs. These rights include :

the right to found a family, the right to leave a country, the right to education, the right to rest and leisure and the right to a social security.

- 2 Private sector initiatives taken by TNCs confirm the legal nature of the set of core human rights suitable to TNC activities, and add the right to health and safety at work, and the right to a fair wage to the list. Both of these rights do not need to be reformulated to be applied to and by TNCs.

- 3 The direct application of the core human rights standards can be ensured by instruments and mechanisms related to Foreign Investments. Therefore, TNCs and NGOs should be urged to cooperate with OECD, which is particularly interested in revising the Guidelines for Multinational Enterprises, in direct association with TNCs and NGOs. This text is of considerable importance as it represents the only regional instrument aimed, *inter alia*, at the direct application of human rights standards to TNCs. Moreover, discussions should be undertaken with UNCTAD so as to prepare a legal framework related to the direct application of human rights standards to TNCs. This framework should also be proposed to the WTO if its Members-States decide to include Foreign investment in the WTO legal system, at the next Ministerial Conference.

Parallel to these inter-State mechanisms, the legally binding direct application of all human rights standards enumerated in the first conclusion can be provided by a commitment by TNCs to implement human rights standards, for a common purpose. This commitment could take the legal form of a multilateral treaty among TNCs which would oblige them, by virtue of the good faith principle, to implement their commitments in practice.

The Impact of Globalisation on Human Rights - Challenges, Opportunities and Issues to Be Explored by the International Commission of Jurists

*Marco Sassòli*¹

This article aims at discussing some of the issues arising for the rule of law and the protection of human rights from the current trend of globalisation. It presents in particular the programmes the ICJ has devised to meet those challenges, in conformity with its "Cape Town Commitment"² and in order to give it shape and practical meaning. It will furthermore try to launch some ideas on the issues themselves and on possible outcomes of the ICJ programmes.

I The Protection of Human Rights in a Globalised World

New challenges to the legal protection of human rights in the context of globalisation

Several factors that created a new context for the protection of human rights which may render irrelevant some of the traditional mechanisms for protecting human rights and ensuring the rule of law. Such factors include the growing interdependence of peoples and national economies through

the exchange of goods, services, capital, information and persons, driven by technological change and trade and investment liberalisation. This results in the internationalisation of most business activities, accompanied by privatisation policies and the resulting weakening of the regulatory capacity of States, which are traditionally expected to protect human rights. Another factor threatening the traditional human rights protection mechanisms is the growing impact of the behaviour of global economic actors on the enjoyment of human rights by people in the North and the South. Interstate mechanisms which could and should logically take over are still weak, marked by sectoral thinking, or lack sufficient democratic legitimacy.

While this structural effect threatens all human rights, social and economic rights are even more directly threatened by globalisation. Those advocating globalisation point out that

[e]xpanding trade and capital flows, in an appropriate regulatory environment, have generally

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2 For the text of the "Cape Town Commitment" see this issue of the *Review*, at 109.

coincided with strong growth and political stability, especially for those economies which have welcomed liberalisation and technological change.³

This may be statistically correct, but many people have been excluded from, or at least do not share in, the benefits of globalisation. There is, indeed, a growing gap between those who have the necessary capital, mobility or skills to benefit from the global market and those who do not.⁴ Globalisation has led to the rise in the power of non-State economic actors acting within the ever loosening framework of economic liberalism. Intangible market-driven forces are perceived by many as based on speculation for the benefit of a few rather than leading to employment, well-being, and development for the community at large. Poverty and unemployment have devastated the lives of the population of entire regions. Even in the industrialised countries, the social safety net has been weakened by deregulation and austerity policies of governments aiming at improving their position in the face of global competition. The social safety net is simultaneously overburdened by all those who cannot compete with the powerful. The potential consequences of growing inequality at the global level could be catastrophic; they challenge the very

existence of our society and of democratic institutions everywhere.⁵

The question therefore arises whether "the regulatory environment" is really appropriate. Indeed, in the context of globalisation, legislation protecting human rights risks being perceived as "bureaucratic red tape". Those fighting for the rule of law have to take up this challenge and reaffirm the intrinsic values of the rule of law compared with the absence of any regulation. They have to show that existing human rights law remains relevant and provides answers even in a new context. In addition, defenders of human rights must develop solutions for the newly arising problems which are not adequately covered by existing law.

Opportunities for human rights advocacy in the context of globalisation

Globalisation does not only pose new challenges to those promoting human rights and the rule of law; it also offers them new opportunities. Ideas flow more freely and free societies are a fertile soil for the rule of law. International law and international institutions appear as the only possible response to the growing number of

3 World Trade Organization, *Annual Report 1998, Special Topic: Globalization and Trade*, Geneva, 1998, p. 33. On pp. 33 - 46 the *Report* makes a powerful case for trade liberalisation and on pp. 48 - 56 it discusses the impact of trade liberalisation on social cohesion, marginalisation, environment and labour standards, elaborating why trade liberalisation is not the main cause of growing problems in these fields. The *Report* does not, however, discuss factors of globalisation other than trade liberalisation.

4 Cf. Dani Rodrik, *Has Globalization Gone Too Far?* (1997).

5 See for a powerful analysis of the deepening instability of global capitalism John Gray, *False Dawn, The delusions of global capitalism* (1998).

international problems. Global economic actors admit the necessity of strengthening them. Authoritarian regimes lose their ability to shield their populations from the message of universal values. It has become easier to form new networks including those lobbying in the capitals or with international organisations and those working with people directly affected in the field. Global campaigning is possible outside the formal structure of interstate meetings.⁶ In addition, the recent financial crises in Southeast Asia and Russia have confirmed how frail economic liberalisation and development can be in places where there is no rule of law and no respect for human rights. This should encourage human rights NGOs to form new partnerships with global economic actors.

Areas to be explored

In their substantive work, human rights advocates should analyse the effect of globalisation on the rule of law and human rights, and explore ways to promote the latter even in circumstances changed by globalisation using both traditional and new methods of human rights protection. They should in particular:

- a) explore the positive and negative effect of the market on subjective rights;
- b) explore whether and how the values of the rule of law can be directly applied to global economic actors;
- c) explore ways to protect the rule of law and human rights in the context of national privatisation and liberalisation policies and formulate standards;
- d) explore how the relatively efficient dispute resolution mechanisms under international trade and investment liberalisation treaties may and must take international human rights law into consideration;
- e) promote human rights clauses in international trade and investment liberalisation treaties, *inter alia* through NGO participation in the relevant *fora*, which also permits monitoring the activities of organisations active in this field;
- f) assist international financial institutions recommending and supporting law reform programmes, *inter alia* to develop a methodology for assessing the impact of their activities on human rights;
- g) raise awareness in multinational corporations for the rule of law as a prerequisite for sustainable commercial success, so as to create new partnerships involving issues such as the independence of the judiciary, the fight against corruption and the promotion and protection of social and economic rights;

6 A recent example is the role of the Internet in the successful international campaign against a Multilateral Agreement on Investment drafted within, cf. Christian de Brie, "Vers une mondialisation de la résistance, Comment l'AMI fut mis en pièces", *Le Monde Diplomatique*, December 1998, p.21.

h) promote and protect the rule of law for all persons migrating for any reason. Indeed, migrants' rights are a crucial test for the universality and indivisibility of human rights in a globalised world.

What human rights advocates could learn from development and environmental NGOs

NGOs active in the field of the protection of the environment and, to a lesser extent, those working in the field of development have been more successful than human rights NGOs in having their concerns heard and addressed. They started earlier and were much more successful in drawing the attention of public opinion and of States to the implications of globalisation, economic liberalisation and the policies of international financial institutions on the values they seek to protect. Unlike the protection of human rights, the objectives of sustainable development and of the preservation of the environment are explicitly foreseen in the preamble of the WTO Agreement.⁷ At the World Trade Organisation (WTO), environmental NGOs succeeded in having established a committee on environmental questions. No such committee exists for human rights.

The human rights community is still very much perceived as waiting for the State to solve human rights problems. This is contrary to certain global political

and economic trends and inevitably means that the protection of human rights decreases when the regulatory and enforcement capacity of States decreases - as it currently does in the context of globalisation. Environmental NGOs have long explored and found market mechanisms that are able to protect the environment. In contrast, we assume that only the State can protect human rights, including through legislation in the horizontal relations between private actors. The protection of labour rights by free and powerful trade unions in a process of collective bargaining is, however, a traditional example of how (rethought) market mechanisms can protect human rights. Through discussions with economists and representatives of the business community we should therefore try to be creative in finding some possible market mechanisms for protecting human rights. Even if the conclusion is that the protection of human rights belongs to the core prerogatives of the State which cannot be "privatised", this too would be an important outcome.

The importance of dialogue between specialised communities in an interdependent world

Human rights NGOs are not limited to learning from development and environmental NGOs. They also have something to offer. Development NGOs should understand the crucial importance of human rights as a factor of development.⁸ Labour NGOs can

7 See preambular para. (1) of the Agreement Establishing the World Trade Organization of 15 April 1994.

8 See on this already *Development, Human Rights and the Rule of Law, Report of a Conference held in the Hague on 27 April - 1 May 1981, convened by the ICJ*, (1981).

render labour standards more attractive for public opinion by calling them, and linking them to, human rights - a term which sounds (even for neo-liberal ears) much less like bureaucratic, protectionist red tape than "labour standards". NGOs could thus demonstrate that they have a holistic view of the world, while maintaining a focus on their particular concerns and introducing into the global dialogue their own particular approach, knowledge, specialisation and constituency, or (to put it in market terms) comparative advantage.

The same necessity of an increased dialogue and mutual understanding applies even more among intergovernmental organisations, within government administrations and between different parts of civil society. The WTO, the International Monetary Fund (IMF), the World Bank and the Organisation for Economic Co-operation and Development (OECD) have to understand the centrality of human rights and accept them as a fundamental framework for and goal of investment, trade and financial agreements. It is not possible that their policies and dispute resolution mechanisms oblige States to violate their international obligations in other fields, *e.g.* in the field of human rights. Furthermore, as the policy of those organisations is decided by their Member States, it is inconceivable that those same States that promote and protect human rights in the UN Human Rights Commission, the International Labour Organisation (ILO) or by adhering to human rights treaties, would then violate those same rights in the decisionmaking bodies of the WTO or the IMF. A major reason for such a schizophrenic attitude is that

within the State administrations and the diplomatic service, those who deal with "the human rights file" are not the same as those who deal with "the international commerce file". The two communities have little communication or understanding of each other's field, principles and concerns.

The same is also true of the relationship between human rights NGOs and business circles. The latter often declare that human rights are part of their corporate culture and claim that they appreciate the need in every country for a functioning legal system and an independent judiciary. They also assert that they understand that in the long run policies denying social and economic rights will lead to situations seriously undermining an integrated world economy, and a free flow of goods, persons and ideas. When it comes to the daily conduct of business, however, the role of human rights is still unclear to business leaders and they remain to be convinced of the interdependence of all human rights. Conversely, human rights defenders often lack even the most basic knowledge of economics and of the problems and dilemmas faced in conducting business in a context of globalisation.

Discussions between the human rights community and other "communities" such as those involved in development, environment, business and international commercial policy would be productive. Communication that does not involve preaching and preconceived ideas may break down the current compartmentalism in thinking so that each community genuinely understands the concerns, experiences and

ideals of the others. It is through such constructive dialogues between the various parties that new alliances can be formed so that all forces can work towards a better world.

II The Relevance of the Mandate and the Traditional Activities of the ICJ in the Context of Globalisation

The rule of law in the context of globalisation

The mandate of the ICJ is to promote the understanding and observance of the rule of law and the legal protection of human rights around the world.

The ICJ has elaborated a dynamic concept of the rule of law and endeavoured to extend the focus of its activities to the emergence of new challenges and opportunities in the field. Thus, after an initial phase dedicated to defining the rule of law, it has paid particular attention to social, economic and cultural rights, and to the rule of law as a factor of development. At its July 1998 Triennial Meeting and Conference on the Rule of Law in a Changing World, held in Cape Town, the ICJ used the concept of globalisation to reconsider the role of the rule of law and of the ICJ in the context of the new "global village". In this same context the Conference also considered the decline of the State, and the concomitant emergence and rise of powerful global economic non-State actors. Hence, the rapid trend towards a globalised economy was found to affect in particular

economic, social and cultural rights and to have implications on many other aspects of the rule of law. The ICJ, therefore, adopted the "Cape Town Commitment". In this commitment it expresses its intention to develop strategies to defend and strengthen the rule of law with the cooperation of various global actors, including transnational corporations and international financial institutions and trade and investment organisations such as the WTO, the IMF, the World Intellectual Property Organisation (WIPO), the World Bank and regional financial institutions.

The relevance of traditional ICJ programmes in the context of globalisation

The ICJ will have to pay particular attention to the problems resulting from globalisation in all its traditional programmes, i.e. when it promotes the independence of judges and lawyers; advocates the more traditional aspects of economic, social and cultural rights; strengthens the legal framework to fight corruption; combats impunity; strengthens human rights protection through the UN and regional organisations; and assists States and other actors in ensuring legal protection at the domestic level.

Conversely, those traditional programmes are focused on aspects of the rule of law and of the protection of human rights which remain relevant in the context of globalisation, if they do not become even more crucial in an interdependent, globalised world.

a) the promotion and protection of economic, social and cultural rights

Indeed, should national and international policies deny economic and social rights - or for that matter other types of human rights - wars, unrest, dictatorships and the disintegration of State structures will often result. Such situations seriously undermine an integrated world economy, a free flow of goods, persons and ideas, and are improper for most businesses. Therefore, the ICJ will continue to conduct the activities on economic and social rights as defined within the framework of the 1995 Bangalore Declaration and Plan of Action⁹, mainly at the regional level.

b) the fight against corruption

Corruption in one country is not merely an obstacle to economic and social rights and the rejection of the rule of law in that particular country. In a globalised world, it also leads to an improper allocation of resources, constitutes unfair competition, and undermines the readiness of the public and in globally active corporations everywhere to respect the law. Therefore, the ICJ will follow-up on the "Declaration on Corruption" adopted during the March 1998, Regional Seminar on Economic, Social and Cultural Rights, organised jointly with the African Development Bank, in Abidjan. "Recommendation No. 2", in particular, should be highlighted. It recommended that the process towards the drafting of an African Convention against Corruption be initiated with the assistance of the ICJ and a monitoring system

be put in place in the form of an "observatoire". Fraudulent enrichment of public officials will also be the subject of ICJ work in other regions of the world, particularly in Asia. Furthermore, in this endeavour the ICJ will focus on corruption as it affects the judiciary.

c) the fight against impunity

Similarly, impunity corrupts the willingness to abide by the law. The response to international crimes is the implementation of international justice, if necessary, and as a last resort, by international courts. In this context the ICJ, which has been lobbying for the establishment of the permanent International Criminal Court during the last decade, will now concentrate on promoting its statute and assisting in its practical implementation. The ICJ intends to keep as a priority the elaboration and promotion of international instruments to combat impunity, in particular in the case of enforced disappearances, as well as providing redress for the victims of human rights violations.

d) promotion and protection of the independence of judges and lawyers

As for the independence of judges and lawyers, it is precisely the global economic actors who need an efficient, fair and predictable law enforcement system. The lack of an independent and effective judiciary - including in the form of a corrupt judiciary or a judiciary lacking the necessary resources - constitutes a serious disadvantage in

9 Cf. The Review of the International Commission of Jurists, 55 (December 1995), pp. 219 - 227.

global competition for developing countries as well as for countries undergoing transition to democracy. It also deprives them of the possibility of protecting their citizens against violations of national and international law by global economic actors. Hence, the Centre for the Independence of Judges and Lawyers (CIJL) will remain an important actor in promoting and protecting judicial independence well beyond its 20th anniversary - which was celebrated in 1998.

e) strengthening human rights protection through the United Nations and regional organisations

When economic actors, investors, financial institutions, and providers and recipients of information, as well as organised crime, act and think globally, the legal responses and the normative framework can no longer be exclusively national. The rule of law and human rights are either protected everywhere or nowhere. Legislation and implementation mechanisms have to become as global as the phenomena they deal with. ICJ efforts to strengthen the protection of human rights through the UN become more critical than ever. Reactions to globalisation stressing regional, national, cultural, ethnic or religious identities - which may constitute opportunities as well as threats for the respect of human rights - make it more necessary than ever that the ICJ continues to successfully strengthen human rights protection through regional organisations. Because it is based in Geneva, which is the capital of UN human rights activities, the ICJ has always made full use of the fora provided by the UN system to promote

and protect human rights. The ICJ strives to strengthen already existing mechanisms in this field and to promote new ones.

The ICJ is convinced that regional mechanisms can be more aware of the concerns of individuals and go further in protecting them, and has demonstrated this commitment in various instances. For example, it has been involved from the very beginning in the establishment of the African Commission on Human and Peoples' Rights, and will continue to work closely with that mechanism, as well as those at the European and Inter-American levels.

f) ensuring the legal protection of human rights at the national level

Last, but by all means not least, it should not be forgotten that even in a globalised world what matters is not that the rule of law be advocated "up there" but that it be respected, known, and discussed "down here". To remain relevant, the input for seeking solutions in the global marketplace must come from "down here", including from people who do not have access to food and basic health care, let alone the Internet. The rule of law has to be relevant to them, otherwise there will be no rule of law. The ICJ will, therefore, continue its workshops to assist jurists and human rights defenders in reinforcing their domestic systems of administration of justice, its programmes aimed at creating awareness of human rights norms and providing legal services in rural areas, various forms of technical assistance to governments, its field missions, studies, trial observations, inter-

ventions and press statements. It is also only through combining what it learns in its work "down here" with its specifically legal approach and expertise that the ICJ can make its unique contribution to the global thinking on human rights.

III New ICJ Programmes to Promote and Protect Human Rights in a Context of Globalisation

The ICJ is satisfied that its response to the implications of globalisation on the rule of law should not be restricted to the organisation's traditional activities. The possibility of new conceptual and normative responses must be explored, through the following programmes:

Direct application of the rule of law to global economic actors

a) the problem

According to traditional legal concepts, law emanates from States, including international law resulting from inter-State behaviour. The rule of law can, therefore, apply and be effective only in States or at the international level between States. Many participants in current debates on globalisation assume that the rule of law and human rights can only be protected, strengthened and developed by States and inter-State mechanisms, through national and international regulations. They believe, in particular, that such regulations should be strengthened to equal the strength of global economic actors. In the current reality - and pending important normative and institutional developments - this would

mean, however, that some important phenomena affecting people's daily lives would remain out of the scope of the rule of law. It would also mean that rapid globalisation of the international economy renders certain aspects of the rule of law largely irrelevant.

For this reason, the ICJ considers it important to explore ways in which the rule of law and human rights, or at least the values they convey, can be directly applied to and by transnational corporations. Indeed, global economic actors stress that the rule of law and human rights are part of their corporate culture. Such actors understand that they need the rule of law to be commercially successful. The objective of this programme is to determine:

- whether such a direct application is possible;
- which human rights and aspects of the rule of law may thus be applied directly and which of them necessarily require State intervention;
- through which concepts and mechanisms could such a direct application function;
- whether/how existing standards should be reformulated to apply directly to global economic actors.

b) methodology

The ICJ will produce a paper which identifies and explores the problems that are to be discussed. The paper will be presented to senior representatives of transnational companies and adapted accordingly. Subsequently, an interdisciplinary workshop on this subject will be convened which should comprise

human rights experts, representatives of multinational corporations, and interested NGOs and IGOs. Such a workshop will also be a unique opportunity for lawyers in the international business community and lawyers in the human rights community to understand each other's concerns and language.

e) Identification of the human rights applicable to international economic actors

The workshop should first identify which rights are relevant to economic actors. Is it appropriate to distinguish between human rights which can be applied by economic actors as they are formulated in the Human Rights Covenants¹⁰, those which are irrelevant to them¹¹ and those which need reformulating or a reconceptualisation to be directly applied to private actors?¹²

Is it appropriate to distinguish between negative and positive obligations of corporations? For example, can we distinguish between their obligation not to interfere with the exercise of human rights by individuals towards the territorial State, on the one hand, and their obligations as protectors of human rights on the other hand? Can only obligations to abstain from interference be directly applied to economic actors, or also positive obligations to protect and to provide? Can one apply economic, social and cultural rights other than workers' rights to companies?

The workshop will likely find that not all human rights are similarly relevant to all international economic actors. Their significance for an individual company will depend on its field of activities, its strength on the world or national market, and/or its political influence in a given country.

d) Identification of the legal concepts through which human rights can be directly applied to private actors

Once the applicable rights are defined, the question will arise how they can legally apply to private actors. There are, of course, particular human rights which have become part of customary international law or are dealt with in international treaties and oblige private actors to comply with them.

However, most human rights will require a special legal construction to apply to private actors. Should States conclude an international treaty that defines the obligations of transnational corporations? Is it realistic to expect States to conclude such a treaty? Should this treaty define the obligations of international economic actors related to their investments? In which forum could such a treaty be negotiated? In the UN? The WTO? Would it be possible and/or productive to conclude an international convention between States receiving investments, in which those States undertake not to receive investments incompatible with their

10 *E.g.* the right to life, the prohibition of torture, the right to equal pay for equal work or the right to protection of artistic production.

11 *E.g.* the right to a fair trial, the right to free elementary education, the right to a nationality or the right to asylum.

12 *E.g.* the right to freedom of movement, the right to found a family, the right to free choice of employment and the right to social security.

human rights obligations, or in which such investments would be denied the protection of international investment protection procedures?

Another solution would be to apply the identified human rights to private actors through uniform or similar national legislation. Could a model code for such legislation be drafted within the UN, WTO or the OECD? Or should the ICJ make a proposal based on existing human rights instruments and legal thinking?

Another approach would consist of revising the OECD Guidelines for Multinational Enterprises, taking into account that the OECD allows States, transnational corporations and NGOs to participate in such a revision process. This would allow the incorporation into the Guidelines of human rights that are considered to be internationally accepted standards for corporate conduct. The Guidelines would, however, maintain their voluntary character.

Finally, one might consider transnational corporations as being bound by universally accepted customary human rights codified in human rights treaties because of their *de facto* situation as emerging subjects of the emerging transnational law.

*e) enforcement of human rights
against international economic actors*

Once the workshop will have determined how human rights can apply to international economic actors, the question will arise how those obligations can be implemented. Is an explicit human rights policy by every company

useful or necessary? These policies could potentially include an analysis of the company's activities and their impact on human rights, as well as a statement of the measures the corporation takes to avoid or minimise negative effects and to maximise positive effects. Should such policies be made public? Should human rights NGOs be involved in their elaboration? Could audit firms offer specific human rights audits?

Who should verify whether a company complies with its human rights policy? Is a self-verification by the company sufficient if the company agrees to publish the results of the self-verification? Should a company's human rights policy be required to allow an independent audit firm to certify their compliance with their human rights policy?

Which market mechanisms could be envisaged to encourage the respect of human rights by international economic actors? How could the external costs of human rights violations be internalised? Could and should international trade and investment dispute settlement mechanisms or national insurances or guarantee mechanisms for trade or investment deny protection to transnational corporations violating human rights? Could States offer tax cuts and lower social security contributions to those corporations which respect economic, social or cultural rights through active measures (protecting and providing, not simply respecting such rights)? Such tax cuts or other financial incentives could correspond to part of what the State saves in not having to take those protection measures itself. Could

one imagine a national or international tax on the operations or benefits of transnational corporations, depending on their compliance with economic and social rights, the revenue from which would be used to finance national or international programmes to respect and protect economic and social rights? Would such a tax be compatible with the principle of non-discrimination in the WTO agreements?

Could the non-compliance with human rights by an international economic actor be considered as unfair competition under national and international competition laws?

Which is the home state of a transnational corporation? Is the home state of a transnational corporation internationally responsible for said corporation's violations of human rights? Is national legislation relating to the respect of human rights by locally-based transnational corporations abroad violating principles on jurisdiction under international law? Would such legislative trade barriers be outlawed by WTO law?

Would it be useful to ask States to report on human rights compliance by transnational corporations on their territory? Could reports by both the States of incorporation and of operation of transnational corporations improve their dialogue and cooperation?

Would it be possible and useful to hold periodic meetings between all States significantly affected by the operations of every major transnational corporation, representatives of that

transnational corporation, NGOs and affected trade unions?

Can codes of conduct which implement international human rights standards violate the WTO principle of non-discrimination if governments are directly or indirectly involved in their implementation? What if they implement only some human rights? Or what if they go beyond existing human rights standards? Can social or ethical labels permitted by the State be technical barriers to trade? Would the result be the same if they only implement international human rights standards? What if they go beyond such standards?

f) envisaged follow-up

The foregoing list of questions shows the great variety of legal issues which could be discussed in the planned workshop. Its published results will therefore certainly advance the debate on transnational corporations and human rights.

Based on the answers given to the above mentioned questions, the follow-up will consist of

- promoting the suggested concepts and mechanisms ;
- promoting a focusing of regulations in intergovernmental fora on those aspects and rights found to be not suitable for direct application; or
- participating in efforts to reformulate standards to make them directly applicable to global economic actors.

Implication of privatisation and deregulation policies for the Rule of Law

Either in the framework of structural adjustment policies recommended by international financial institutions or to obtain (or retain) an advantage in global competition, several countries in both the developing and developed world have made efforts to decrease and streamline regulations affecting the business community and privatise formerly public enterprises and services. Emphasis has been placed on a reduced role for the State, greater reliance on market forces and a rapid opening for international competition.

Some point out that deregulation often abolishes or weakens legislation implementing and protecting economic, social and cultural rights and that as soon as an activity is privatised, it is no longer subject to the comprehensive principles of the rule of law and human rights applicable to State behaviour. Instead, it is only subject to the much weaker principles applicable to private activities. There is obviously State legislation ensuring the indirect horizontal application of human rights among private actors which will apply, but it is precisely such legislation which is often streamlined in deregulation policies.

Others consider that it is only through such privatisation policies that greater freedom can be gained. They believe that only such policies give people the hope of a life where they can actually enjoy economic, social and cultural rights. In contrast, they argue, in an environment of global competition retaining a State-centred approach will make the State less and less able to

actually guarantee human rights and fulfil its unique core functions. Indeed, all agree that some activities cannot be privatised. There is, however, disagreement on where the right equilibrium lies between freedom and rules.

The ICJ intends to initiate its contribution to this debate with a mission by a multidisciplinary team to an African country and a country of the former Soviet Union, both of which have recently adopted privatisation and deregulation policies. The aim is to analyse the impact of such policies on the rule of law to determine:

- which State activities were privatised and what were the consequences for the rule of law;
- what is the impact of the behaviour of private actors - performing activities formerly implemented by the State - on the effective enjoyment of human rights by the subjects who have become clients;
- which mechanisms and rules of private law existed or were introduced to ensure a horizontal application of human rights on the private actors;
- which of the abolished regulations could be considered as implementing international obligations under human rights treaties and what were the real consequences of such abolition;
- which regulations were replaced by which market mechanisms and what were the real consequences of this change;

- which abolition of regulations strengthened the rule of law and allowed greater enjoyment of human rights.

The ICJ will publish the results of those missions and will, if necessary, make recommendations to the authorities concerned, the new private actors involved, international financial institutions and to donor States.

Based upon the results of the missions, the ICJ considers it necessary to organise in the year 2000 an interdisciplinary workshop to discuss and determine:

- which State activities cannot be privatised from the point of view of the rule of law;
- which regulations are necessary to implement international obligations under human rights treaties, which can be replaced by market mechanisms and which constitute obstacles to the rule of law and the full enjoyment of human rights;
- which aspects of the rule of law and of human rights should continue to apply to different categories of State activities even when they are privatised and what mechanisms and rules of private law must exist or be introduced to ensure such horizontal direct effect.

The ICJ plans to confront some experts of international financial institutions with the country studies described below, elaborate a paper enumerating and exploring the problems to be discussed, and then convene a work-

shop on this subject which should comprise economists, lawyers, civil servants, representatives of the private sector, trade unions, international financial institutions, and interested NGOs and IGOs. The results of this workshop will then be published.

According to the answers given to the above mentioned questions, the follow-up will consist of promoting, if possible in cooperation with international financial institutions, the findings of the workshop and the suggested concepts, mechanisms and rules. The workshop should, in particular, enable the ICJ to provide governments and international financial institutions with technical assistance in this field.

Conclusion

Law has to serve human beings. For this reason it must adapt to new realities - so long as it can influence such realities in favour of human beings. The present author believes that globalisation is a reality which can and must be influenced or regulated to the benefit of human beings.

Globalisation is not unavoidable. It is a choice made by our governments, including those which were freely elected by their peoples. This choice has been influenced by technological developments, but also by the hope that it will benefit all human beings. Those governments were pressured by financial and economic interest groups, but they also had to acknowledge that the old State-centred and protectionist system had not succeeded to free large

parts of humanity from misery, ignorance and injustice.

Although the phenomenon is not unavoidable, it may well have become irreversible.¹³ However, human rights and the rule of law must transcend globalisation and deal with its consequences for the benefit of those affected. International human rights law - reflecting the world - must become more complex, flexible, multidimensional and adaptable to the existence

of multifaceted realities. The rule of law should, however, not give way to relativism so far as defending values is concerned. It should only revise the ways and means with which it defends those values. Through its different programmes, the ICJ is ready to meet the challenge and contribute, with its specific legal and genuinely international approach, to identify some of the new ways of promoting and protecting human rights in the next millennium.

13 On 17 and 18 September 1998 the UN General Assembly held a high-level dialogue on social and economic impact of globalisation and interdependence and their policy implications. The UN Secretary-General summed up the discussions in stating that there was no prospect of reversing globalisation. The representative of Indonesia, on behalf of the Group of 77, called for urgent steps to manage the force of globalisation in order to maximise its benefits and minimise its risks (*cf.* UN press releases GA/9437 to 9442).

The Rights of the Defence in the Law and Practice of the International Criminal Tribunals

Carlos López-Hurtado*

Introduction

This article will review the law and practice of the international criminal tribunals with regard to the rights of the defence. Defence rights are understood as the set of rights the defendant is supposed to enjoy while facing criminal proceedings and are aimed at ensuring a fair trial to him or her. The law and practice of the international criminal tribunals comprise the practice of the two *ad hoc* criminal tribunals

for the former Yugoslavia (ICTY) and for Rwanda (ICTR)¹, as well as the Statute of the future International Criminal Court (ICC)². It will also consider the draft statute for the ICC prepared by the International Law Commission (ILC)³ for the consideration of the UN General Assembly and the Draft Statute prepared by the Preparatory Committee for the consideration of the Rome Diplomatic Conference of Plenipotentiaries (Prepcom)⁴.

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- 1 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Created by UN Security Council Resolution 827 (1993), 3217th meeting, 25 May, 1993, and International Criminal Tribunal for the Prosecution of Persons responsible of Genocide and Other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda during 1994. UN Security Council Resolution 955 (1994), 3453rd meeting, 8 November 1994.
- 2 Rome Statute of the International Criminal Court. Adopted at Rome by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. Doc. A/CONF.183/9.
- 3 Draft Statute of an International Criminal Court, report of the International Law Commission on the work of its forty-sixth session (1994), General Assembly Official Records, Suppl. N° 10 (A/49/10).
- 4 Draft Statute for the International Criminal Court. Report of the Preparatory Committee on the Establishment of an International Criminal Court. UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Doc. A/CONF.183/2/Add.1 14 April 1998.

As the subject is very general and comprehensive this article will limit itself to providing an overview and to discussing the law and practice of the international tribunals with respect to certain rights. These rights include, the right to provisional release pending trial, the right to examine or have witnesses examined and the right to choose legal counsel or have one assigned by the court when indigent.

These subjects will be discussed in the following manner. Firstly, a description of the law and practice of the international human rights judicial bodies will be provided to have an idea of the right under discussion as it stands in the international human rights instruments. Then, a review of the law and practice with regard to these rights in the Statutes and decisions of the international tribunals will be made. Thirdly, an overview of the way the issue is tackled in the Statute of the ICC, and of the ongoing elaboration of the rules of procedure and evidence of the ICC, will be made.

Before starting the analysis, some general considerations are important in order to locate the debate at the appropriate level and avoid a mechanical and uncritical assessment of the law and practice of the international criminal tribunals.

The first consideration stems from decisions of the international tribunals and the work of some scholars⁵. It concerns the relation between the mandate of the international tribunals and the limited means they have to discharge their duties. The ICTY and ICTR are the first truly international criminal tribunals ever set up to try international crimes as defined in international criminal law⁶. However, their effectiveness cannot be compared with domestic criminal courts, especially in that the international tribunals do not have the powers and auxiliary means that national criminal courts normally have. This condition will be very important in the restrictive or wide interpretations the tribunal will make with regard to certain rights of the accused.

A second consideration relates to the law-making role of the international criminal tribunals. Their work constitutes a pioneering effort for ascertaining the content of international criminal law, and for creating and adapting substantive and procedural rules in response to the needs of international justice. The debate about the respect for certain rights of the defence has to be understood as part of the process of production and interpretation of law at the international level and at the junction of humanitarian law and human rights law. In this context, the crucial point will be the weight that is assigned to the caselaw and interpretations given

5 See below decisions on protective measures for witnesses in the Tadic case, and the decision on provisional measures in the Delalic case, among others. See also Abi-Saab, Georges "Droits de l'homme et juridictions pénales internationales. Convergences et tensions" In: *Mélanges Nicolas Valticos* at 245-253.

6 As will be explained below, the trials that took place in the aftermath of the Second World War are not included in this category as they took place before the concept of due process was adequately elaborated at the international level.

by other international bodies and courts in the field of human rights, and the discretion that the judges should be granted.⁷

The third and final consideration is the nature of the international tribunals as amalgam of different legal traditions, especially of common law and civil law. The statutes and practice of the international tribunals constitute themselves a creative exercise that will not always follow rules and principles of one or another system but will try to find its own way. This will lead to inevitable tensions on many occasions.

Having stated these general considerations, the following paper will present a general overview of the rights of the defence as incorporated in the statutes of the ICTY, ICTR and the new ICC. The second, third and fourth parts of this article will focus on the debate about the international tribunals' practice with regard to some rights of the defence. This practice, it is argued, represents, to some extent, a departure from internationally recognised human rights standards that, nevertheless may constitute a step forward in the efforts to find appropriate norms applicable in the new tasks the tribunals are carrying out.

I An Overview of the Rights of the Defence in the Statutes and Practice of the International Criminal Tribunals

The right of the accused to a due process of law involves a set of rights that will guarantee a fair process in the judicial determination of his or her criminal responsibility. It covers the whole process, since the initial affectation of the personal liberty for the purpose of criminal prosecution until the final determination, in appeal or otherwise, of guilt or innocence.⁸ As such it encompasses a group of rights and procedural guarantees which cannot be covered in this article given the limited space provided and its objective. However, a brief account of treaties and other international law instruments relating to the rights contained in the concept of due process of law is necessary to have an idea of their widespread recognition.

The rights of the defence to a due process of law and a fair trial have been recognised in Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), which protect persons from arbitrary arrest and guarantee the right to a fair trial. Likewise, Articles 5, 6, and 7 of the European Convention for the

7 In the Velásquez Rodríguez case, the Inter-American Court of Human Rights pointed out that "the international protection of human rights should not be confused with the criminal justice", recognising in this way the different approach of the international mechanisms for the protection of human rights and the work of criminal courts. Velásquez Rodríguez case, sentence of 29 July 1988, paragraph 134.

8 For an analysis of the due process of law in the International covenant of civil and Political Rights, see Noor Muhammad, Haji "Due process of law for persons accused of crime" In: Henkin, Louis (Ed.) *The International Bill of Rights. The Covenant on Civil and Political Rights*. Columbia University Press, New York. 1981 at 138.

Protection of Human Rights and Fundamental Freedoms (ECHR) and Articles 7, 8, 9, and 10 of the American Convention of Human Rights (ACHR) provide for the protection of such rights.

The rights related to due process of law are not absent from the main instruments of international humanitarian law either. Chapter III of the Third Geneva Convention of 1949, Relative to the Treatment of Prisoners of War (Articles 99-108), as well as Articles 64-76 of the Fourth Geneva Convention Relative to the Protection of Civilians in Times of War, provide for certain guarantees of due process of law to be observed when prisoners of war are tried by the detaining power. Additionally, Article 129 of the Third Geneva Convention as well as Article 146 of the Fourth Geneva Convention accord the right to an impartial and fair trial for those accused of grave breaches of the Conventions. Furthermore, Article 3 common to the four 1949 Geneva Conventions, applicable to armed conflicts of non-international character, prohibits the passing of sentences and the carrying out of executions without previous judgment by a regularly constituted court and without all judicial guarantees generally recognised. Article 6 of the 1977 Additional Protocol II, which is also applicable to armed conflicts of non-international character, spells out these judicial guarantees in a way consistent with Article 14 of the ICCPR.

Many of the guarantees of due process of law have been developed or clarified to a greater extent through the practice of the treaty-bodies mandated to monitor State compliance with human rights treaties. The adoption of non-binding declarations and resolutions by the UN General Assembly and Commission on Human Rights, amongst others, have further developed some aspects of these rights. Among these non-binding instruments, the Universal Declaration of Human Rights stands out for its universal acceptance. The UN Basic Principles on the Independence of the Judiciary and the UN Standard Minimum Rules for the Treatment of Prisoners are also of exceptional importance in providing the rights of a due process to certain vulnerable groups or from the point of view of the administration of justice⁹.

The International Military Tribunals of Nuremberg and the Far East operated in a framework marked by the absence of internationally-recognised standards of due process of law. Their Statutes did not provide all safeguards and guarantees of a due process of law to the accused. The few rights accorded to the accused in Article 16 of the Charter of the Nuremberg Tribunal did not provide the guarantees nor were they fully respected during the trials. It was reported that "evidence by declaration under oath (affidavit), which does not permit cross-examination and is generally inadmissible under common law, was

9 *The Administration of Justice and the Human Rights of Detainees. The Right to a Fair Trial: Current recognition and measures necessary for its strengthening. Final Report prepared by Mr. Stanislav Chernichenko and Mr. William Treat.* Sub-Commission on Prevention of Discrimination and Protection of Minorities. UN doc. E/CN.4/Sub.2/1994/24 3 June 1994 at 13-17.

widely used"¹⁰. Counsel for the accused had limited access to the information in possession of the prosecution. The German defence counsel, who were not trained in cross-examination, faced difficulties in a largely adversarial system. In addition, one accused was tried *in absentia* (Article 12 of the Nuremberg Charter permitted trials *in absentia*), and those convicted were denied the right to appeal¹¹. The little respect for procedural guarantees during these trials were reportedly justified by the need that those responsible for the atrocities during the Second World War should not go unpunished.

In contrast, the Statutes of the two *ad hoc* tribunals contain provisions that recognise the rights of the accused as stated in the major international human rights instruments (Article 20 of the ICTY Statute and 19 of the ICTR). In his report, the UN Secretary-General commenting on the relevant provisions stated that "[I]t is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings"¹². However, the statutes of both *ad hoc* tribunals contain some provisions that were interpreted as qualifying certain rights of the accused, as will be seen below.

The ILC 1994 draft statute for the ICC recognised the rights of the defence although in an incomplete manner.¹³ Some human rights organisations suggested that the final ICC statute should state clearly the applicable human rights law in the preamble or in the introductory articles¹⁴. However, this suggestion was not taken up by the 1998 Prep-com draft nor in the ICC Statute, although many references, to the need not to prejudice or to be consistent with the rights of the accused, were included in various provisions.

The ICC Statute develops, in a very detailed manner, the accused rights of due process in several provisions. Some of them are related to the rights of the accused (Article 67); others to the rights during investigation (Article 55), or the issuing of an arrest warrant against a suspected person (Article 58); others are related to the protection of victims and witnesses (Article 68), and the admission of evidence (Article 69). This set of rules guarantee, to an unprecedented extent, the rights of the accused to due process.

Some remarks can be made as a general assessment of this overview. It can be said that, in general, the statutes of the *ad hoc* tribunals and the ICC Statute reflect the internationally

10 La Rosa, Anne-Marie "A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial" In: *International Review of the Red Cross* Nov-Dec. 1997 No. 321 at 636.

11 *The International Criminal Court: Making the Right Choices*. Amnesty International. July 1997 at 42.

12 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) at 106.

13 See for some criticism from the point of view of human rights organisations: Amnesty International. *Op. Cit.* in note 11.

14 *Ibid.* at 43.

recognised standards of the rights of the accused before international criminal courts, and so recognise the rights and guarantees for the accused to have a fair trial. However, in practice the judges have also to consider the rights and interests of other persons involved in the process as well as to the practical limits of conducting justice at the international level. The respect for the rights of the accused is neither the only preoccupation nor the only priority of the international criminal justice system. This is especially so in the practice of the *ad hoc* tribunals where the need to protect victims and witnesses was included many times in the same provisions guaranteeing the rights of the accused.

If it is true that the statutes of the *ad hoc* international tribunals contain most of the rights of the accused, it is also true that these statutes provided more guarantees to the accused in respect to some parts of the process generally neglected in the international human rights instruments. Article 18 of the ICTY statute and its equivalent in the ICTR statute, for instance, grant the accused certain rights during investigation and the preparation of the indictment. It is worth noting that international instruments, such as the ICCPR, do not contain similar guarantees during the pre-trial stage. Most of the guarantees

in this respect were developed by extensive interpretation of the right to a fair trial in Article 14 of the ICCPR¹⁵. In this area, the set of rights and guarantees provided by the recently adopted ICC statute are by far the most comprehensive ever provided for the accused under any international criminal justice system.

The following sections will describe and analyse, within the context defined above, three defence rights which have been the subject of heated debate due to the way in which they were interpreted or implemented by the two *ad hoc* international tribunals.

II. The Right to Provisional Release Pending Trial

The concept of the right to provisional release pending trial stems from the text of the following instruments as well as from the practice of international judicial or quasi-judicial bodies established to monitor the practice of States that are party to them. Among those instruments are the ICCPR (Article 9(3)), ECHR (Article 5(1)). The UN General Assembly's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁶ (UN Principles on

15 Grote, Rainer "Protection of Individuals in the Pre-trial Procedure" In: Weissbrodt, David & Rudiger Wolfrum (Eds.) *The Right to a Fair Trial*. Springer-Verlag, Germany 1997. at 700.

16 Adopted by the General Assembly resolution 43/173 of 9 December 1988. Reproduced in *Human Rights: A compilation of International Instruments* Vol. 1 United Nations ST/HR/rev.5 (vol.1). See also 1929 Geneva Convention relative to the Treatment of Prisoners of War, which establishes that pre-trial detention of prisoners of war should be as short as possible (Article 47(2)); and Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War, restricting pre-trial detention only to cases where the same measure would be applicable to an accused member of the armed forces of the detaining power or is essential for reasons of national security (Article 103(1)). Humanitarian law then only accepts pre-trial detention not as a rule but a measure restricted to certain circumstances.

Detention), provides in its Article 38 as a general rule that "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial".

The statutes of the two *ad hoc* tribunals do not contain provisions equivalent to Article 9(3) of the ICCPR which states that "...[i]t shall not be the general rule that persons awaiting trial shall be detained in custody...", or other similar rules in the above mentioned international instruments. Article 19 of the ICTY statute and Article 18 of the ICTR statute grant the judge the power to order the arrest of a person the indictment of whom has been confirmed, but is silent on the right of such a person to apply for provisional release pending trial. The detention of persons for investigatory or other purposes is not contemplated in the statutes of the *ad hoc* tribunals since the judges can only order the arrest of a person once he/she has been indicted.

The ICTY Rules of Procedure and Evidence (the Rules) provide in Rule 65(B) that "release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."

The motion for provisional release filed by the accused Zejnil Delalic and the later decision on it may illustrate

how the ICTY has interpreted in practice these rules. This case is elaborated further below.

The decision on the motion for provisional release filed by the accused Zejnil Delalic and later decisions

On 25 September 1996, the Trial Chamber of the ICTY issued its decision on a motion for provisional release pending trial for the accused Delalic.¹⁷ This decision set out a series of guidelines that were to be followed in subsequent decisions on the same matter. As the provisions in Rule 65 of the ICTY are clear the issue did not raise much debate amongst the judges and was adopted unanimously.

The Trial Chamber, in accordance with Rule 65(B), set out four criteria to be met before ordering the provisional release of the accused; three of them are substantial and one is procedural (the hearing of the host country). The Trial Chamber considered these conditions as "conjunctive in nature" and determined that "the burden of proof rests on the defence."¹⁸

The Trial Chamber recognised that international standards view pre-trial detention, in general, as the exception rather than the rule. However, it maintained that shifting the burden to the accused to demonstrate that exceptional circumstances exist is justified by "the extreme gravity of the offences with which persons accused before the

¹⁷ *Prosecutor v. Delalic, Mucic, Delic and Landzo. Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic.* 25 September 1996 Case IT-96-21.

¹⁸ *Ibid.* at 1.

International Tribunal are charged and the unique circumstances under which the International Tribunal operates.”¹⁹ The International Tribunal has neither a police force nor control over the territory in which the accused would reside if released, nor does it have any practical means to bring him back to court should he decide to abscond from justice. If such circumstances occur, the International Tribunal would see the fulfilment of its mandate to facilitate and strengthen peace in the former Yugoslavia, as delayed at least.

The Trial Chamber first considered the factors that may constitute exceptional circumstances. These are: the existence of reasonable suspicion that the accused has committed the crime or crimes he is charged with, his alleged role in the said crimes and the length of his detention.²⁰ In determining the meaning and extent of “reasonable suspicion” the Trial Chamber relied on the jurisprudence of the European Court of Human Rights (European Court). In this line, the Trial Chamber pointed out that the European Court deems detention, on the basis of reasonable suspicion, lawful. In the Court’s opinion, “reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.”²¹ The Trial Chamber found that this definition is substantially similar to that used by the

ICTY in Sub-rule 47(A) and in *Prosecutor v. Ivica Rajic, Review of the indictment Judge Sidhwa, 29 August 1995.*²²

Following the European Court’s jurisprudence the Trial Chamber stated: “the reasonableness of a suspicion justifying arrest cannot always be judged according to the same standards as are applied in dealing with conventional crimes.”²³ However, it also recalled that although interpretations given by other judicial bodies are relevant, “the International Tribunal must interpret its Rules ‘within its own unique legal framework.’”

The Trial Chamber, relying again on the European Court’s jurisprudence, considered that the existence of reasonable suspicion at the time of the arrest is not enough to maintain an accused person in detention. Quoting *Stögmüller v. Austria*, the Trial Chamber said, “the persistence of such [reasonable] suspicions is a condition *sine qua non* for the validity of the continued detention of the person concerned...”. The Trial Chamber thus purported to make a review of the existence of those facts taking into account the new elements and challenging evidence provided by the accused.

The Trial Chamber considered the provision of new evidence on the existence of exceptional circumstances by

19 *Ibid.* at 19

20 *Ibid.* at 21

21 *Ibid.* at 22 quoting *Fox, Campbell and Hartley v. U.K.* 182 E. Court H.R. Series A at 16, 1990.

22 *Ibid.* 23.

23 *Ibid.* 22.

the accused as necessary. Recalling the decision of the Trial Chamber I denying the provisional release of the accused *Blaskic* for failure to provide new evidence to challenge that provided by the prosecutor at the time the arrest was ordered, the Trial Chamber pointed out that, in the case at issue, *Delalic*, unlike *Blaskic*, had provided new evidence, but it remained to be seen whether or not it was sufficient to demonstrate the absence of reasonable suspicion.²⁴ After a detailed analysis, the Trial Chamber concluded that the defence had failed to prove its case and rejected the motion.

In an interesting article Anne-Marie La Rosa considers that the contradiction between the international human rights standards that provide for the right to release pending trial and the provisions of the ICTY Statute and Rules in that regard, is only apparent since the requirement of "reasonable suspicion" for the detention to be lawful under the international human rights instruments is equivalent to the existence of "evidence reasonably to maintain that a suspect has committed a crime under the jurisdiction of the Court", which is a requirement for a judge of the Tribunal to confirm the indictment²⁵. Only then, can the judge issue an order of arrest. In this way La Rosa finds that the practice of the ICTY is consistent with that of other judicial bodies, such as the European Court of Human Rights. Curiously, under La Rosa's reasoning the accused may be able to challenge his detention only when there is enough ground to

challenge the indictment at the same time. La Rosa herself recognises that the

... consequence of the restrictive interpretation of the Chambers is that provisional release can be ordered only in cases where the accused may also seek rejection of the indictment, on the grounds that it does not meet or no longer meets the conditions which authorised its confirmation by a judge of the Tribunal.²⁶

It can be asked why should an accused person seek provisional release if he can effectively challenge the indictment and can, therefore, be definitely released without charges? The Statute of the ICTY does not allow preventive detention of persons under suspicion or for investigation, meaning that only those accused persons whose indictment has been confirmed can be arrested. Therefore, if the indictment is not confirmed or is challenged successfully, the person shall be released immediately. In this context and according to La Rosa's reasoning the accused could challenge his detention only when he can also challenge the indictment.

The general rule seems to be the holding of the accused in detention until the trial, and only upon exceptional circumstances - that requires new evidence similar to that necessary to challenge the indictment - can the accused be released pending trial.

24 *Ibid.* 28.

25 La Rosa, Anne-Marie *Op. Cit.* note 10 at 644-646.

26 *Ibid.* at 648.

Under the doctrine and practice of the international human rights monitoring bodies the right to provisional release applies during the whole period from the detention of the person, for whatever reason, to the commencement of trial²⁷. Even during trial it may not be necessary to hold the accused in detention, having due regard to the gravity of the alleged crime. In domestic courts, the accused is normally denied provisional release for crimes of exceptional gravity. However, what is the exception in domestic criminal justice is the rule for the ICTY. The practice of the Tribunal has been consistent in denying provisional release to all who have requested it, granting it only in cases where the accused is affected by a terminal sickness or his health is severely undermined.²⁸

In the law and practice of the *ad hoc* tribunals the arrest of a person requires the previous confirmation of the indictment by a pre-trial judge. It is therefore more difficult to obtain and provide an additional guarantee that the elements that justify the arrest exist. At the same time, once the person is arrested, his release, even on a provisional basis, is possible only under exceptional circumstances. The *ad hoc* tribunals, the ICTY in particular, seem to apply different

standards from those internationally recognised for the arrest and release of the accused before the commencement of trial. The reasons for this departure are to be found in the nature of the international environment in which these tribunals operate and the crimes that they have to deal with.

The ILC draft statute and the path towards the Rome Statute of the ICC

The problems described above arising from the statutes and rules, as well as from the practice of the *ad hoc* tribunals were not addressed by the ILC 1994 draft as they arose after the ILC produced its draft statute for the ICC. The ILC draft and the Statute of the ICC, unlike the statutes of the *ad hoc* tribunals, do provide for preventive detention without the person being formally indicted. Article 29(2) of the ILC draft provided that "a person arrested may apply to the Presidency for release pending trial." In its comments on this provision the ILC did not consider it necessary to depart from the practice of the international human rights instruments and bodies. However, considering that the charges are very serious, it recognised that "it

27 In this regard see Noor Muhammad, Hajid, *Op. Cit.* note 8 at 141- 144, and Grote, Rainer, *Op. Cit.* in note 15 at 704-708.

28 The Trial Chamber has not only denied provisional release to all accused in the *Celebici* camp trial, but also to those voluntarily surrendered to the Tribunal such as *Blaskic* (April 24, 1996) in whose case it stated "it may order provisional release only in very rare cases in which the condition of the accused, notably the accused's state of health, is not compatible with any form of detention". Consequently, the Tribunal denied release to *Kovacevic*, January 16, 1998; *Kupreskic*, May 15, 1998; *Radic*, July 8, 1998; among others. See Sean Murphy "Progress and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" *American Journal of International Law* vol. 23, 1999 at 77-78 for a general account of this practice.

will be usually necessary to detain an accused who is not already in secure custody in a State.²⁹ The language used by the ILC is thus quite different from that of the *ad hoc* tribunals: the rule is provisional release pending trial although, considering the nature of the crimes and the circumstances, it might well be the case that in general the accused will be held in detention.

The 1998 Prep-com draft and the Rome ICC Statute both contain elaborate provisions on the right of the accused to provisional release pending trial, in contrast to the Statutes and Rules of the Ad Hoc Tribunals and the ILC draft itself. The relevant provisions of the Prep-com draft Statute of the ICC are Articles 58, 59 and 60. Article 58 of the ICC Statute establishes the conditions for issuing an arrest warrant or summons to appear by the pre-trial chamber. Paragraph 1 provides for an arrest order to be issued only if the pre-trial chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court, and it appears that the arrest of the person is necessary. It also provided that the order should be issued upon a prosecutor's application, the latter bearing the burden of providing sufficient evidence to support his request. Moreover, detention may not be ordered if it appears that a summons will suffice. In this regard, the provisions in the Statute of the ICC do not differ substantially from those in the Prep-com draft.

In relation to arrest proceedings in the custodial State, paragraph 3 of Article 59 of the Statute establishes the right of the person arrested "to apply to the competent authority in the custodial State for interim release pending surrender". Paragraph 4 requires these authorities to assess whether, in the light of the gravity of the alleged crimes, there exist urgent and exceptional circumstances to justify interim release.

The same right is accorded to persons under arrest, in Article 60, upon their surrender to the court. Paragraph 1 establishes the duty of the pre-trial chamber to inform the accused of his rights "including the right to apply for interim release pending trial." Paragraph 2 re-states the general rule and requires the pre-trial chamber to examine whether the two conditions set forth in Article 58 for issuing the arrest warrant are still met before taking a decision on the request. The first condition relates to the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. The second relates to the necessity to arrest the person to ensure that he or she will appear at trial, or to prevent him or her from obstructing or endangering the investigation or the court proceedings as well as from continuing to commit the crime. A sound interpretation of these provisions will assert that if either of these two conditions fail, the court shall release the detained person. If the two conditions are met, however, the court shall reject the application for release pending trial.

²⁹ Draft Statute of an International Criminal Court, *Op. Cit.* in note 3, comments on Article 29.

The provisions of the ICC Statute appear to provide a better protection of the right of the accused to release pending trial than that provided by the Statute, Rules and practice of the ICTY. The Rome Statute also reverses the attempt, in the Prep-com draft, to re-introduce detention as a rule in Article 60(2) of the draft. After providing for the right of the accused to apply for provisional release, this provision went on to state that, the person shall be detained unless the pre-trial chamber is satisfied that the person, if released will comply with the two conditions listed above. This provision clearly established release pending trial as an exception to the general rule of detention.

It is worth noting that the Statute of the ICC is silent on the issue of the accused's release during the trial. It should be understood nevertheless that such a possibility exists, subject to the conditions of Article 58. Rule 75 of the Draft Rules of Procedure and Evidence submitted by Australia³⁰ provides for the Trial Chamber to review the order of the Pre-Trial Chamber relating to the release or detention of the accused person. It also provides for a periodic review of its order and at any time on the request of the prosecutor or the accused person. This Rule would make possible for the accused to apply for release even during trial.

A general assessment of the provisions and practice of the International Criminal Tribunals with regard to the right to release pending trial, needs to balance the interest of the arrested person

for his provisional release with the interest of the international community to effectively impart justice. This balance has been carried out in a different way by the law and practice of the ICTY on one hand and the Statute of the ICC on the other hand. While the former makes both the arrest of the accused and his release pending trial more difficult, the latter follows the international standards on the subject, allowing the arrest before the confirmation of the indictment. It seems that the constraints of the international environment and the limited powers and resources of the *ad hoc* tribunals have outweighed other considerations. This environment is marked by the absence of an international police and direct jurisdiction over the territory where the accused would reside if released. The power of the tribunals to seize the accused is mediated by the willingness of the State in which the accused resides to cooperate with the international tribunal.

The right of the accused to release pending trial is based on the prejudice he may suffer from being deprived of his liberty (with social and economic consequences) while his guilt has not yet been established. On the other side, the interest of justice is to ensure the effective appearance of the accused at the trial. These interests need to be balanced in the light of the circumstances and context in which the tribunals carry out their functions: where no or few guarantees exist to ensure that the accused will be present at the trial if released, it will be necessary, in most cases, to hold the suspect or accused in detention prior to and during the trial.

30 *Draft Rules of Procedure and Evidence of the International Criminal Court*. Proposal submitted by Australia. New York 16-26 January 1999. PCNICC/1999/DP.1.

However, this has to be decided with due consideration to the circumstances of the case and without prejudice to the right to seek provisional release as a general rule. While the provisions of the ICC Statute guarantee this right it is not clear whether the international environment where it is going to operate will allow a different practice of the ICC with regard to the right of the accused to release without affecting its ability to effectively impart justice.

III. The Right to Examine or to Have Witnesses Examined

The right to examine or to have witnesses examined is an important part of the right to a fair trial and an element that guarantees the equality of arms for both parties in the process. Article 14(3) of the ICCPR recognises the right of the accused "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The same provision can be found in Article 6(3)(d) of the European Convention.

Article 21 of the ICTY Statute and Article 20 of the ICTR Statute reproduce the accused's right to examine or have examined witnesses as it stands in the ICCPR and ECHR. The practice of the ICTY, however, has departed, to some extent, from that of the monitoring bodies and international human

rights courts. In effect, in the *Tadic* case analysed below, the tribunal permitted the use of anonymous testimony of a witness as valid evidence.

The decision granting anonymity to prosecutor's witnesses in the *Tadic* case

On 10 August 1995, the Trial Chamber of the ICTY issued a decision granting a series of protective measures requested by the prosecutor, among them the withholding of the identities of four witnesses from the accused and his counsel.³¹ A majority endorsed the decision with judge Stephen dissenting in the crucial point of granting full anonymity to the prosecutor's witnesses. The majority's decision was based on Articles 20 and 22 of the Statute of the ICTY and on Rules 69, 75, 79 and 89 of its Rules of Procedures. Below is a brief account of this decision.

In considering the prosecutor's request for protective measures, the Trial Chamber first considered whether in the interpretation and application of its Statute and Rules, the Tribunal is bound by the jurisprudence and interpretation of Article 14 of the ICCPR and Article 6 of the ECHR, and by the opinions of the Human Rights Committee and the European Court of Human Rights respectively. After stating some characteristics of its «uniqueness», amongst them the fact that it is the first international criminal tribunal ever in function, its constitution as an original amalgam of common and civil law traditions and its particular context

³¹ *Prosecutor v. Dusko Tadic Decision on the Prosecutor's motion requesting protective measures for victims and witnesses*. 10 August 1995 Case IT-94-1.

and concerns; the trial chamber concluded:

As such, the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations³².

The Trial Chamber added that amongst the elements of the legal framework in which the provisions of Article 21 of the Statute must be interpreted and applied are the specific "object and purpose" of the International Tribunal and the unique characteristics of the Statute that provides for the affirmative obligation to protect victims and witnesses.³³ Additionally, the majority's decision established a difference between ordinary criminal courts to which the provisions in the ICCPR and ECHR apply and the ICTY itself that is a sort of special tribunal that is, in certain respects, "comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence."³⁴ The Trial Chamber then concluded that "while the jurisprudence of other international judicial bodies is relevant when examining the meaning of concepts such as 'fair trial', whether or not the proper balance is met depends

on the context of the legal system in which the concepts are being applied."³⁵

The Trial Chamber then went on to consider first the issue of confidentiality. After considering the relevant provisions in its own Statute and Rules as well as the practice of other international and national judicial bodies, the Trial Chamber granted by a unanimous vote the measures requested by the prosecutor, namely the non-disclosure of the identities of six witnesses to the public and the press. Additionally, also by unanimous decision, the Trial Chamber granted protection of the privacy of four of the six witnesses and safeguards against re-experiencing their trauma by permitting them to give testimony without a direct confrontation with the accused.³⁶ In every instance, the court emphasised that it was performing an exercise of keeping the balance between the rights of the accused to a public and fair trial and the protection of victims and witnesses.

The decision about confidentiality could be achieved by unanimity because it comported an issue about which little ambiguity, if any, exists in the statute and rules, as well as in the practice of other international judicial bodies. This was not the case with regard to the issue of anonymity sought by the prosecutor in respect to four witnesses. Judge Stephen attached a dissent to the decision.

32 *Ibid.* at 27.

33 *Ibid.* at 26.

34 *Ibid.* at 28.

35 *Ibid.* at 30.

36 *Ibid.* at 50-52.

After a lengthy and careful consideration of norms and practice a majority of the Trial Chamber concluded that the granting of anonymity did not violate the rights of the accused to a fair trial in general and to examine or have examined witnesses against him in particular. In effect, after underlining once again the soundness of a balancing practice between two public interests (paragraphs 55-57), and finding that such balance is required in Article 20 of its Statute, which demands full respect for the rights of the accused and due regard for the protection of victims and witnesses, the majority's decision, quoting *R. v. Taylor*, a case before the English Court of Appeal, stated that any limitation to the rights of the defendant is a matter for the exercise of discretion by the trial judge. The majority added: "Such discretion must be exercised fairly and only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined witnesses against him."³⁷ The majority judges considered that the situation of enduring conflict in the former Yugoslavia constituted "an exceptional circumstance *par excellence*" and, using an anal-

ogy, equated this exceptional situation to those allowing derogation from recognised procedural guarantees within the framework of major international human rights instruments. In the majority judges' opinion there are other factors which are also relevant when considering whether to grant anonymity to a witness or not, drawing from domestic law.

In the majority's opinion: "[a]nonymity of a witness does not necessarily violate this right [the accused person's right to examine or have examined the witnesses against him], as long as the defence is given ample opportunity to question the anonymous witness."³⁸ A series of procedural safeguards can ensure a fair trial when the identity of the witness is not disclosed to the accused. Those safeguards were taken from a case before the European Court of Human Rights, *Kostovsky v. The Netherlands*, the final conclusions of which nevertheless the majority discards as a relevant precedent, since the circumstances of the case were different from the case at issue.³⁹ In the opinion of the majority

37 *Ibid.* at 60-61.

38 *Ibid.* at 67.

39 *Kostovsky v. The Netherlands*, European Court of Human Rights, 20 of November 1989, Series A n° 166. In this case two examining magistrates and a police officer received the statements of two anonymous persons during the pre-trial stage without the presence of the accused and his counsel. Although the latter were informed and given the opportunity to submit written questions to one of the anonymous persons indirectly through the examining magistrate, the nature and scope of the questions were limited to preserve the anonymity of the author of the statement. These statements were later presented at the trial and accepted as evidence but the authors of those statements were not presented at the trial hearing and could not be observed by the judges of the trial court. Additionally, the examining magistrates themselves did not know the identities of the persons making the declarations. The European Court observed that "In this circumstances it cannot be said that the handicaps under which the defence laboured were counterbalanced by the procedures followed by the judicial authorities" (paragraph 43). Finally, the Court concluded that in these circumstances the constraints to the rights of the defence were such that Mr. Kostovsky cannot be said to have received a fair trial.

"according to the European Court of Human Rights, certain safeguards built into the procedures followed by a court of law can redress any diminution of the rights to a fair trial arising out of a restriction of the right of the accused to examine or have examined witnesses against him."⁴⁰ Those safeguards, in the majority's opinion, are the following

Firstly, the judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony... Secondly, the judges must be aware of the identity of the witness, in order to test the reliability of the witness... Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts...⁴¹

Finally, the majority of the Trial Chamber considered each case individually taking into account the factors that may justify the granting of anonymity to the prosecutor's witnesses. It ended up by granting anonymity to four of them.

The foregoing decision was met with strong criticism from scholars and practitioners, especially from those with a common law background. The criticism follows, in general, the terms of Judge Stephen's dissent.

Judge Stephen considered first whether the Statute and the Rules of the ICTY allow the granting of anonymity to witnesses. In his opinion the Statute assigns different weight to the need to respect "unconditionally recognised standards regarding the rights of the accused" and the quite distinct need "to ensure the protection of victims and witnesses." He discards any balancing of interests where the overriding obligation to respect the rights of the accused is affected. The accused's right to examine witnesses against him would be precluded by the majority's decision to withhold witnesses' identity from the accused and his counsel. This is so because, in his opinion, the "essential purpose of confrontation" is "to secure for the opponent the opportunity of cross-examination."⁴²

Judge Stephen assigned different weight to the jurisprudence of other international judicial bodies. For him, the practice of the Human Rights Committee and, in particular, that of the European Court of Human Rights provide a clear guidance as to the interpretation of the rights of the accused in Article 21 of the Statute of the ICTY. This interpretation, with *Kostovsky v. The Netherlands* as a leading case on the subject, considers the use of anonymous testimony as involving limitations on the rights of the accused which were irreconcilable with the guarantees contained in Article 6 of the ECHR.⁴³

40 Prosecutor v. Tadic, decision on protective measures...*Op. Cit.* note 31 at 69.

41 *Ibid.* at 71

42 *Ibid.* quoting Delaware v. Van Arsdall, 475 U.S. 673, 683 (1986).

43 *Ibid.* quoting Eur. Court H.R., Kostovsky judgment.

In Judge Stephen's opinion non-disclosure of the identity of a witness to the accused is contemplated only in the pre-trial stage and only as an "exceptional measure" (Rule 69), but in no case Rule 75, that permits non-disclosure to the public and to the media, can be construed as permitting anonymous testimony as a way to facilitate the testimony of vulnerable victims and witnesses (Rule 75(B)(iii)). Judge Stephen maintained that such a radical concept would not have been introduced in the Rules by an indirect and ambiguous wording, especially after more detailed provisions for non-disclosure to the public and the press had been provided.

Judge Stephen concluded by accepting all protective measures sought by the prosecutor, including the anonymity of some witnesses who were bystanders and whose identity was not necessary for the defence to conduct an effective cross-examination. However Judge Stephen did not accept the granting of anonymity to witnesses whose identities need to be known by the defence for effective cross-examination.

In the event, only one of the witnesses granted anonymity testified without his identity being revealed to the accused. Counsel for the accused,

however, was able to see the witness while testifying.⁴⁴ Two other witnesses testified in direct confrontation with the accused and the fourth was withdrawn. The only witness who testified under protection was not a key witness for rape charges as these charges were withdrawn before the commencement of trial, therefore undermining the case for permitting "anonymity, especially in cases of rape or sexual assault."⁴⁵ The decision in the *Tadic* case constituted the basis upon which the Tribunal granted measures of protection for witnesses and victims in various other cases.⁴⁶

However, the practice of the ICTY with regard to witnesses' anonymity is far from being consistent. In the *Blaskic* case, another Trial Chamber asserted that anonymity of a witness is permissible only until a reasonable time before the commencement of the trial itself,

... from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media... How can one conceive of the accused being afforded an equitable trial,

44 Murphy, Sean *Op. Cit.* note 28 at 84.

45 Professor Christine Chinkin, who submitted an *amicus curiae* to the Tribunal on the issue of witnesses' anonymity supported the granting of such a measure on the basis of the necessity to protect rape victims from the social embarrassment and re-experiencing their trauma while confronting the accused. She also held that these kinds of measures are necessary in order to put an end to impunity of crimes involving rape and sexual violence. See: Chinkin, Christine "Due process and witness anonymity" *American Journal of International Law* vol. 91, 1997 at 75.

46 For instance in the *Erdemovic* case (October 18, 1996) and the trial of the *Celebici* camp. See for references: Murphy, Sean *Op. Cit.* note 28 at 84-85.

adequate time for preparation of his defence, and intelligent cross-examination of the prosecution witnesses if he does not know from where and by whom he is accused?⁴⁷

**The ILC draft statute
and the path towards the 1998 Rome
Statute of the ICC**

The ILC draft Statute, as seen above, does not contain detailed provisions on the subject as they normally are dealt with in the Rules of Procedure and Evidence. Therefore, Article 41 of the ILC draft limits itself to declaring that the accused is entitled to a fair and public trial subject to Article 43 (that envisages protection of victims and witnesses in general terms). It also entitles the accused to some minimum guarantees, among them: "(e) to examine or have examined the prosecution witnesses..."

By contrast, in the ICC Statute,⁴⁸ Article 67 on the rights of the accused and Articles 68 and 69 on the protection of victims and witnesses and on evidence respectively, contain detailed provisions similar in many cases to the rules of the *ad hoc* tribunals. Article 68 (5) permits non-disclosure of evidence or information to the accused when there is a risk of "grave endangerment of the security of a witness or his or her family." But such measures are limited

to "any proceedings conducted prior to the commencement of the trial..." and shall be exercised in "a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." The Statute of the ICC thus seems to ban full anonymity of witnesses that goes beyond the pre-trial stage and is "prejudicial" or inconsistent with the rights of the accused.

Additionally, Article 69(2) establishes that "testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence." Testimony can also be presented by means other than orally, by transcripts or depositions, but the withholding of the identity of the witness is never envisaged.

During the First meeting of the Preparatory Commission for the International Criminal Court in February 1999, the Draft Rules of Procedure and Evidence was submitted by Australia.⁴⁹ Rule 67(a) of this draft states that the Prosecutor shall provide the defence with the names and addresses of witnesses whom the Prosecutor intends to call to testify at trial, and to do so sufficiently in advance of the commencement of the trial to enable the adequate preparation of the defence. With regard to this Rule, the ICTY in a written contribution to the work of the Preparatory Commission "strongly

47 *Prosecutor v. Blaskic, decision on the application of the Prosecutor for protective measures for victims and witnesses*, 5 November 1996. Case IT-95-14-T paragraphs 24-25.

48 The ICC Statute does not represent a substantial modification of the Pre-com draft, keeping the provisions the same number in both documents.

49 *Op. Cit.* note 30.

urges the Preparatory Commission to not make this a mandatory requirement, as this could intimidate witnesses who may be in need of protection."⁵⁰

To conclude on this provision, some remarks are necessary.

First, one can note the difference in the attitude towards the role that the judges can play in ensuring the fairness of the trial. These attitudes are exemplified in the decision on the *Tadić* case analysed above, by the majority on one side and the dissenting judge on the other. While the majority assigns significant room for the discretion of the judge in balancing the rights of the accused and in providing, through the conduct of the whole trial, safeguards for the accused when his rights have been affected in any way, so ensuring a fair trial, the dissenting judge attaches to the strict respect of the rights of the accused the sole guarantee of a fair trial for him. This difference may also reflect a difference of perspective between legal traditions.

Second, the need and possibility of balancing interests and rights of the accused with other contending rights and interests, especially those regarding the victims and witnesses, is a procedural issue of a certain importance. The practice of the ICTY suggests that such a balance is needed to achieve fairness in the trial.

It is likely that the ICC will have to face situations in which the right and

interest of the accused person to know the identity of the witnesses against him so as to be able to carry out an effective cross-examination might comport prejudice to the rights of the victim or the witnesses to privacy and protection. The future judges of the ICC will have to take into account some elements at the moment of taking a decision.

It is undeniable that the granting of full anonymity to witnesses during the trial itself will import a serious limitation of the rights of the accused, thence affecting the principle of equality of arms in the process. It seems that an extreme measure of full anonymity for a witness whose testimony can lead to the conviction of the accused, and therefore the disclosure of his or her identity is absolutely necessary for the defence in order to conduct an effective examination, would constitute a radical limitation on the rights of the accused to examine a witness. If the accused does not know the identity of the witness his possibility of defence is substantively diminished and there is a risk of being convicted by false witness. The ability and the forms of examination can be subject to balance and qualification and anonymity can be granted to unimportant witnesses but full anonymity for an important and direct witness would affect the "minimum core" of the right to examine witnesses.

Following the lines of judge Stephen dissent, some authors consider that the minimum guarantees to which the accused is entitled to should not be the

50 *Contributions of the Chambers of the International Criminal Tribunal for the Former Yugoslavia*. Submitted to the 26 July-13 August 1999, Preparatory Commission on the proposed Rules of Procedure and Evidence for the International Criminal Court. Prepared by the ICC Liaison Committee of the Chambers of the ICTY. Paragraph 30

subject of any qualification or balancing. Further, they argue that derogation from those rights by the majority judges is not possible without an explicit rule or provision.⁵¹ Natasha Affolder, in particular criticises that something "as radical as a derogation provision from 'minimum guarantees' stated in the statute should be inferred with no proof of legislative intent for such an inference." However, the argument of derogation from certain rights does not appear to be explicitly advocated by the majority. Rather, it seems that the majority used the analogy of derogation, that exist under international human rights instruments, to justify the need for a different approach in view of the special characteristics of the tribunal's legal environment and the nature of the crimes it has to deal with.⁵² What is at issue then is the possibility of balancing interests and rights and this concept seems to be widely accepted.⁵³

The case for full anonymity for certain witness does not lack strength. The international tribunal has the mandate to effectively impart justice. The fulfil-

ment of that mandate would be impaired if under the specific circumstances the necessary evidence cannot be presented at the trial. It is worthy to note that many of the crimes under the jurisdiction of the international tribunals are related to serious sexual offences (such as rape and mutilation) against non-combatants in the midst of ongoing armed conflicts. The likelihood that the victims or key witnesses (generally relatives or close persons to the victim) will be willing to testify in a public trial and in front of the accused is little. It is most probable that these kind of victims and witnesses will prefer not to testify to face the social shame and ostracism to which they would be condemned in their communities, not to mention the threats against their own security and that of their relatives. In these cases, schemes of witness and victim protection will be needed in the pre-trial stage, and perhaps also during the trial itself as the threats and risks for the witnesses and victims are likely to persist after the process. However, all measures of protection of witnesses and victims will not be enough when for social, cultural and

51 Affolder, Natasha "Tadic, The anonymous witness and the sources of international procedural law" *Michigan Journal of International Law* Vol. 19, 1998. at 477-478; Leigh, Monroe "Witness anonymity is inconsistent with due process" *American Journal of International Law*, Vol. 91, 1997 at 82. These authors also argue that a new procedural rule has been made the Trial Chamber without having the authority to do so. Affolder maintains that there exists a general principle of law that provide for the right to confrontation. *Op. cit.* at 489.

52 Derogation from the right to a fair trial and the guarantees therein does not appear to be possible as it flows from the debate around the proposal for an Optional Protocol to the ICCPR that would make Article 14 on a fair trial non-subject to derogation. The proposal has not been successful so far since even the UN Human Rights Committee itself considers that some aspects of the right to a fair trial are already non-derogable. See: *The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial. Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/26*. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session. UN Document E/CN.4/Sub.2/1994/26 at 13.

53 Harris, D.J.; O'Boyle, M.; Warbrick, C. *Law of the European Convention on Human Rights* Butterworths, 1995. Page 267. See also: Sunga, Lyal *The emerging system of International Criminal Law*. Kluwer Law International, The Hague, London, Boston, 1997 at 317.

religious reasons the witness does not want any person other than the judges to know his or her identity. In this case, the judges may consider the granting of full anonymity to permit a key testimony to be presented at the trial in the interests of justice and the victim.

Whatever is the final decision, the judges of the international court will have to exercise some discretionary power in dealing with issues related to the procedure and evidence. All situations cannot be anticipated in the Rules nor is it good that that be the case.

IV. The Right to Legal Counsel of One's Own Choice

A third issue for discussion relates to the accused's right to conduct a defence and specifically to his right to have free legal counsel assigned if he or she does not have the means to pay for it. The implementation of this right, recognised without qualification by the statutes of the *ad hoc* tribunals, have raised certain practical difficulties for the ICTR.

Article 14(3)(d) of the ICCPR provides that everybody charged with a criminal offence is entitled in full equality "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does have sufficient means to pay for it."

Similar provisions are stated in the ECHR (Article 6(3)(c)) and the ACHR (Article 8(2)(e)). Dr. Manfred Nowak, Commenting Article 14 of the ICCPR, suggests that the right to have a defence counsel assigned by the court at no cost if the accused does not have the means to pay for it arises only when the interest of the administration of justice is at stake. This, in turn, will depend on the seriousness of the offence and the potential maximum punishment.⁵⁴ Minor offences do not entitle the accused to free legal assistance even if he is indigent. Nowak citing the practice of the UN Human Rights Committee, emphasises the necessity that the assigned legal counsel provides effective representation in the interests of justice.⁵⁵

The Statutes of the two *ad hoc* tribunals contain similar guarantees.⁵⁶

54 Nowak, Manfred *The UN Covenant on Civil and Political Rights*. Kehl am Rhein, Strasbourg, Arlington. Engel 1993. at 259-260.

55 *Ibid.* page 261. See also De Zayas, Alfred "The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" In Weissbrodt, D. (Et. Alt.) *op. cit.* note 14 at 685-686. Of special relevance on the effectiveness and opportunity for assignment of legal counsel are the set of principles in the *United Nations Basic Principles on the Role of Lawyers*, especially Principle 5. Reprinted in the Bulletin of the Centre for the Independence of Judges and Lawyers N° 25-26.

56 Article 21(4)(d) of the ICTY Statute and Article 20(4)(d) of the ICTR Statute both provide the same guarantee as in the ICCPR.

However, the ICTR has faced some practical problems in implementing this right taking into account the particularities of the context in which it has to impart justice. The extreme poverty and the subsequent inability of all defendants to hire their own lawyer, have prompted the Tribunal to adopt a more progressive policy on the assignment of legal counsel that has given rise to hostility from some defendants and lawyers. It has also highlighted the problems and limitations faced by the defence when working in the field of international justice.

The assignment of legal counsel for the accused in the practice of the ICTR

The trial of Jean-Paul Akayesu was plagued by incidents and delays due, in part, to the accused's attitude towards his assigned counsel. Akayesu was first assigned counsel on 10 May 1996, but his first counsel was changed with his consent shortly thereafter when the counsel refused to appear at trial alleging unsettled financial claims between himself and the Tribunal. When Akayesu initiated a nine-day hunger strike, in October 1998, in protest of the registrar's refusal to appoint the counsel of his choice, he had already seen his counsel change three times. The last time he changed counsel was in September 1998, shortly before he was sentenced, at that moment he decided to defend himself without counsel. Later, with the intention of appealing against his conviction he requested the

appointment of a Canadian lawyer but the registry denied the request arguing that a new policy on assignment of counsel temporarily barred the appointment of more Canadian and French lawyers as counsel for the accused.⁵⁷

The case of Akayesu has not been the only one in which different incidents involving the assignment of counsel for the accused indigent have occurred. During the hunger strike carried out by Akayesu other accused persons joined him in solidarity, protesting at the same time against the barring of Canadian and French lawyers. In a letter submitted to the Tribunal the accused detained in facilities at Arusha, requested the President of the Tribunal to put an end to the barring of Canadian and French lawyers and the respect for the right of the accused to have a counsel of his choice. The accused complained that the counsels chosen by the registrar «do not fulfil adequately their mission. To the contrary their lack of interest is manifest and is characterised by their absence at hearings.»⁵⁸

The same decision to bar lawyers of certain nationalities also affected the assignment of co-counsel for the accused Pauline Nyiramasuhuko. The accused, and the Canadian counsel already assigned to her, had requested the assignment of another Canadian lawyer as co-counsel for her defence. The registrar denied the request arguing that the power to appoint co-counsel was entirely at his discretion and that in exercising this discretionary

57 Press accounts in file with the author and with the International Commission of Jurists, Geneva.

58 *Letter to the President of the ICTR from the detained*. 25 October 1998. In file with the author and the International Commission of Jurists (translated from the French language by the Editor).

power he had to take full consideration of certain criteria such as geographical distribution and representation of legal systems in the Tribunal. The incident, which started in August 1997, was the subject of a decision on 13 March 1998, by Trial Chamber I in the following terms.⁵⁹

The decision addressed three issues related to the assignment of counsel to the accused. First, the Tribunal addressed the question as to whether the power granted to the registrar to appoint counsel for the accused indigent is subject to judicial review or is a fully discretionary power of the registrar. The Trial Chamber, recalling its duty to ensure a fair and expeditious trial with due regard to the rights of the accused, as stated in Article 19 of the Statute of the ICTR, considered that the question of the right to legal assistance is subject to judicial review.⁶⁰ The Trial Chamber accepted that Article 15(c) of the Directives on Assignment of Counsel adopted by the Tribunal grants the registrar the power to appoint a co-counsel for the accused when the circumstances so deserve. It also accepted that the registrar has the discretion to appoint a certain individual and not another, but « the exercise of such an administrative prerogative remains subservient to judicial control and review, the aim of which is to ensure that the Directive be respected and that the Registrar makes use his or

her discretionary power in a just and equitable manner.»⁶¹

In the second place, the Trial Chamber addressed the question concerning whether or not, in the present case, the assignment of co-counsel was necessary to fully respect the right of the defence. In this regard, the Trial Chamber stated its agreement «with the Registrar when he says that the terminology used 'in terms of need' (*en tant que besoin*) in effect give to the registrar the discretionary power to decide to nominate, or not, a co-counsel for the accused.»⁶² However, taking into account the gravity of the charges and the complexity of the case at issue, as well as the fact that other co-accused had been already assigned co-counsel, «the Tribunal considers that, in this case, there is a necessity to nominate a co-counsel for the defence of the accused.»⁶³ The Tribunal then instructed the registrar to assign a co-counsel to the accused.

The Tribunal went on to consider a third question, namely, whether the accused has the right to choose the co-counsel assigned to her by the Tribunal. In the case, the defence had argued that, the proposed Canadian lawyer fulfilled the requirements set forth in Article 13 of the Directive and, therefore, there were no objective reasons why he should not be appointed. The

59 *Le Procureur contre Pauline Nyiramasubuko et Arsène Shalom Ntahobali. Affaire ICTR-97-21-T Décision Faisant suite à la Requête en exception Préjudicielle déposée par la défense aux fins de Nomination d'un co-conseil au Bénéfice de Pauline Nyiramasubuko*, 13 mars 1998.

60 *Ibid.* at 4

61 *Ibid.* at 5 (translated from the French language by the Editor).

62 (translated from the French language by the Editor).

63 (translated from the French language by the Editor).

Registrar maintained that those requirements were necessary only for the purpose of being included in the list of available legal counsels but not for being actually appointed. The registrar asserted that he was obliged to take other factors into consideration when assigning counsel for the accused. The Tribunal accepted that «the Registrar is entirely free (*a toute latitude*) to impose internal rules, as long as they would be equitable and just», and that «the right of the accused to a counsel of his or her own choice is equally not absolute.»⁶⁴ Recalling its decision of July 1997 on the *Ntakirutimana* case the Tribunal stated that the same considerations therein were applicable *mutatis mutandis* to the case in question. In the *Ntakirutimana* decision, the Tribunal had determined that:

... an indigent accused person must have the possibility to indicate a counsel of his or her own choice on the list that has been established to this end by the Registrar, ... the Registrar must take into consideration the wishes of the accused, unless he or she has reasonable and well-grounded motives for not accepting the request. In taking a decision, the Registrar will have to also take into account, amongst other things, the resources available to the Tribunal, the recognised competence and experience of the counsel, the criterion of geo-

graphical distribution and equilibrium between the main legal systems of the world, without distinction as to age, gender, race or the nationality of the candidates.⁶⁵

In compliance with the decision the registrar was ready to appoint a co-counsel for the accused Nyiramasuhuko but maintained the criteria of geographical distribution already set out and accepted by the Trial Chamber in the aforementioned decision. The defendant did not accept a counsel assigned by the registrar and filed an appeal of the decision.

In February 1999, the Office of the Registrar of the ICTR published a "Note on Assignment of Defence Counsel" aimed at stating the position of the Tribunal with regard to the right of the accused to a counsel assigned by the Court. The note explicitly states that, according to international law, "there does *not* exist any right to choose a particular individual to serve as appointed defence counsel", and that "the ICTR practice more than complies with the requirements of international law and seeks to the maximum extent possible to meet the wishes of the accused with respect to the assignment of counsel to him or her."⁶⁶

It should be noted that the practice of the international human rights bodies does not allow the view that the

64 *Ibid.* at 15.

65 *Ibid.* at 16 (translated from the French language by the Editor).

66 *Note on Assignment of Defence Counsel*. Office of the Registrar of the ICTR. Arusha 22 February 1999.

67 See in this regard De Zayas, Alfred *Op. Cit.* in note 55 at 685-687.

accused has the right to choose the free counsel appointed to him or her by the Court.⁶⁷ In this respect the practice of the *ad hoc* tribunals constitute a progressive interpretation that allows the accused to choose the counsel to be appointed to him by the Tribunal. This practice has arguably been prompted, by the need to ensure the fairness of the trial and the rights of the defence in a context where, due to the gravity of the charged offences and the nature and costs of litigation before an international system of justice, it is exceptionally difficult for the accused to hire their own counsel.

However, the series of incidents and the Tribunal decisions thereon, have highlighted some key points with regard to the registrar role in the assignment of counsel and the supervisory role of the judges. It has also highlighted the difficulties the defence has to face when working at the level of the international system of justice.

The ILC draft and the ICC Statute

The ILC draft and the Statute of the ICC contain provisions that recognise the international standards on the subject that were stated earlier. The relevant provisions in this context are Article 41(d) of the ILC draft and Article 67(d) of the Statute of the ICC. However, the necessary provisions on assignment of counsel to the accused and the guarantees and facilities for the

independent exercise of the defence at the international level were left to the Rules of Evidence and Procedure of the Rome Statute.

In the first meeting of the Preparatory Commission in New York in 1999, France submitted a written comment on the Australian proposal for the Rules of the ICC Statute. The French document proposes, *inter alia*, the establishment of an "Office of the Defence to the International Criminal Court" that will serve as interlocutor to the organs of the Court on all matters of common interest. The French proposal also suggests the inclusion of detailed provisions in the Rules with regard to the Registrar's power to assign free legal counsel to the accused. The Rules would prohibit the Registrar to refuse to register a counsel in the list for reasons other than those related to his personal and professional qualifications.⁶⁸

On the other hand, the ICTY in its contribution to the work of the ICC Preparatory Commission, stated that «it is quite important for the Rules to provide for an indigent person to be assigned counsel by the Registrar, rather than allowed to *select* a counsel from the list of counsel provided by the Registrar. Indigent persons do not have an unfettered right to counsel by any person of their choice; rather, they have the right to be provided with competent counsel.»⁶⁹ These issues are yet to be resolved by the Preparatory Commission.

68 *Comments on the Proposal by Australia contained in Document PCNICC/1999/DP.1 Working Paper submitted by France. Document PCNICC/1999/DP.3 2 New York February 1999.*

69 *Op. Cit.* note 50 paragraph 25.

Final Remarks

The subject of this article constitutes a point of connection between humanitarian law and human rights law. It reflects the tensions and also the enriching interplay between the two branches of international law. It also calls for further study and reflection on an issue that assumes significant importance as humanitarian law is increasingly operating through judicial bodies. The subject of a fair trial and the rights of the accused, although not totally new for humanitarian law, has however become much more important since the international criminal tribunals came into existence and will be even more important with the new International Criminal Court.

With regard to the issues analysed in this paper, it can be said that they constitute some of the points on which the law-making work and practice of the two *ad hoc* criminal tribunals have departed from standards of human rights law. The reasons for such departures are found in the specific context surrounding their work to fulfil their mandate to impart justice at the international level. The work of the tribunals, essentially a work of creation and development of law, continues its path towards the achievement of standards that will best reconcile the needs and mandate of the international justice on one hand and the human rights of the accused on the other.

Most of the issues analysed in this paper are still the subject of controversy. The Statute of the ICC already contains detailed provisions on matters related to the subject of this article, and there will be no need for more detailed provisions in the text of the Rules that is being prepared. However, although detailed rules in the Statute and Rules of the ICC will help to solve some of the problems, it will be unavoidable to leave to the judges the task of finding the most adequate and fair formula for many of the problems that are likely to emerge in concrete cases. In doing so, the judges will have to exercise their discretion and implement a balancing of interests with the aim of achieving justice. As the ICTY has rightly pointed out: "Explicit provisions in the Rules providing for judicial discretion and judicial authority are of the utmost importance... this flexibility has proved to be a strength of the ICTY in dealing with wide variety of situations coming before a criminal court operating in an international legal environment"⁷⁰.

The practice of the International Tribunals so far has shown that multiple interests are at stake. The interests and rights of the accused are in the first place, but are probably not without qualification. There are other primary interests as well: that of the victims and witnesses and the interest of the international community in a fair and effective justice.

70 *Op. Cit.* note 50 paragraph 10.

Basic Texts

The Cape Town Commitment

Between 20 and 22 July 1998, the International Commission of Jurists (ICJ), in conjunction with the Commission's triennial meeting, convened in Cape Town, South Africa, a Conference on the Rule of Law in a Changing World.

The Conference was inaugurated by the Minister of Justice of the Republic of South Africa, Dr. A.M. Omar, who brought a message from President Mandela recalling with gratitude the contribution of the ICJ to the struggle against *apartheid*. The Conference was also addressed by Archbishop Desmond Tutu who underscored the primordial importance of truth and justice in the liberated, democratic, free, non-racial and non sexist State of South Africa.

The three main topics of the Conference as developed and discussed in the plenary sessions and working groups were: trade and investment liberalisation and their impact on the respect of human rights, threats to universality and emerging concepts of responsibility; and the emerging international judiciary and new challenges to the rule of law. The discussion on these topics was situated in the new globalised context and were examined through the prism of the rule of law as defined by the ICJ in its previous work and fora.

On the issue of trade and investment liberalisation, and their impact on respect for human rights, consideration was given to the following.

- The role of the State and the fora where States interact are changing; large spheres of decision-taking are no longer within the remit of national law and of States, and many of the crucial decisions are now taken by other entities.
- Some functions which used to be carried out through inter-State cooperation, have been taken over by global/regional/privatised actors, whose major characteristic is that they are difficult to hold accountable under international procedures in general, and traditional and established human rights procedures in particular.
- Multilateral trade and investment agreements should be permeated with principles of the rule of law and respect for human rights. It is necessary to ensure that these agreements be subjected to existing international human rights law mechanisms and that the multilateral treaties concluded by States in the context of trade and investment liberalisation do not prevent those same States from fulfilling their international human rights obligations.

- There is an urgent necessity to ensure that international financial institutions operate in conformity with the rule of law. The lack of mechanisms for judicial review of the activities of international financial institutions in order to ensure that they themselves do not, through their activities, contribute to, or encourage, the violation of human rights, poses a challenge to human rights and rule of law organisations such as the ICJ. There is a need for a strategy focusing on the justiciability of the actions of international financial institutions, the accountability of governments, and popular participation.
- Consideration was given to the necessity of developing existing international human rights instruments and mechanisms, so that they can be used to ensure that corporations realise that they also have responsibilities under human rights law. Multinational and transnational corporations must be held liable under criminal and civil law for violating international human rights norms.
- The balance between civil and political rights on the one hand, and economic and social rights on the other, is more than ever threatened. Globalisation has created more insecurities, particularly among marginalised groups throughout the whole world, in the South as well as in the North. However, there are new possibilities for sowing the seeds of economic and social rights, as international financial institutions start to pay attention to the social

dimension of their policies. On many occasions, the Conference discussed and stressed the importance of including human rights clauses or social clauses in international trade and investment agreements.

- The linkage between corruption and the enjoyment of economic, social and cultural rights led the Conference to conclude that fighting corruption ought to be part of the fight for human rights and the rule of law which is central to the ICJ mandate. Legislative and other measures are required to combat corruption and the impunity of its perpetrators.

In considering threats to universality, and emerging concepts of responsibility, participants took note in particular of the following issues.

- A distinction must be drawn between universality and globalisation. Whereas globalisation is developed in one part of the world and spreads thereafter to other parts, universality implies that human rights take their roots from all parts of the world.
- The notion of universality involves respect for difference, diversity and tolerance. However, human rights are universal. The respect for human rights cannot be subjected to issues of social, cultural and economic relativism.

The Conference reaffirmed that the rule of law is an essential condition of both freedom and stability. The main challenges discussed were the problems

of access to the courts and the provision of appropriate remedies and that people must be made aware of the existence of their rights. In this regard, the Conference welcomed the new opportunities created by the emerging body of international criminal law and the establishment of new regional and international human rights tribunals. In particular, the adoption of the Statute for the establishment of the International Criminal Court and of the Protocol on the African Court on Human and Peoples' Rights were welcomed.

Further discussion on the independence of the judiciary took place during the panel discussion which was held on the occasion of the commemoration of the twentieth anniversary of the Centre for the Independence of Judges and Lawyers. This commemoration was launched with an address by the Chief Justice of South Africa, the Honourable Justice I. Mohamed. The Conference examined the status of judicial independence today and recalled that this fundamental constitutional value for a democratic State and for the preservation of the rule of law is yet the most threatened. It reiterated that the independence and impartiality of and equality within the judiciary are those building blocks necessary to the achievement of more equitable societies. The Conference emphasised that accountability constitutes a basic and essential component of every power, including the judicial power. There is a necessity to rely on a system of self-accountability of judges protected by tenure and with a sense of responsibility. The Conference also acknowledged that international financial institutions and civil society are becoming increas-

ingly important actors in creating the appropriate environment for the functioning of an independent and impartial judiciary.

The Cape Town Commitment

Challenges and Action Plan for the ICJ

- i. There is a need for the ICJ to develop strategies for monitoring the activities of the new global actors, in particular, of international financial institutions and trade and investment organisations such as WTO, WIPO, the World Bank, the IMF and regional financial institutions. The ICJ should lobby for and contribute to the drafting of international trade and investment agreements which conform to international human rights standards.
- ii. The ICJ should contribute to raising human rights awareness of Corporations and to the strengthening of existing international human rights mechanisms and instruments to ensure the accountability of Corporations for human rights violations perpetrated as a consequence of their activities.
- iii. The ICJ should link up with other organisations to commence a campaign against corruption and the impunity of its perpetrators by developing normative strategies at the national, regional and universal

levels. Efforts should be made to work closely in this respect with international financial institutions and intergovernmental organisations.

iv. The ICJ should continue to monitor, assist and cooperate fully with the International Tribunals for Rwanda and the Former Yugoslavia in their crucial tasks. Concurrently, the ICJ should continue to work towards the establishment of the International Criminal Court (ICC). In Africa, the ICJ should continue to work closely with the OAU

towards the establishment of the African Court. Campaigns should be launched for the ratification of the ICC statute and the Protocol for the establishment of the African Court.

v. The ICJ and its CIJL should continue their relentless combat for the promotion and protection of the independence of judges and lawyers.

*Cape Town,
Republic of South Africa,
24 July 1998*

Guiding Principles on Internal Displacement

Foreword

The Guiding Principles on Internal Displacement were presented to the United Nations Commission on Human Rights in 1998 by the Representative of the United Nations Secretary-General on Internally Displaced Persons, Francis M. Deng. They identify the rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. They provide protection against arbitrary displacement, offer a basis for protection and assistance during displacement, and set forth guarantees for safe return, resettlement and reintegration.

Although they do not constitute a binding instrument, the Principles reflect and are consistent with international human rights and humanitarian law and analogous refugee law. They have been noted by the United Nations Commission on Human Rights and Economic and Social Council and by regional organisations, such as the Organisation of African Unity and the Inter-American Commission on Human Rights of the Organisation of American States. The Inter-Agency Standing Committee, composed of the heads of the major international relief, development and human rights agencies, has welcomed the Principles, encouraged its members to apply them in the field and is widely disseminating them. The Secretary-General, in his report to the Security Council in 1999 on «Protecting Civilians in Armed Conflict», emphasised the importance

of promoting observance with the Principles in situations of internal displacement.

The Principles were developed over several years by a team of international lawyers under the direction of the Representative. In developing the Principles, the team consulted regularly with UN agencies, regional organisations and non-governmental organisations, including the International Commission of Jurists, which actively participated in meetings to review the Principles, most notably the experts meeting held in Vienna in 1998, hosted by the Government of Austria.

The Guiding Principles should provide valuable practical guidance to governments, other authorities, international organisations and NGOs in their work with internally displaced persons.

Guiding Principles on Internal Displacement

Introduction: Scope and Purpose

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance

during displacement as well as during return or resettlement and reintegration.

2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.
3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
 - (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
 - (b) States when faced with the phenomenon of internal displacement;
 - (c) All other authorities, groups and persons in their relations with internally displaced persons; and
 - (d) Intergovernmental and non-governmental organizations when addressing internal displacement.
4. These Guiding Principles should be disseminated and applied as widely as possible.

Section I - General Principles

Principle 1

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

Principle 2

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

Principle 4

1. These Principles shall be applied without discrimination of any kind, such as race, color, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

Section II - Principles Relating to Protection from Displacement

Principle 5

All authorities and international

actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
 - (a) When it is based on policies of *apartheid*, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
 - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
 - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
 - (e) When it is used as a collective punishment.
3. Displacement shall last no longer than required by the circumstances.

Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimise displacement and its adverse effects.
2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.
3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:
 - (a) A specific decision shall be taken by a State authority empowered by law to order such measures;
 - (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
 - (c) The free and informed consent of those to be displaced shall be sought;

- (d) The authorities concerned shall endeavor to involve those affected, particularly women, in the planning and management of their relocation;
- (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
- (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

Section III - Principles Relating to Protection during Displacement

Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally

displaced persons shall be protected in particular against:

- (a) Genocide;
- (b) Murder;
- (c) Summary or arbitrary executions; and
- (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:
 - (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
 - (b) Starvation as a method of combat;
 - (c) Their use to shield military objectives from attack or to shield, favor or impede military operations;
 - (d) Attacks against their camps or settlements; and
 - (e) The use of anti-personnel landmines.

Principle 11

1. Every human being has the right to dignity and physical, mental and moral integrity.
2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:
 - (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;
 - (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labor of children; and
 - (c) Acts of violence intended to spread terror among internally displaced persons.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

Principle 12

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circum-

stances such as internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.

3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.
4. In no case shall internally displaced persons be taken hostage.

Principle 13

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.
2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

Principle 15

Internally displaced persons have:

- (a) The right to seek safety in another part of the country;
- (b) The right to leave their country;
- (c) The right to seek asylum in another country; and
- (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Principle 16

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
2. The authorities concerned shall endeavor to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
3. The authorities concerned shall endeavor to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
4. Grave sites of internally displaced persons should be protected and

respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

Principle 17

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

Principle 18

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall

provide internally displaced persons with and ensure safe access to:

- (a) Essential food and potable water;
 - (b) Basic shelter and housing;
 - (c) Appropriate clothing; and
 - (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

Principle 19

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual and other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases,

including AIDS, among internally displaced persons.

Principle 20

1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Principle 2

1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:

- (a) Pillage;
 - (b) Direct or indiscriminate attacks or other acts of violence;
 - (c) Being used to shield military operations or objectives;
 - (d) Being made the object of reprisal; and
 - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:
 - (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
 - (b) The right to seek freely opportunities for employment and to participate in economic activities;
 - (c) The right to associate freely and participate equally in community affairs;
 - (d) The right to vote and to participate in governmental and public affairs, including the right to

have access to the means necessary to exercise this right; and

- (e) The right to communicate in a language they understand.

Principle 23

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

Section IV - Principles Relating to Humanitarian Assistance

Principle 24

1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.

2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

Principle 25

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

Principle 26

Persons engaged in humanitarian assistance, their transports and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

Principle 27

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.
2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

Section V - Principles Relating to Return, Resettlement and Reintegration

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to

ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.
2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

International Labour Organization

*C182 Worst Forms of Child Labour Convention, 1999**

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 87th Session on 1 June 1999, and

Considering the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour, as the main priority for national and international action, including international cooperation and assistance, to complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973, which remain fundamental instruments on child labour, and

Considering that the effective elimination of the worst forms of child labour requires immediate and comprehensive action, taking into account the importance of free basic education and the need to remove the children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families, and

Recalling the resolution concerning the elimination of child labour adopted by the International Labour Conference at its 83rd Session in 1996, and

Recognizing that child labour is to a great extent caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular poverty alleviation and universal education, and

Recalling the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, and

Recalling the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, and

Recalling that some of the worst forms of child labour are covered by other international instruments, in particular the Forced Labour Convention, 1930, and the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, and

* Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Note: This Convention has not yet come into force: Convention: C 182, Place: Geneva, Session of the Conference: 87, Date of adoption: 17:06:1999, See the ratifications for this Convention.

Having decided upon the adoption of certain proposals with regard to child labour, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this seventeenth day of June of the year one thousand nine hundred and ninety-nine the following Convention, which may be cited as the Worst Forms of Child Labour Convention, 1999.

Article 1

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term child shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term the worst forms of child labour comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Article 4

1. The types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation, 1999.
2. The competent authority, after consultation with the organizations of employers and workers concerned, shall identify where the types of work so determined exist.
3. The list of the types of work determined under paragraph 1 of this Article shall be periodically examined and revised as necessary, in consultation with the organizations of employers and workers concerned.

Article 5

Each Member shall, after consultation with employers' and workers' organizations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.

Article 6

1. Each Member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour.
2. Such programmes of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organizations, taking into consideration the views of other concerned groups as appropriate.

Article 7

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.
2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:
 - (a) prevent the engagement of children in the worst forms of child labour;

- (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;

- (e) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;

- (d) identify and reach out to children at special risk; and

- (e) take account of the special situation of girls.

3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

Article 8

Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.

Article 9

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 10

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.
2. It shall come into force 12 months after the date on which the ratifications of two Members have been registered with the Director-General.
3. There after, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and acts of denunciation communicated by the Members of the Organization.
2. When notifying the Members of the Organization of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention shall come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with Article 102 of the Charter of the United Nations, full particulars of all ratifications and acts of denunciation registered by the Director-General in accordance with the provisions of the preceding Articles.

Article 14

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.

Cross references

Conventions: (C29) Forced Labour Convention, 1930

Conventions: (C138) Minimum Age Convention, 1973

Recommendations: (R35) Forced Labour (Indirect Compulsion) Recommendation, 1930

Recommendations: (R36) Forced Labour (Regulation) Recommendation, 1930

Recommendations: (R 146) Minimum Age Recommendation, 1973

Supplemented: (R 190) Complemented by the Worst Forms of Child Labour Recommendation, 1999

Constitution: 22: Article 22 of the Constitution of the International Labour Organisation.

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Report of a Regional Seminar on Economic, Social and Cultural Rights, Abidjan, Côte d'Ivoire

*Published by the ICJ in English and French,
239 pp. Geneva 1998, 17 Swiss francs(US\$11.50), plus postage*

This is the report of the regional seminar which was organised in Abidjan from 9-12 March 1998. The seminar was designed as a follow-up to the 1995 Conference on Economic, Social and Cultural Rights and the Role of Lawyers organised by the International Commission of Jurists (ICJ), in Bangalore, India. For most African countries the guarantee of economic, social and cultural rights, as contained in the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), has not been matched with concrete action. Neither the obstacles to the realisation of these norms nor the role of the different actors at the national and regional levels in their implementation have been clearly defined. The aim of the seminar was thus to identify more clearly, the obstacles to the realisation of ESCRs, strategies to overcome them and determine the role of different actors, particularly jurists, in promoting these rights to ensure equitable and sustainable development in Africa. Participants, whose papers are reproduced in this Report, were drawn from the African Commission, the United Nations Committee on Economic, Social and Cultural Rights, intergovernmental institutions such as the ECOWAS and SADEC, multilateral development banks and financial institutions, national and regional NGOs, some members of the legal profession and academia. This report is expected to be of use, *inter alia*, to the various national and regional actors and to the OAU mechanism which will be charged with the implementation of the African Economic Treaty.

Derechos Humanos en México - Misión de la CIJ Human Rights in Mexico - An ICJ Mission

*Published by the ICJ in Spanish and English, 72 pp. Geneva 1999,
12 Swiss francs (US\$8.00), plus postage*

In response to reports from various Mexican and intergovernmental human rights organisations, the ICJ, in agreement with the Government of Mexico, undertook a mission to Mexico in March 1999. The aim was to gather information on the human rights situation, particularly in the Federal District of Mexico and the States of Chiapas, Guerrero and Oaxaca, and at the same time to ensure follow-up on the ICJ mission to Chiapas in February 1994. Although the ICJ mission and report commend Mexico for its efforts to correct situations which violate human rights, they nonetheless denounce the perpetration of multiple human rights violations which affect the right to life, liberty, physical integrity and the security of persons. The active presence in Chiapas of paramilitary groups is also identified by the ICJ as extremely disturbing. Paramilitaries harass and target civilians and enjoy widespread impunity for their actions. The Report's conclusions and recommendations were presented to the UN Commission on Human Rights, the UN Human Rights Committee and the UN Sub-Commission on Human Rights in 1999.