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PROTECTING HUMAN RIGHTS IN A GLOBALIZED WORLD

DINAH SHELTON*

Abstract: The shift in sovereignty accompanying globalization has meant that non-state actors are more involved than ever in issues relating to human rights. This development poses challenges to international human rights law, because for the most part that law has been designed to restrain abuses by powerful states and state agents. While globalization has enhanced the ability of civil society to function across borders and promote human rights, other actors have gained the power to violate human rights in unforeseen ways. This Article looks at the legal frameworks for globalization and for human rights, then asks to what extent globalization is good for human rights and to what extent human rights are good for globalization. It then considers several legal responses to globalization as they relate to the promotion and protection of human rights. This Article concludes that responses to globalization are significantly changing international law and institutions in order to protect persons from violations of human rights committed by non-state actors.

INTRODUCTION

International human rights law aims primarily to protect individuals and groups from abusive action by states and state agents.¹ Recent developments throughout the world, including failed states, economic deregulation, privatization, and trade liberalization across borders—components of what has come to be known as globalization—have led to the emergence of powerful non-state actors who have resources sometimes greater than those of many states.² Two opposing views of globalization and its relationship to human rights have emerged: some see the two topics as mutually reinforcing and positive in improving human well-being, while others view globalization as posing new threats not adequately governed by existing international human rights law.

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¹ See *infra* note 42, et seq.

² See *infra* notes 31–25.

The legal relationship between globalization and human rights can be analyzed from the perspective of economic regulation as well as that of human rights law, examining first whether international economic law sufficiently supports or takes into account human rights concerns, then considering the extent to which human rights law takes into account globalization and economic interests. In respect to both inquiries, the fundamental question is whether a human rights system premised on state responsibility to respect and ensure human rights can be effective in a globalized world.

This Article will discuss the framework of international human rights law and that related to globalization, i.e., international trade, technology, and investment law. It studies the relationship between globalization and human rights, assuming that international society accepts human rights as a fundamental goal and globalization as a generally positive phenomenon. After considering whether or not globalization is favorable to the promotion and protection of human rights, and whether or not the promotion and protection of human rights is favorable to globalization, the Article examines several approaches for the promotion and protection of human rights in the era of globalization: (1) emphasizing state responsibility for the actions of non-state actors; (2) imposing international legal obligations directly on non-state actors, including international institutions, multilateral enterprises, and individuals; (3) encouraging private regulation through corporate codes of conduct, product labeling, and other consumer or corporate actions; and (4) involving non-state actors directly in the activities of international organizations to promote and protect human rights.

The Article concludes that responses to globalization are significantly changing international law and institutions in order to protect persons from violations of human rights committed by non-state actors. To the extent that these changes have brought greater transparency to and participation in international organizations, globalization has produced unintended benefits and further challenges to the democratic deficit in global governance.³ At the same time, an emphasis on subsidiarity and a strengthening of weak states and their institutions may be necessary to ensure that globalization does not mean a decline in state promotion and protection of human rights. To ensure that such strengthening does not lead to further

³ See Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 489 (2001).

human rights violations, the international community should make concerted multilateral efforts to enhance its ability to respond to human rights violations, rather than unleashing each state to control what it views as the sins of the private sector.

I. THE MEANINGS OF GLOBALIZATION

Globalization is a multidimensional phenomenon, comprising “numerous complex and interrelated processes that have a dynamism of their own.”⁴ It involves a deepening and broadening of rapid transboundary exchanges due to developments in technology, communications, and media.⁵ Such exchanges and interactions occur at all levels of governance⁶ and among non-state actors,⁷ creating a more interdependent world.

Globalization is not new,⁸ although its forms and the technology that spurs it have changed. Globalization today is most often associ-

⁴ *Globalization and its Impact on the Full Enjoyment of All Human Rights: Preliminary Report of the Secretary-General*, U.N. GAOR, 55th Sess., ¶ 5, U.N. Doc. A/55/342 (2000). On the various meanings of globalization, see Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75 (Dinah Shelton ed., 2000). See generally A.G. MCGREW ET AL., *GLOBAL POLITICS: GLOBALIZATION AND THE NATION STATES* (1992); STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION (R. Boyer & D. Drache eds., 1996); J.N. Rosenau, *The Dynamics of Globalization: Toward an Operational Formulation*, 27 SEC. DIALOGUE 247 (1996).

⁵ The U.N. General Assembly has called globalization “not merely an economic process but [one that] has social, political, environmental, cultural and legal dimensions which have an impact on the full enjoyment of all human rights.” *Globalization and its Impact on the Full Enjoyment of All Human Rights*, G.A. Res. 55/102, U.N. GAOR 3d Comm., 55th Sess., 81st plen. mtg., at 2, U.N. Doc. A/RES/55/02 (2001); see also *Globalization and its Impact on the Full Enjoyment of All Human Rights*, G.A. Res. 54/165, U.N. GAOR 3d Comm., 54th Sess., 83d plen. mtg., at 2, U.N. Doc. A/RES/54/165 (2000). Both resolutions recognize “that globalization affects all countries differently and makes them more exposed to external developments, positive as well as negative, including in the field of human rights.” *Id.*

⁶ See generally D.M. JOHNSTON, *CONSENT AND COMMITMENT IN THE WORLD COMMUNITY* (1997). Examples include the memoranda of understanding of port state authorities, judicial cooperation, and border city agreements. *Id.*

⁷ HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 940 (2d. ed. 2000). Non-state actors include individuals, scientific and academic associations, international criminal syndicates, corporations, religious bodies, human rights organizations, and international organizations. *Id.* The U.N. estimates that there were some 36,000 non-governmental organizations in 1995. *Id.*

⁸ Some see globalization as beginning around the end of the fifteenth century, with Europe’s expansion through mercantile capitalism into America and Asia. See Statement of Rubens Ricupero, Secretary-General, UNCTAD, *Financial Globalization and Human Rights: Written Statement Submitted by the International Organization for the Development of Freedom of Education to the Commission on Human Rights*, U.N. Doc. E/CN.4/1998/NGO/76 (1998).

ated with economic interdependence, deregulation, and a dominance of the marketplace that includes a shifting of responsibilities from state to non-state actors.⁹ Economic globalization has been accompanied by a marked increase in the influence of international financial markets and transnational institutions, including corporations, in determining national policies and priorities.¹⁰ In addition, information and communications technology has emerged as a dominant force in the global system of production, while trade in goods, services, and financial instruments are more prevalent than any time in history.¹¹

Some see this emergence of cross-border networks of production, finance, and communications as posing profound challenges to traditional concepts of state sovereignty. Richard Falk has spoken of the “disabling of the state as guardian of the global public good”¹² in the face of a shift of power and autonomy from the state to markets. Kenichi Ohmae refers to a “borderless world” in which “[m]ore than anything else, the burgeoning flow of information directly to consumers is eroding the ability of governments to pretend that their national economic interests are synonymous with those of their people.”¹³ He adds that, “[i]n today’s world there is no such thing as a purely national economic interest.”¹⁴ Perhaps the same may be said for national political interests. Other authors refer to the decline of the western nation state.¹⁵ The presence of weakened and failed states is an unde-

Others consider it to be a phenomenon with even longer roots, beginning with the invention of money and the emergence of trade links around the Mediterranean. See Grzegorz W. Kolodko, *Technical Paper No. 176: Globalisation and Transformation: Illusions and Reality*, at 7, available at <http://www.oecd.org/dev/publication/tp1a.htm> (last visited Dec. 12, 2001).

⁹ See W.H. REINICKE, GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT 11–18 (1998).

¹⁰ See Philip Alston, *The Universal Declaration in an Era of Globalization*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY 29 (Barend van der Heijden & Bahia Tahzi-Lie eds., 1998).

¹¹ See, e.g., John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 918 (1996). The rate of information exchange has drastically reduced transaction costs, enabling expansion of trans-boundary communications. In 1860, sending two words across the Atlantic cost the equivalent of \$40 in current money. Today this amount would be enough to transmit the contents of the entire Library of Congress. Kolodko, *supra* note 8, at 11–12.

¹² RICHARD FALK, LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE, at xxiv (1998); see also Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 925 (1996).

¹³ KENICHI OHMAE, THE BORDERLESS WORLD 185 (1991).

¹⁴ *Id.* at 197.

¹⁵ McGinnis, *supra* note 11, at 918; KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES 1 (1995).

niable modern phenomenon,¹⁶ yet there is no clear causal link between globalization and failed states.¹⁷ Moreover, state sovereignty remains the international frame of reference,¹⁸ even if the exact contours of sovereignty change over time, as they have throughout history.¹⁹

Paul Streeten has pointed out that globalization can come “from above,” in the form of multinational firms, international capital flows, and world markets, or it can come “from below,” reflecting the concerns of individuals and groups throughout the world.²⁰ It seems evident that globalization has enhanced the ability of civil society to function across borders and promote human rights. The past two decades have seen a shift to multi-party democratic regimes, as more than 100 countries ended rule by military dictatorships or single parties. Pressed by an international network of non-governmental organizations and activists, the international protection of human rights itself can be seen as an aspect of globalization, reflecting universal

¹⁶ “An estimated five million people died in intrastate conflicts in the 1990s. In 1998, there were more than ten million refugees and five million internally displaced persons.” U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 6 (2000), available at <http://www.undp.org/hrd2000/english/hdr2000.htm> [hereinafter UNDP]. On internal conflicts, race, and ethnicity, see NEW TRIBALISMS: THE RESURGENCE OF RACE AND ETHNICITY 1 (Michael W. Hughey ed., 1998).

¹⁷ Dinah Shelton, *Droit et justice pour chaque citoyen de la planète?*, in MARINA RICCIARDELLI ET AL, MONDIALISATION ET SOCIÉTÉS MULTICULTURELLES: L'INCERTAIN DU FUTURE 305, 313 (2000). The weakening of the state is at the origin of numerous ethnic conflicts, sustained by unregulated commerce in conventional arms and by the growth in numbers of armed mercenaries. *Id.* Of the sixty-one conflicts that appeared during the years 1989–1998, all but three were internal armed conflicts. In states where the government has collapsed, armed tribes, and ethnic and political groups control territories without the rule of law and in the absence of public authorities. *Id.* In those states, human rights, like other legal constraints, have given way to anarchy and the exercise of unlimited power. *Id.*

¹⁸ See Jason Burke et al., *Asylum in Crisis: All Australia Can Offer is Guano Island*, THE OBSERVER (LONDON), Sept. 2, 2001, at 3. Some 460 refugees on board the Norwegian freighter the MV Tampa discovered the on-going importance of borders and state sovereignty in September, 2001, when they were denied entry and held off the coast of Australia for six days before being routed to Nauru and New Zealand. *Id.*

¹⁹ On the various meanings of sovereignty, see T.J. BIERSTECKER & C. WEBER, STATE SOVEREIGNTY AS A SOCIAL CONSTRUCT 1-4, 11, 123, 283 (1996); R. JACKSON & A. JAMES, STATES IN A CHANGING WORLD 8, 19 (1993); HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 36, 37 (1994). See generally JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (1995); STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

²⁰ Paul Streeten, *Globalization and its Impact on Development Co-operation*, 42 DEV. 11, 11 (1999).

values about human dignity that limit the power of the state and reduce the sphere of sovereignty.²¹

Global technology and the information revolution have limited the ability of governments to control the right to seek, receive, and transmit information within and across boundaries. Ideas and information can circulate more freely, as can individuals. The number of televisions per 1000 persons doubled between 1980 and 1995, while the number of Internet subscribers exceeds 700 million persons. Free circulation enhances the ability to inform all persons about rights and avenues of redress. It also makes it more difficult for governments to conceal violations and allows activists more easily to mobilize shame in order to induce changes in government behavior.²² Information technology and the media also can be used, however, to violate human rights when the government is weak. In Rwanda, the radio and television channel "Radio-Télévision Libre des Mille Collines" was an important avenue for inciting genocide.²³ Internet too has been used for hate speech.²⁴

The multiple and sometimes contradictory impacts of globalization are reflected in the complete disagreement of views over the pattern and direction of globalization. Proponents point to a rise in average incomes for the world as a whole. Opponents note that there is persistent inequality and poverty. The World Bank Development Report estimates that, at purchasing power parity, the per capita GDP in the richest twenty countries in 1960 was eighteen times that of the

²¹ Prior to the founding of the United Nations (U.N.), human rights were seen largely as internal matters within the sovereignty of the state. Early debates in the U.N. over human rights usually centered on the question of whether or not Article 2(7), prohibiting the U.N. from intervening in matters essentially within the domestic jurisdiction of a state, excluded human rights issues from the agenda of the organization. For the debate over South Africa's apartheid policies as a matter of international concern, see U.N. GAOR Comm. on the Racial Situation in the Union of South Africa, 8th Sess., Supp. No. 16, at 16-22, U.N. Doc. A/2505 (1953). Today, the claim of domestic jurisdiction is largely rejected. See, e.g., Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, Oct. 3, 1991, *reprinted in* 30 I.L.M. 1670, 1672 (1991) ("[C]ommitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.")

²² See, e.g., Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANS-NAT'L L. & CONTEMP. PROBS. 125, 159-61 (1998).

²³ See Jamie Frederic Metzler, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 629 (1997).

²⁴ See Christiane Chombeau, *Des Juifs D'extrême Droite Déversent Leur Haine Antiarabe Sur Internet*, LE MONDE, Oct. 12, 2001, at 11.

poorest twenty countries.²⁵ By 1995, the gap had widened to thirty-seven times.²⁶ According to the International Labor Organization (ILO), only 24% of the world's foreign direct investment (FDI) went to developing countries in 1999, down from 38% over the period 1993–97, and 80% of recent investment went to only ten developing countries.²⁷ Wealth concentration is not only seen among countries, but among individuals as well. According to the *UNDP Human Development Report 1999*, the assets of the three wealthiest individuals in the world is more than the combined gross national product of all least developed countries, while the annual sales of one transnational corporation exceeds the combined gross domestic product of Chile, Costa Rica, and Ecuador.²⁸

Globalization, thus, has created powerful non-state actors that may violate human rights in ways that were not contemplated during the development of the modern human rights movement.²⁹ This development poses challenges to international human rights law, because, for the most part, that law has been designed to restrain abuses by powerful states and state agents, not to regulate the conduct of non-state actors themselves or to allow intervention in weak states when human rights violations occur.³⁰ An increasingly globalized civil society is likely to respond to economic globalization by opposing liberalized trade and investment regimes that are not accompanied by accountability, transparency, public participation, and respect for fundamental rights.

²⁵ INTERNATIONAL LABOR OFFICE, *REDUCING THE DECENT WORK DEFICIT: A GLOBAL CHALLENGE—REPORT OF THE DIRECTOR GENERAL 49* (2001), available at <http://www.ilo.org> (citing WORLD BANK, *WORLD BANK DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY* (2001)) (last visited Jan. 29, 2002) [hereinafter ILO Report of the Director General].

²⁶ *Id.* The 1998 U.N. Development Program report has even more extreme figures, focusing on individual wealth: the 20% of the world's people who live in the richest countries had thirty times the income of the poorest 20% in 1960, and by 1995, had eighty-two times as much income. U.N. DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 1998*, at 29 (1998).

²⁷ See ILO Report of the Director General, *supra* note 25, § 3.1.

²⁸ U.N. RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, *STATES OF DISARRAY: THE SOCIAL EFFECTS OF GLOBALIZATION, REPORT ON THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT 13* (1995), available at <http://www.unrisd.org> (last visited Mar. 11, 2002).

²⁹ Although there were issues such as the slave trade and war crimes that were raised during the nineteenth century and concern for some economic and social rights emerged in the early twentieth century, most human rights law developed in the period following World War II.

³⁰ See generally LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

The result may be viewed as a “clash of globalizations.”³¹ The clash plays out in the international institutional and normative system that has separated human rights matters from economic policy and regulation, creating distinct institutions, laws, and values for each field. Integrating them is no easy task; indeed, some commentators view a conflict as inevitable.³²

A. *The Framework of International Human Rights Law*

The development of human rights law in response to globalization is not new, and there is nothing inherent in the international system that would prevent further protective measures. The movement against the slave trade, which was largely a private enterprise, and to combat the more indiscriminate or destructive forms of weaponry, such as gas warfare and dum-dum bullets, are early examples of international movements to counter the negative side of international trade and technology. Broader efforts to establish international protection for human rights can be traced to the surge of globalization and the emergence of international markets that occurred at the end of the nineteenth century.³³ During this period, the telephone, the telegraph, and radio transmissions first opened the world to rapid transboundary communications; the development of railroads and steamships allowed trade to move more quickly from one market to another, while the abuses associated with industrialization provoked efforts to improve working conditions and the standard of living in many countries.

Efforts to avoid competitive distortions and enhance the protection of fundamental rights of workers necessitated international labor standards. The resulting movement led to the creation of the ILO in 1919.³⁴ Unlike all subsequent international organizations, the ILO

³¹ Stephen Kobrin, *The MAI and the Clash of Globalizations*, 112 FOREIGN POL'Y 97, 97 (1998).

³² See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 672-73 (1996) (noting that the basic values of globalization may conflict with other values of society); see also Frank Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 51 (1999); Alex Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 470 (1997).

³³ JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 64 (1989) (“Modern markets also created a whole new range of threats to human dignity and thus were one of the principal sources of the need and demand for human rights.”).

³⁴ The ILO's Constitution may be accessed at INTERNATIONAL LABOR ORGANIZATION CONST., available at <http://www.ilo.org/public/english/about/iloconst.htm> (last visited Mar. 11, 2002). The original constitution of the ILO comprises Part XIII of the Treaty of

engaged all the relevant actors in its operations from the beginning. Using a tripartite structure of representation, the ILO ensured the participation of business, labor, and governments in developing worker rights and minimum labor standards for member states.³⁵ While the standards adopted are addressed to member states for implementation, compliance requires the cooperation of the non-state actors as well, because the organization primarily aims to respond through regulation to poor treatment of labor by private industry. Such regulation is made easier by the participation of labor and business in the law-making and supervisory procedures of the ILO.

The international protection of civil and political rights emerged later, becoming an aim of the international community at the end of World War II in response to the atrocities committed during that conflict. While human rights theory supports the claims of rights holders against all others,³⁶ international human rights law treats the

Versailles of June 28, 1919, of the Treaty of Saint Germain of Sept. 10, 1919, of the Treaty of Trianon of June 4, 1920, and Part XII of the Treaty of Neuilly of Nov. 27, 1919. In 1944, the Declaration Concluding the Aims and Purposes of the ILO redefined the aims and purposes of the ILO to emphasize that: (1) labor is not a commodity; (2) freedom of expression and association is essential to sustained progress; and (3) all human beings have a right to pursue their material and spiritual well-being in conditions of freedom, dignity, and equal opportunity. The Declaration now forms an annex to the ILO Constitution. For further information on the ILO, see International Labor Organization, at <http://www.ilo.org> (last visited Mar. 11, 2002).

³⁵ Between 1919 and 2001, the ILO adopted 182 conventions and 180 recommendations covering basic human rights such as abolition of forced labor, freedom of association, and elimination of child labor, as well as conventions on occupational safety and health, industrial relations, and other conditions of employment.

³⁶ Among the fundamental theoretical issues respecting human rights is the question of who rights may be claimed against, i.e., identifying the duty-holder corresponding to the rights-holder. The French Declaration of the Rights of Man and the Citizen proclaims that, "the end in view of every political association is the preservation of the natural and imprescriptable rights of man." Declaration of the Rights of Man and the Citizen, French National Assembly, Aug. 27, 1789, art. II. This may imply rights held against all private and public interests. H.L.A. Hart describes "general rights" as those which "have as correlatives obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship or transaction, though of course they will often be asserted when some particular persons threaten to interfere as a moral objection to the interference." H.L.A. Hart, *Are There Any Natural Rights?* in JEREMY WALDRON, *THEORIES OF RIGHTS* 77, 87-88 (1984). In his view the assertion of general rights directly invokes the principle that all men equally have the right to be free; the assertion of a special right invokes the same concept indirectly. Gerwitz also posits that rights are claim-rights, in the Hohfeldian sense, that they "are justified claims or entitlements to the carrying out of some correlative duties, positive or negative. A duty is a requirement that some action be performed or not be performed; in the latter, negative case, the requirement constitutes a prohibition." A. Gerwitz, *Are There Any Absolute Rights?*, in WALDRON, *supra*, at 93. Government's function is to ensure that rights and duties are fulfilled. Winston agrees that, "when individuals enter

state as the principal threat to individual freedom and well being.³⁷ In the post-World War II paradigm, the state and its agents are obliged to respect and ensure rights. Indeed, some acts are explicitly defined as human rights violations only if committed by state agents or those acting in complicity with them.³⁸ If rights are violated, the state is obligated to ensure domestic remedies to correct the harm are available.³⁹ A failure to do so may allow the individual to bring a complaint against the state before an international tribunal. No *international* procedures exist at present whereby an injured individual may directly hold responsible the individual perpetrator of the harm.⁴⁰

Despite the emphasis on state responsibility, international human rights instruments continue to recognize human rights that are violated predominately by non-state actors, for example, freedom from slavery and forced labor. The duty imposed in such instances, however, remains primarily on the state to ensure the right against the slave holders and employers of forced labor. Human rights instruments also speak to the obligations of non-state actors. The first gen-

into the social compacts by which governments are created, they in effect deputize their governments to discharge their duties to protect human rights on their behalves. This would explain why it is customary to treat governments as the addressees of human rights, but also why, when governments fail to fulfill their roles in protecting these rights, the responsibility to see that they are protected devolves on individuals." MORTON E. WINSTON, *THE PHILOSOPHY OF HUMAN RIGHTS* 9 (1988).

³⁷ See Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 157, 157 (Burns H. Weston & Stephen P. Marks eds., 1999) (noting human rights law was not designed to consider as human rights violations those abuses that take place in the private sector).

³⁸ See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72 (1984), *reprinted in* 23 I.L.M. 1027 (entered into force June 26, 1987) ("[Torture] means any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."); Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, art. 3, O.A.S.T.S. No. 67, O.A.S. Doc. OEA/ser. P., AG/doc. 2023/85, *reprinted in* 25 I.L.M. 519 (1986) (entered into force Feb. 28, 1987) (describing those who shall be guilty of torture as including a public servant or employee or a person acting at the instigation of a public servant or employee).

³⁹ See generally DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (2000).

⁴⁰ According to Michael Riesman, one of the "crueler ironies" of human rights law is that the system allows the actual wrongdoers to escape responsibility while the victims pay taxes the state uses to compensate such victims for the harms they have suffered. Michael Reisman & Janet Koven Levit, *Reflections on the Problem of Individual Responsibility for Violations of Human Rights*, in *THE MODERN WORLD OF HUMAN RIGHTS: ESSAYS IN HONOR OF THOMAS BUERGENTHAL* 419, 421 (Pedro Nikken & Antonio Cancado Trindade eds., 1996).

eral international human rights instrument, the American Declaration of the Rights and Duties of Man (American Declaration), begins its preamble with an exhortation to all individuals to conduct themselves with respect for the rights and freedoms of others. It clearly views individuals as having duties towards each other.⁴¹ The Universal Declaration of Human Rights (Universal Declaration), adopted some six months later, refers to itself as “a common standard of achievement for all peoples and all nations, to the end that every individual, and every organ of society” shall strive to promote respect for, and observance of, the rights.⁴² Article 1 of the Universal Declaration specifically refers to the behavior of individuals towards each other.⁴³ This is complemented at the close of the Universal Declaration with a firm statement that, “[n]othing in this Declaration may be interpreted as implying for any [s]tate, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”⁴⁴ Human rights law also imposes individual responsibility for some human rights violations⁴⁵ and other acts⁴⁶ designated as crimes under international law. These offenses require the state where the offender is found to try or extradite the individual, and in a few instances may allow prosecution before an

⁴¹ See American Declaration of the Rights and Duties of Man, Ninth International Conference of American States, O.A.S. Res. XXX, art. XXIX, O.A.S. Off. Rec. OEA/ser. L./V/I.4 Rev. (1965). (“It is the duty of the individual to so conduct himself in relation to others that each and every one may fully form and develop his personality.”).

⁴² Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

⁴³ *Id.* art. 1.

⁴⁴ *Id.* art. 30.

⁴⁵ Human rights treaties that call for criminalization of specific acts include the Convention on the Prevention and Punishment of the Crime of Genocide, the U.N. Convention Against Torture, the Inter-American Convention against Torture, the Inter-American Convention on Forced Disappearance of Persons, and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

⁴⁶ See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, 10 I.L.M. 133 (1971) (entry into force Oct. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151 (1971) (entry into force Jan. 26, 1973); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 168, 13 I.L.M. 41 (1974) (entry into force Feb. 20, 1977); European Convention on the Suppression of Terrorism, Nov. 10, 1976, Europ. T.S. No. 90, 15 I.L.M. 1272 (1976) (entry into force, Aug. 4, 1978); International Convention against the Taking of Hostages, June 3, 1983, G.A. Res. 34/146, at xxxiv, U.N. GAOR, Supp. No. 46, at 245, U.N. Doc. A/34/786 (1979), *reprinted in* 18 I.L.M. 1456 (1979).

international tribunal.⁴⁷ More generally, Article 28 of the Universal Declaration recognizes that, “[e]veryone is entitled to a social and international order in which the rights and freedoms set for in th[e] Declaration can be fully realized.”⁴⁸ From this may emerge the principle that respect for human rights applies to all societal relations locally, regionally, and globally. Thus, although positive human rights law generally addresses state action or inaction, the theoretical and positive foundation is there to apply human rights guarantees to non-state actors.

In recent years, the many facets and importance of the complex interplay of human rights and globalization are reflected in the multiple studies conducted on aspects of globalization by the human rights organs of the United Nations (U.N.). The Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) has undertaken studies on transnational corporations,⁴⁹ on the impact of globalization on the enjoyment of human rights generally,⁵⁰ the impact of globalization on racism and xenophobia,⁵¹ the relationship between the enjoyment of human rights and income distribution,⁵² and on human rights as the primary objective of international trade,

⁴⁷ For crimes committed in the former Yugoslavia and in Rwanda, the U.N. created special international tribunals, but a permanent international court does not exist.

⁴⁸ Universal Declaration, *supra* note 42, at 71.

⁴⁹ See *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1998/8, U.N. ESCOR, 50th Sess., 26th mtg., U.N. Doc. E/CN.4/Sub.2/Res/1998/8 (1998) [hereinafter Sub-Commission Resolution 1999/8].

⁵⁰ See J. Oloka-Onyango & Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/Sub.2/2000/13 (2000) (submitted in accordance with Sub-Commission Resolution 1999/8) [hereinafter Oloka-Onyango & Udagama, *Globalization I*]; J. Oloka-Onyango & Deepika Udagama, *Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 53d Sess., U.N. Doc. E/CN.4/Sub.2/2001/10 (2001) (submitted in accordance with Sub-Commission Resolution 1999/8 and Commission on Human Rights Decision 2000/102). In decision 2000/102, the Commission on Human Rights decided to approve the nomination of Mr. J. Oloka-Onyango and Ms. Deepika Udagama as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights.

⁵¹ See J. Oloka-Onyango, *Comprehensive Examination of Thematic Issues Relating to the Elimination of Racial Discrimination: Globalization in the Context of Increased Incidents of Racism, Racial Discrimination and Xenophobia*, U.N. ESCOR, 51st Sess., U.N. Doc. E/CN.4/Sub.2/1999/8 (1999) [hereinafter Oloka-Onyango, *Racism*].

⁵² See Jose Bengoa, *The Realization of Economic, Social and Cultural Rights: The Relationship Between the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, and Income Distribution*, U.N. ESCOR, 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/9 (1997).

investment, and finance policy and practice.⁵³ Beginning in 1998, the Commission on Human Rights (Commission) established a working group on the impact of structural adjustment programs on economic, social, and cultural rights.⁵⁴ The working group is largely composed of developing countries, with France, Germany, and Italy representing industrialized countries among the sixteen states participating. The Commission also has appointed an independent expert on the topic.⁵⁵

Both the Commission and the Sub-Commission have adopted resolutions on globalization and human rights.⁵⁶ The Sub-Commission also unanimously adopted a resolution on trade liberalization and its impact on human rights,⁵⁷ in which it asked all governments and forums of economic policy to take fully into consideration the obligations and principles of human rights in the formulation of international economic policy. At the same time, the resolution expressed opposition to unilateral sanctions and to negative conditionality on trade as a means to integrate human rights into the policies and practices governing international economic matters. The resolution requested the High Commissioner for Human Rights to cooperate with the World Trade Organization (WTO) and its member states to underline the human dimension of free trade and investments and to take measures to see that human rights principles and obligations are fully taken into account in future negotiations in the framework of the WTO.

Finally, it is noteworthy that human rights law not only potentially imposes duties on non-state economic actors, it guarantees rights es-

⁵³ See J. Oloka-Onyango & Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*, U.N. ESCOR, 51st Sess., U.N. Doc. E/CN.4/Sub.2/1999/11 (1999).

⁵⁴ See *Economic, Social and Cultural Rights: Report of the Open-ended Working Group on Structural Adjustment Programmes and Economic, Social and Cultural Rights on Its Second Session*, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/1999/51 (1999).

⁵⁵ See Fantu Cheru, *Economic, Social and Cultural Rights: Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, U.N. ESCOR, 51st Sess., U.N. Doc. E/CN.4/1999/50 (1999).

⁵⁶ For more information on this matter, see the Commission on Human Rights, Resolution 1999/59 of April 27, 1999, and the Sub-Commission on the Promotion and Protection of Human Rights, on globalization and its impact on the full enjoyment of all human rights. U.N. ESCOR, 51st Sess., 58th mtg., U.N. Doc. E/CN.4/Res/1999/59 (1999); U.N. ESCOR, 52d Sess., 32d mtg., U.N. Doc. E/CN.4/Sub.2/Res/2000/7 (2000).

⁵⁷ See *Trade Liberalization and Human Rights*, Sub-Commission on the Promotion and Protection of Human Rights Res. 1999/30, U.N. ESCOR, 51st Sess., U.N. Doc. E/CN.4/Sub.2/Res/1999/30 (1999) [hereinafter Res. 1999/30].

essential for the furtherance of globalization. It protects the right to property, including intellectual property, freedom of expression and communications across boundaries, due process for contractual or other business disputes, and a remedy before an independent tribunal when rights are violated. Furthermore, the rule of law is an essential prerequisite to the long-term conduct of trade and investment.

B. *The Framework of International Trade Law*

Intrinsic to globalization is the contemporary legal and institutional framework within which the regimes of international trade, finance, and investment are being conducted. In general, economic globalization has a focus on economic efficiency, the goal being to improve economic well being through efficient market exchanges.⁵⁸ The system is based upon enhancing the economic well being of nations through trade, on the theory that gains are maximized through the unrestricted flow of goods across national boundaries.⁵⁹ The system rests upon a view of humans as economic beings that seek to maximize wealth and self-interested satisfaction of personal preferences.⁶⁰ In a pure economic model, values outside efficiency are irrelevant, even pernicious because they complicate or hamper the trading system.⁶¹

⁵⁸ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 8–9 (2d ed. 1989).

⁵⁹ See DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* 3 (1996).

⁶⁰ On economic values, see Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economic and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 671 (1993).

⁶¹ The consequences of the economic approach can be tested by considering the issue of child labor. The ILO estimates that there are approximately 250 million children working worldwide. ILO Report of the Director General, *supra* note 25, § 1.3. From the human rights perspective, a ban on child labor is necessary for the well-being, dignity, and proper development of the child. It is also legally required to implement the ILO Convention and the Convention on the Rights of the Child which reflect these goals. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456 (1989). Every state except the United States has ratified the latter Convention and some states have enacted child labor bans, in total or in part. For example, the United States prohibits the importation of products "mined, produced and manufactured by forced or indentured child labor." Treasury and General Government Appropriations Act of 1998, Pub. L. No. 105–61, § 634, 111 Stat. 1272, 1316 (1998). From the perspective of international economic theory, it can be argued that such bans should be discouraged because they are inefficient. Child labor produces goods more cheaply and gives an economic advantage to the producing state. On the other hand, economic analysis also shows that productivity increases with the educational level of workers and in the long run is likely to be more economically beneficial than child labor. Within the international trading regime, such trade bans could be found

The legal dimensions of the framework are expressed in international economic law and the institutional structure of the Bretton Woods multilateral lending institutions and the WTO. International trade and finance institutions were created largely to operate on the economic model and generally exclude from consideration other values of international society, like human rights and environmental protection.

The international trade regime is clearly marked by a commitment to open markets.⁶² The Uruguay Round agreements that concluded with the establishment of the WTO⁶³ expanded the substantive reach of international trade regulation to include trade-related aspect of intellectual property,⁶⁴ trade in services,⁶⁵ and trade-related investment measures.⁶⁶ Yet, within the legal instruments and policies related to trade and investment there can be found some considerations of human rights. The General Agreement on Tariffs and Trade (GATT) allows states to ban the importation of products stemming from prison labor.⁶⁷ In addition, GATT Article XX(a) permits trade measures "necessary to human morals."⁶⁸ GATT Article XX(b) allows

to be in violation of the most-favored-nation and national treatment requirements unless they are justified by one of the exceptions found in GATT article XX. The jurisprudence of the WTO suggests that only products themselves are the subject of the restrictions, not the processes by which they are made. *See* GATT Dispute Panel Report on Thailand-Restrictions on Imp. of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200, DS 10/R-375/200 (1991); GATT Dispute Panel Report on U.S. Restrictions on Imp. of Tuna, 33 I.L.M. 1594 (1991).

⁶² Frank Garcia argues that, "the regulatory framework which international economic law provides for globalization operates according to a view of human nature, human values and moral decision-making fundamentally at odds with the view of human nature, human values and moral decision-making which underlies international human rights law." Garcia, *supra* note 28, at 53 (1999).

⁶³ *See* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 108 Stat. 4809, 4815, 33 I.L.M. 1125, 1144 (1994) [hereinafter WTO Agreement].

⁶⁴ *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994), available at <http://www.wto.org> [hereinafter TRIPs Agreement].

⁶⁵ *See* General Agreement on Trade in Services, Apr. 15, 1994, 108 Stat. 4809, 4815, 33 I.L.M. 1167 (1994), available at <http://www.wto.org> [hereinafter GATS Agreement].

⁶⁶ *See* Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 108 Stat. 4809, 4815 (1994), available at <http://www.wto.org>.

⁶⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(e), 61 Stat. 5, A3, T.I.A.S. 1700, 55 U.N.T.S. 187, available at <http://www.wto.org> [hereinafter GATT Agreement]; General Agreement on Tariffs and Trade-Multilateral Trade Negotiations, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. XX(e), 33 I.L.M. 1125 (1994).

⁶⁸ GATT Agreement, *supra* note 67, art. XX(a).

measures “necessary to protect human, animal or plant life or health.”⁶⁹ All of these exceptions are limited by the Article XX *chapeau* that requires the measures taken not be a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.⁷⁰

The agreement establishing the WTO refers to “reciprocal arrangements” for tariff reductions and the “elimination of discriminatory treatment in international trade relations.”⁷¹ Yet, the annexes to the WTO Agreement comprise seventeen interwoven trade agreements that accord rights indirectly to individuals and other non-state actors.⁷² Among the rights protected are those of intellectual property.⁷³ The General Agreement on Trade in Services (GATS) applies most-favored nation and national treatment principles to service suppliers, requiring that governments accord non-national service suppliers treatment no less favorable than that granted to suppliers from any other country.⁷⁴ The earlier GATT Article X requires remedies before independent tribunals for those affected by the application of national laws and public information about those laws and regulations.⁷⁵ The WTO extends these procedural rights to the agreements on antidumping, subsidies, intellectual property, and services.⁷⁶

In jurisprudence and statements of international officials, the rights of non-state actors are beginning to be considered. In a 1999 panel decision, the panel stated that, “the multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators” whose needs should be a factor in deciding disputes brought to the WTO.⁷⁷ The U.N. Secretary-General

⁶⁹ *Id.* art. XX(b).

⁷⁰ *Id.* art. XX. For an interpretation of the *chapeau* and Article XX exceptions, see GATT Appellate Body Report on U.S.–Imp. Prohibition of Certain Shrimp and Shrimp Prod., § VI(c), WT/DS58/AB/R (Oct. 12, 1998), *available at* 1998 WL 720123, at *41.

⁷¹ WTO Agreement, *supra* note 63, pmb1.

⁷² See Steve Charnowitz, *The WTO and the Rights of the Individual*, 36 INTERECONOMICS 98 (2001).

⁷³ See TRIPs Agreement, *supra* note 64, arts. 1.3, 2.1, 9.1, 10.2, 11, 14.2, 16.1, 25.1, 27.1, 35.

⁷⁴ GATS Agreement, *supra* note 65, arts. I:2(d), II:1.

⁷⁵ GATT Agreement, *supra* note 67, art. X.

⁷⁶ For the application of such procedural rights to anti-dumping, see the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, arts. 6.1, 12.1, 12.2, 6.2, 6.9, 8.3, 13, 11.2, *available at* [http:// docsonline.wto.org](http://docsonline.wto.org) (last visited Mar. 1, 2002), and for the application of subsidies. See TRIPs Agreement, *supra* note 64, arts. 22.2, 23.1, 26.1, 28.1, 31, 39.2, 41, 42, 46; GATs Agreement, *supra* note 65, arts. VI, VII.5.

⁷⁷ GATT Dispute Panel Report on U.S.–Sections 301–310 of the Trade Act of 1974, ¶¶ 7.76, 7.90, 7.94, 7.167, WT/DS152/R (Dec. 22, 1999).

has found that the goals and principles of the WTO agreements and those of human rights law have much in common in part because the WTO agreements "seek to create a liberal and rules-based multilateral trading system" according to which states can trade under conditions of fair competition.⁷⁸

Yet, efforts to strengthen human rights protections in trade law have run into difficulties. The WTO Singapore Ministerial Declaration made reference to international labor standards, yet primarily affirmed the jurisdiction of the ILO over the matter.⁷⁹ Before and during the meeting of member states of the WTO in Seattle, developing countries opposed any discussion or negotiation on worker rights. Industrialized countries recommended enhanced cooperation between the secretariats of the WTO and the ILO, while the United States called for the elaboration of a working program dedicated to employment standards. It seems clear that at present the WTO would oppose the use of unilateral or multilateral trade sanctions for human rights violations. Regional economic bodies have more easily raised human rights matters.⁸⁰

With globalization, the International Monetary Fund (IMF) and the World Bank have received considerable attention because of the substantial impact they can have on human rights, although both initially resisted taking human rights into account in their operations.⁸¹ The General Counsel of the World Bank at first rejected the idea that the Bank should take into account human rights concerns, arguing a need to honor the Bank's Charter⁸² "and to respect the specialisation of different international organisations."⁸³ Recently, the World Bank

⁷⁸ The goals of the WTO include the objectives of increasing living standards, full employment, the expansion of demand, production and trade in goods and services, linked to optimal use of the world's resources according to the objective of sustainable development. WTO Agreement, *supra* note 63, pmb1.

⁷⁹ World Trade Organization, *Singapore Ministerial Declaration* ¶ 4, WTO Doc. WT/MIN(96)DEC/W (Dec. 13, 1996), *reprinted in* 36 I.L.M. 218, 221 (1997).

⁸⁰ NAFTA has created a Labor Commission to monitor national enforcement of labor laws. North American Agreement on Labor Cooperation, Sept. 8, 1993, Can.-Mex.-U.S., art. 8.1, 32 I.L.M. 1499, 1504 (1993). The European Union makes respect for human rights a condition of membership via the Treaty of Amsterdam.

⁸¹ See James Gathii, *Human Rights, The World Bank and the Washington Consensus: 1949-1999*, 94 AM. SOC'Y INT'L L. PROC. 144, 144 (2000); Anne Orford, *The Subject of Globalization: Economics, Identity and Human Rights*, 94 AM. SOC'Y INT'L L. PROC. 146, 147 (2000).

⁸² The Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134, *as amended*, 16 U.S.T. 1942, 606 U.N.T.S. 294 (1965) (providing in Article IV, section 10 that, "[o]nly economic considerations shall be relevant" in the Bank's lending decisions and operations).

⁸³ Ibrahim Shihata, *Democracy and Development*, 46 INT'L & COMP. L.Q. 635, 638 (1997).

has begun to consider the human dimension of its work and it has declared that the alleviation of poverty is its main objective. The Bank has also been active in designing mechanisms to address the issue of the debt burden, culminating in the highly indebted poor countries (HIPC) initiative.

These efforts mark a shift from the "Washington Consensus" methods of structural adjustment and economic liberalization that were applied in the 1980s and early 1990s to the macroeconomic policies of developing countries.⁸⁴ The Washington Consensus privileged market forces, and the Bank followed by promoting privatization programs that took the state out of health, education, and housing. Reduced social spending transferred resources to the private sector and, in some cases, to the military. Human rights activists responded by demanding greater attention to human rights and a social safety net to meet the basic needs of individuals.

Largely as a result of scrutiny from non-governmental organizations and activists concerned about increasing wealth disparity, increased unemployment and other failures to improve the human condition in the countries subject to Bank operations, the Bank has begun to pay attention to social safety nets, human rights, and the notion of good governance. By 1990, the General Counsel determined that, "[v]iolation of political rights may . . . reach such proportions as to become a Bank concern due to significant direct economic effects or if it results [in violation of] international obligations."⁸⁵ In 1998, the Bank published a report on development and human rights emphasizing equality and development and the protection of vulnerable groups.⁸⁶ It also instituted its Inspection Panel to hear a narrow spectrum of complaints about violations of Bank policy.

The IMF has been less accommodating and remains under pressure to incorporate human rights concerns in its activities. After a difficult public encounter in May, 2001 between the IMF and the U.N. Committee on Economic, Social and Cultural Rights (CESCR), the latter invited three members of the CESCR to meet with the IMF in

⁸⁴ See Cord Jakobeit, *The World Bank and Human Development: Washington's New Strategic Approach*, 6 DEV. & COOPERATION 1, 4 (1999).

⁸⁵ IBRAHIM SHIHATA, ISSUES OF "GOVERNANCE" IN BORROWING MEMBERS: THE EXTENT OF THEIR RELEVANCE UNDER THE BANK'S ARTICLES OF AGREEMENT (1990), *quoted in* JOHN STREMLAU & FRANCISCO SAGASTI, PREVENTING DEADLY CONFLICT: DOES THE WORLD BANK HAVE A ROLE? 45 (1998).

⁸⁶ WORLD BANK GROUP, DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK (1998), *available at* <http://www.worldbank.org/html/extdr/rights/hrintro.htm> (last visited Mar. 11, 2002).

Washington on October 31, 2001, to have informal, private discussions to try to find some common ground and build confidence.

The IMF argues that its founding Charter mandates that it pay attention only to issues of economic nature. The IMF has issued a document on "Good Governance,"⁸⁷ said to respond to the fact that, "a much broader range of institutional reforms is needed if countries are to establish and maintain private sector confidence and thereby lay the basis for sustained growth."⁸⁸ The IMF's concerns still appear confined to:

Issues such as institutional reforms of the treasury, budget preparation and approval procedures, tax administration, accounting, and audit mechanisms, central bank operations, and the official statistics function. Similarly, reforms of market mechanisms would focus primarily on the exchange, trade, and price systems, and aspects of the financial system. In the regulatory and legal areas, IMF advice would focus on taxation, banking sector laws and regulations, and the establishment of free and fair market entry.⁸⁹

The "Good Governance" document emphasizes combating corruption and the need to establish transparent operational systems within states; there is no mention of human rights. The Guidelines also say nothing about the IMF itself and its operations.

While both the World Bank and the IMF have modified their policy stances to reduce the emphasis on structural adjustment policies to give greater emphasis to poverty reduction, the ILO still faults them for failing to give enough importance to employment. In its view, a number of country experiences clearly show that integration in global markets is compatible with successful social policy, provided there are adequate national social security systems, functioning systems of social dialogue and relatively low income inequality.⁹⁰

II. IS GLOBALIZATION GOOD FOR HUMAN RIGHTS?

There is considerable debate over the question of whether or not globalization is good for human rights. One view is that globalization

⁸⁷ See generally INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE (1997).

⁸⁸ *Id.* at v.

⁸⁹ *Id.* at 4.

⁹⁰ See generally ILO Report of the Director General, *supra* note 25, at 9.

enhances human rights, leading to economic benefits and consequent political freedoms.⁹¹ The positive contributions of globalization have even led to the proposal that it be accepted as a new human right.⁹² In general, trade theory predicts a significant increase in global welfare stemming from globalization, indirectly enhancing the attainment of economic conditions necessary for economic and social rights. Many thus believe that market mechanisms and liberalized trade will lead to an improvement in the living standards of all people. Some also posit that free trade and economic freedom are necessary conditions of political freedom, or at least contribute to the rule of law that is an essential component of human rights.⁹³ Certainly, globalization facilitates international exchanges that overcome the confines of a single nation or a civilization, allowing participation in a global community. There is also the possibility that economic power can be utilized to sanction human rights violators more effectively.⁹⁴ Ease of movement of people, goods, and services are enhanced. Increased availability and more efficient allocation of resources, more open and competitive production and improved governance could lead to faster growth and more rights. In sum, Judith Bello argues that:

Trade liberalization promotes the growth of stability-promoting middle class all over the globe; trade enhances efficiency and wealth and thereby creates potential revenue for environmental protection. Trade creates jobs in developing as well as developed countries, thereby reducing the pressure on both illegal immigration and illicit drug trafficking. Trade liberalization is not a panacea for the world's problems, but it can be part of a solution for many of them.⁹⁵

The pro-globalization assumption that globalization is in the common good and market forces will achieve general well being is

⁹¹ See ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* 30–35 (1999).

⁹² M.D. Pendleton, *A New Human Right—The Right to Globalization*, 22 *FORDHAM INT'L L.J.* 2052, 2052 (1999).

⁹³ See Garcia, *supra* note 32, at 60.

⁹⁴ See Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 *AM. U. J. INT'L L. & POL'Y* 1, 42–45 (1996).

⁹⁵ Judith Bello, *National Sovereignty and Transnational Problem Solving*, 18 *CARDOZO L. REV.* 1027, 1029 (1996).

not a consensus view. Anne Orford, for example, argues that, “[t]he trade and investment liberalization furthered by the Uruguay Round agreements entrenches a relationship between states and transnational corporations that privileges the property interests of those corporations over the human rights of local peoples and communities.”⁹⁶ As such, the economic and technological changes associated with globalization may lead to a world in which the state is no longer the principal threat to human rights, but one where the threats are more posed by multinational corporations, multilateral intergovernmental organizations, and transnational criminal syndicates or organized terrorists. The U.N. Development Program devoted its 2000 *Human Development Report* to “Human Development and Human Rights” in which it pointed out that, “global corporations can have enormous impact on human rights—in their employment practices, in their environmental impact, in their support for corrupt regimes or in their advocacy for policy changes.”⁹⁷

It has been argued that values associated with human rights emerge with multinational free market growth, as the rule of law follows investors who seek predictability and safeguarding of investments, leading to strengthened independent institutions for civil and political rights, but human rights advocates assert that liberalization in trade, investment, and finance does not necessarily lead to general economic development or better human rights performance. According to the Oxfam Poverty Report:

Trade has the power to create opportunities and support livelihoods; and it has the power to destroy them. Production for export can generate income, employment, and the foreign exchange which poor countries need for their development. But it can also cause environmental destruction and a loss of livelihoods, or lead to unacceptable levels of exploitation. The human impact of trade depends on how goods are produced, who controls the production and marketing, how the wealth generated is distributed, and the terms upon which countries trade. The way in which the international trading system is managed has a critical bearing on all of these areas.⁹⁸

⁹⁶ Orford, *supra* note 37, 169.

⁹⁷ UNDP, *supra* note 16, at 1.

⁹⁸ KEVIN WATKINS, THE OXFAM POVERTY REPORT 109–110 (1995).

Opponents of globalization see it as a threat to human rights in several ways. First, local decision-making and democratic participation are undermined when multinational companies, the World Bank, and the IMF set national economic and social policies. Second, unrestricted market forces threaten economic, social, and cultural rights such as the right to health, especially when structural adjustment policies reduce public expenditures for health and education. Third, accumulations of power and wealth in the hands of foreign multinational companies increase unemployment, poverty, and the marginalization of vulnerable groups.

Some criticism has been particularly strong. In resolution 1997/11, the U.N. Sub-Commission on the Promotion and Protection of Human Rights asked El Hadji Guissé to prepare a working document on the impact of the activities of transnational corporations on the realization of economic, social, and cultural rights. The report, delivered in June, 1998, is a wholesale condemnation of economic globalization.⁹⁹ It begins, “[t]oday’s economic and financial systems are organized in such a way as to act as pumps that suck up the output of the labour of the toiling masses and transfer it, in the form of wealth and power, to a privileged minority.”¹⁰⁰ Given this opening, it is not surprising that Guissé finds little in globalization that assists in the realization of human rights. Yet, he agrees that the pursuit of profit is not necessarily incompatible with the promotion and protection of human rights.

Globalization is leading to greater problems of state capacity to comply with human rights obligations, particularly economic, social, and cultural rights,¹⁰¹ such as trade union freedoms,¹⁰² the right to work, and the right to social security. It also may have a disproport-

⁹⁹ El Hadji Guisse, *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations*, U.N. ESCOR, 50th Sess., U.N. Doc. E/CN.4/Sub.2/1998/6 (1998).

¹⁰⁰ *Id.* ¶ 1.

¹⁰¹ See Statement by the United Nations Committee on Economic, Social and Cultural Rights, *Globalization and Economic, Social and Cultural Rights* (May, 1998), at <http://www.unhchr.ch/tbs/doc.nsf/385c2ad...a?OpenDocument&Highlight=O>, globalization (last visited Oct. 22, 2001); see also UNCTAD, *WORLD INVESTMENT REPORT 1994: TRANSNATIONAL CORPORATIONS, EMPLOYMENT AND THE WORKPLACE* 260 (1994).

¹⁰² ILO Report of the Director General, *supra* note 25, at 9. According to the 2001 report of the ILO Director General, close to two of every five countries have serious or severe problems of freedom of association. *Id.*

tionate effect on minorities.¹⁰³ Cooperation internationally and from non-state actors is needed in the face of an undoubted concentration of wealth in the hands of multinational enterprises, greater than the wealth of many countries. Globalization is a particular issue for women, because they often bear a disproportionate burden of poverty, which may be exacerbated by economic restructuring, deregulation,¹⁰⁴ and privatization.¹⁰⁵ Investors have demonstrated a preference for women in the “soft” industries such as apparel, shoe- and toy-making, data-processing, and semi-conductor assembling—industries that require unskilled to semi-skilled labor, leading women to bear the disproportionate weight of the constraints introduced by globalization.¹⁰⁶ The process of economic liberalization has also led to growth in the informal sector and increased female participation therein. Employment in the informal sector generally means that employment benefits and mechanisms of protection are unavailable.¹⁰⁷ Underemployment seems to be as big a problem as open unemployment.

It also has been asserted that states feel compelled to ease labor standards, modify tax regulations, and relax other standards to attract foreign investment,¹⁰⁸ seen especially in the export production zones (EPZs) where employment may be plentiful, but working conditions poor. Labor unions claim that EPZs are sometimes designed to undermine union rights,¹⁰⁹ deny or restrict rights to free association, expression, and assembly.¹¹⁰ There are some twenty-seven million work-

¹⁰³ See Marc W. Brown, *The Effect of Free Trade, Privatization and Democracy on the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary*, 4 BUFF. HUM. RTS. L. REV. 275, 275 (1998).

¹⁰⁴ See LIN LEAN LIM, MORE AND BETTER JOBS FOR WOMEN: AN ACTION GUIDE 18–20 (Int'l Labour Office 1999). Deregulation and the privatization of state enterprises have been key components of structural adjustment programs (SAPs) introduced by multilateral lending agencies as conditionals attached to aid packages to developing countries. *Id.*

¹⁰⁵ See generally Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda*, 19 HUM. RTS. Q. 630 (1997).

¹⁰⁶ For more information on these effects, see Riham el-Lakany, *WTO Trades off Women's Rights for Bigger Profits*, 12 WOMEN'S ENV'T & DEV. ORG. 1, 32 (1999), available at www.wedo.org/news/Nov99/wtotradeoff.htm.

¹⁰⁷ LIM, *supra* note 104, at 19–20.

¹⁰⁸ See Deborah Spar & David Yoffie, *Multinational Enterprises and the Prospects for Justice*, 52 J. INT'L AFF. 557, 557 (1999).

¹⁰⁹ International Confederation of Free Trade Unions, *Background Paper: Implementation of International Covenant on Economic, Social and Cultural Rights*, ¶ 4, U.N. Doc. E/C.12/1998/4 (1998) [hereinafter ICFTU].

¹¹⁰ See, e.g., John Eremu, *Uganda Warned on EPZ Strategy*, NEW VISION, Dec. 7, 1998, at 54 (noting that exclusive protection zones in many African countries are characterized by human rights abuses).

ers employed in such zones worldwide.¹¹¹ It is estimated that the number of developing countries with EPZs increased from twenty-four in 1976 to ninety-three in 2000, with women providing up to 80% of the labor force.¹¹²

Another impact observed in many countries is a shift from companies hiring permanent employees with job security and benefits, to the use of contingent or temporary workers lacking health care, retirement, collective bargaining arrangements, and other security available to the permanent work force.¹¹³ As with other negative impacts of globalization, this one also has more severe impacts on women,¹¹⁴ minorities, and migrant workers.¹¹⁵ Women comprise the largest segment of migrant labor flows, both internally and internationally. States often do not include migrant workers in their labor standards, leaving women particularly vulnerable.¹¹⁶ Overall, only some 20% of the world's workers have adequate social protection.¹¹⁷ In addition, some 3000 people a day die from work-related accidents or disease.¹¹⁸

Globalization also has produced an important new type of trans-boundary criminal enterprise. International crimes that involve or impact human rights violations are increasing: illegal drug trade, arms trafficking, money laundering, and traffic in persons are all facilitated by the same technological advances and open markets that assist in human rights. Traffic in women for sexual purposes is estimated to involve more than \$7 billion a year, but the sex trade is not

¹¹¹ ILO Report of the Director General, *supra* note 25, at 10.

¹¹² LIM, *supra* note 104, at 30.

¹¹³ See Aaron B. Sukert, Note, *Marionettes of Globalization: A Comparative Analysis of Protections for Contingent Workers in the International Community*, 27 SYRACUSE J. INT'L L. & COM. 431, 431 (2000).

¹¹⁴ See 1999 *World Survey on the Role of Women in Development: Globalization, Gender and Work: Report of the Secretary General*, at 9, 54th. Sess., U.N. Doc. A/54/227, U.N. Sales No. E.99.IV.8 (1999). Women have entered the workforce in large numbers in states that have embraced liberal economic policies. *Id.* "It is by now considered a stylized fact that industrialization in the context of globalization is as much female-led as it is export led." The overall economic activity rate of women for the age group 20–54 approached 70% in 1996. *Id.* at 8. One estimate is that 90% of the twenty-seven million people employed in EPZs worldwide are women. See JOHN HILARY, GLOBALIZATION AND EMPLOYMENT: NEW OPPORTUNITIES, REAL THREATS I (1999).

¹¹⁵ Hilary, *supra* note 114, at 440–41.

¹¹⁶ See generally Laurie Nicole Robinson, *The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures Via Article 39 of the United Nations Convention on the Rights of the Child*, 5 IND. J. GLOBAL LEGAL STUD. 239 (1997).

¹¹⁷ ILO Report of the Director General, *supra* note 25, at 9.

¹¹⁸ *Id.*

the only market for humans. Coercion against agricultural workers, domestic workers, and factory workers also is evident.

Crime syndicates are rivaling multinational corporations for economic power, threatening the security and well being of large numbers of persons. The free movement of capital, which is a prior condition to the growth in foreign investment, permits money laundering in the absence of exchange controls or other appropriate regulation. The free circulation of goods can bring stolen automobiles, smuggled sex workers, and torture implements, as well as fresh fruit and vegetables. At the same time, new technologies also permit the easier pirating of intellectual property. Indigenous groups and local communities challenge the very foundations of intellectual property protection, particularly when applied to pharmaceuticals necessary to ensure the right to life and to health.

Certain human rights are particularly threatened by globalization. Respect for private life needs protection against personal data collection. Cultural and linguistic rights can also suffer under global assault, but the evidence seems contradictory. There is no doubt that globalization facilitates the transfer of cultural manifestations and cultural property. A study by the U.N. Economic and Social Council (UNESCO) indicates that commerce in cultural property tripled between 1980 and 1991 under the impulse of satellite communications, Internet, and videocassettes.¹¹⁹ Yet, in this field, as in others, mergers and acquisitions have concentrated ownership to the detriment of local industry. The Hollywood film industry represented 70% of the European market in 1996, more than double what it was a decade earlier, and constituted 86% of the Latin American market. In the opposite direction, traditional cultures across the world are being transmitted and revived in multiethnic states through the movement of peoples, their languages, and their beliefs.

Economic globalization has been criticized for protecting investors to the detriment of local people, arguably increasing unemployment and underemployment. To make conditions better for investors, the World Bank and IMF impose economic "reform" that may lead to human rights violations, including an increase in infant and child mortality rates.¹²⁰ In addition, structural reform usually mandates

¹¹⁹ See generally U.N. ECONOMIC AND SOCIAL COUNCIL, STUDY ON INTERNATIONAL FLOWS OF CULTURAL GOODS BETWEEN 1980–1998 (2000).

¹²⁰ See Danilo Turk, *The Realization of Economic, Social and Cultural Rights*, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Agenda Item 8, ¶ 1-37, U.N. Doc. E/CN.4/Sub2/1992/16 (1992); see also Statement by the Committee on Economic, Social and Cultural Rights,

trade liberalization, something industrialized countries have not been similarly pressured to do. States may or may not be weakened, but the weakest within states are further marginalized. Lack of accountability results from the inability to exercise rights of political participation or information about key decisions. Structural adjustment may require cutting public expenditure for health and education, social security, and housing. Labor deregulation, privatization, and export-oriented production increase income disparity and marginalization in many countries.¹²¹ This leaves the main function of the state to be policing and security, which may lead either to increased political repression or to violent protests and political destabilization.

According to the independent expert appointed by the U.N. to study the impact of structural adjustment programs on human rights, there are two main consequences of such programs. First, they have led to a significant erosion of the living standards of the poor and investment in the productive sectors of many countries; second, such countries have ceded their right to independently determine their country's development priorities. According to the expert, structural adjustment shifted from being a mechanism to handle national debt into a vehicle for deregulation, trade liberalization, and privatization—all reducing the role of the state in national development. Properly structured debt relief is essential to alleviate poverty and build democratic institutions.¹²²

The formation and enhancement of transboundary religious, tribal, corporate, or associational allegiances are aspects of globalization that have both positive and negative aspects. They may challenge the nationality link and loyalty of individuals towards the territorial state. Networks of human rights activists forming an international civil society are an important component in the protection of human rights. Their formation and work is enhanced by information technology and ease of movement. Networks linked by air, telecommunications, media, and the Internet allow shared ideas and the formation of shared values. The human rights activists of the world share values with each other and a commitment to universal compliance with human rights norms that transcend nationality and particular cultural

Globalization and Economic, Social and Cultural Rights (May, 1998), at <http://www.unhchr.ch/html/menu2/6/cescrnote.htm#note18h> [hereinafter *Statement, Globalization*].

¹²¹ See Sadasivam, *supra* note 105, at 630.

¹²² The debt burden of the thirty-three poorest countries of the world collectively amounts to \$127 billion owed to industrialized countries and institutions. In Mozambique, one of the poorest countries in the world, 30% of all revenue goes to debt servicing.

values. These activists have in turn pressured corporations to accept social responsibility in their global dealings. On the negative side, international criminal syndicates and terrorist groups form the same transboundary allegiances and threaten the security of all. The problems then become those of states that are too weak, not states that are too strong.

III. ARE HUMAN RIGHTS GOOD FOR GLOBALIZATION?

The dominant view among economists and policy makers in multilateral financial institutions appears to be that any hindrances to global trade and investment are bad for development in general. Recent studies, however, suggest that business and economic indicators are better in developing countries that have more favorable civil and political rights than in repressive regimes.¹²³ Mancur Olson explains that the majority in whose interests a democratic government is ruling demand smaller growth-retarding exaction from the minority and pay greater attention to the supply of growth-promoting public goods than does a dictatorship, even when the majority is acting out of pure self-interest.¹²⁴ According to his analysis, the dispersal of political power and the emergence of representative government have often been the trigger for faster economic growth. So, prosperity is not only good for democracy, but democracy seems good for prosperity. A feature in the poorest countries is the absence or poor enforcement of contract and property rights, which are necessary for advanced markets and rapid growth.

It also seems clear that establishment of the rule of law with protection for contracts and property rights is essential to maintaining security for international investment and trade. Tourism is the world's fastest-growing industry, generating more than 10% of total international GNP, and is particularly harmed by images of repression, acts of terrorism, and the political instability that usually result from widespread human rights abuses. Judicial reform and the establishment of the rule of law with respect for human rights should be a priority, even if only for the instrumental reason to secure investment, prop-

¹²³ See A. Bernstein, *Labor Standards: Try a Little Democracy*, *Bus. Wk.*, Dec. 13, 1999, at 42.

¹²⁴ See generally MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* (2000). On development and human rights, see generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

erty, contracts, debts, and profits.¹²⁵ As the U.N. Development Program's *Human Development Report 2000* proclaims, "[r]ights make human beings better economic actors."¹²⁶

Like human rights, economic liberalization is concerned with restraining the power of the state. At the special session of the U.N. General Assembly to review progress since the 1995 Copenhagen World Summit for Social Development, the final document, adopted on July 1, 2000, makes special reference to the role and responsibilities of the private sector to work with governments to eradicate poverty, promote full employment and universal access to social services, and ensure that everyone has equal opportunities to participate in society. In turn, democratic rule and the rule of law inspires further global business activity, generating an upward spiral in rights protection. The text encourages corporate social responsibility and promotes dialogue among government, labor, and employer groups. It also expresses a belief in the relationship between economic growth and social development.¹²⁷ The Copenhagen Declaration and Program of Action affirmed that social development and social justice cannot be attained in the absence of respect for all human rights and fundamental freedoms. The Sub-Commission on Promotion and Protection of Human Rights finds in major human rights instruments "obligations and goals which are fundamental to the development process and to economic policy."¹²⁸

None of the international human rights instruments imposes an economic model, free trade, or deregulation. Yet, as Anne Orford points out, there is a link between human rights and a liberal economic regime that may facilitate globalization.¹²⁹ Liberal concepts of human rights identify the individual with property ownership and are linked with the emergence of capitalism.¹³⁰ In contrast, the failure by some governments to respect core labor standards is likely to provoke

¹²⁵ In Bosnia, foreign investment and donor support have been stifled because of rampant corruption and judges too fearful of retribution to enforce the law. See Chris Hedges, *Leaders in Bosnia Are Said to Steal up to \$1 billion*, N.Y. TIMES, Aug. 17, 1999, at A1; see also Benn Steil & Susan L. Woodward, *A European 'New Deal' for the Balkans*, FOREIGN AFF., Nov.-Dec. 1999, at 95-96 (noting that reports of financial corruption and delays in creating economic institutions have driven away corporate investors).

¹²⁶ UNDP, *supra* note 16, at iii.

¹²⁷ For clarification on this relationship, see United Nations, *Copenhagen+5 Review*, at <http://www.un.org/esa/socdev/genewa2000/index.html> (last visited Mar. 10, 2002).

¹²⁸ Res. 1999/30, *supra* note 57.

¹²⁹ Orford, *supra* note 81.

¹³⁰ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. V, § 27 (C.B. McPherson ed., Hackett Publishing Co. 1980) (1690).

trade tensions and lead to protectionist efforts. The stability of the world's trading system may thus depend upon ensuring that an open trading system does not come at the price of human rights.

IV. INTERNATIONAL RESPONSES TO THE PROBLEMS OF GLOBALIZATION AND HUMAN RIGHTS

Globalization has led to an increased concern about the responsibility of all international actors to ensure the promotion and protection of human rights. International institutions and scholars have responded with various proposals for strengthening the international regime. First, human rights activists and institutions have begun to posit the primacy of human rights law. The Committee on Economic, Social and Cultural Rights (CESCR) has emphasized that, "the realms of trade, finance and investment are in no way exempt from these general principles [on respect for human rights] and that international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights."¹³¹ The CESCR also asserts that competitiveness, efficiency, and economic rationalism must not be permitted to become the primary or exclusive criteria against which governmental and inter-governmental policies are evaluated.¹³²

Second, state responsibility for failing to control the actions of private parties has received considerable attention in the case law of international tribunals¹³³ and the work of the U.N.¹³⁴ Third, international law is increasingly regulating non-state behavior directly. Fourth, private market mechanisms such as codes of conduct or consumer purchasing schemes have sought to influence corporate behavior. Finally, restructured international governance mechanisms are

¹³¹ Statement, *Globalization*, *supra* note 120, ¶ 5.

¹³² *Id.* ¶ 4.

¹³³ See, e.g., Inter-Am. C.H.R., Velasquez Rodriguez Case, Judgment of July 29, 1988, Ser. C, No. 4, ¶ 159-77, available at http://www.corteidh.or.cr/sericing/C_4_Eng.html (last visited Mar. 11, 2002). See generally, Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 *FORDHAM INT'L L.J.* 1, 1 (1990).

¹³⁴ The General Assembly has affirmed that while globalization, by its impact on the role of the state, may affect human rights, the promotion and protection of all human rights is first and foremost the responsibility of the state. The Assembly has called for an environment at both the national and global levels that is conducive to development and to the elimination of poverty through, *inter alia*, good governance within each country and at the international level, transparency in the financial, monetary and trading systems and commitment to an open, equitable, rule-based, predictable, and non-discriminatory multi-lateral trading and financial system. G.A. Res. 102/54, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/102 (2000).

bringing a variety of international actors together to achieve common goals.

The first general trend, seen particularly among human rights advocates, has been to affirm the priority of human rights over other international legal regimes. According to this view, international economic policies cannot be exempt from conformity to international human rights law. States and international organizations are directly obliged to comply with those principles and obliged to ensure that private economic actors within their jurisdictions do not act in violation of those rights.¹³⁵ In a 1998 statement on globalization and economic, social, and cultural rights, the CESCR expressed its concerns over the negative impact of globalization on the enjoyment of economic, social, and cultural rights, and called on states and multilateral institutions to pay enhanced attention to taking a rights-based approach to economic policy-making.¹³⁶ The CESCR declared that the realms of trade, finance, and investment are in no way exempt from human rights obligations. Those concerns were raised again in the statement the CESCR addressed to the WTO Third Ministerial Conference in Seattle in November, 1999. The CESCR urged WTO members to adopt a human rights approach at the conference, recognizing the fact that, "promotion and protection of human rights is the first responsibility of Governments."¹³⁷ The CESCR's language echoes that of the Vienna Declaration and Program of Action,¹³⁸ which affirmed that, "the promotion and protection of human rights and fundamental freedoms is the first responsibility of government" and that, "the human person is the central subject of development." Similarly, the Copenhagen Declaration and Program of Action¹³⁹ recommended to

¹³⁵ According to Diller and Levy, referring specifically to the issue of coercive forms of child labour, where fundamental human rights norms are implicated, "international law requires that treaty obligations, such as trade undertakings, be maintained only to the extent of consistency with these norms." Janelle Diller & David Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 678, 678 (1997).

¹³⁶ Statement, *Globalization*, *supra* note 120.

¹³⁷ *Statement of the United Nations Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization*, Committee on Economic, Social and Cultural Rights, 21st Sess., Agenda item 3, ¶ 6, U.N. Doc. E/C.12/1999/9 (1999).

¹³⁸ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23; *see also* Commission on Human Rights, *Globalization and its Impact on the Full Enjoyment of All Human Rights*, U.N. Doc. E/CN.4/RES/1999/59 (1999) ("While globalization by its impact on, *inter alia*, the role of the State, may affect human rights, the promotion and protection of all human rights is first and foremost the responsibility of the State.").

¹³⁹ *Final Act, World Summit for Social Development: Report of the World Summit for Social Development*, U.N. Doc. A/CONF.166/9 (1995) [hereinafter *Final Act*].

states the need to intervene in markets to prevent or counteract market failure, promote stability and long-term investment, ensure fair competition and ethical conduct, and harmonize economic and social development. The Sub-Commission on Promotion and Protection of Human Rights has expressly asserted the “centrality and primacy” of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies, agreements, and practices.¹⁴⁰ The Commission on Human Rights, for its part, has affirmed that, “the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies and economic reforms arising from the debt.”¹⁴¹ The special rapporteurs on globalization and its impact on the full enjoyment of human rights flatly assert that, “the primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.”¹⁴²

Can the primacy of human rights be justified in international law? An argument can be posited on the basis of treaty law. The U.N. Charter refers to human rights in its second preamble paragraph and lists human rights as the third of its purposes in Article 1, after maintenance of peace and security, and the development of friendly relations among nations based on equal rights and self-determination of peoples.¹⁴³ The Charter not only makes human rights an aim of the organization, it obligates all member states to take joint and separate action with the U.N. to achieve universal respect for and observance of human rights and fundamental freedoms, as in Articles 55 and 56.¹⁴⁴ Article 103 of the Charter provides that, “in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter

¹⁴⁰ Sub-Commission on Promotion and Protection of Human Rights, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, U.N. Doc. E/CN.4/Sub.2/RES/1998/12 (1998); *Report of the Sub-Commission on its 50th Sess.*, U.N. ESCOR, 50th Sess., at 39, U.N. Doc. E/CN.4/Sub.2/1998/45 (1998).

¹⁴¹ Commission on Human Rights, *Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/RES/2000/82 (2000).

¹⁴² Oloka-Onyango & Udagama, *Globalization I*, *supra* note 50.

¹⁴³ U.N. CHARTER pmb., art. 1.

¹⁴⁴ *Id.* arts. 55–56.

shall prevail.”¹⁴⁵ This “supremacy clause” has been invoked to suggest that the aims and purposes of the U.N., maintenance of peace and security, and the promotion and protection of human rights, constitute an international public order to which other treaty regimes must conform.¹⁴⁶ It may be argued, however, that there is no conflict between human rights and the international trade and financial regime because they regulate separate areas of human activity. In addition, some may point to the “later in time” rule of the Vienna Convention on the Law of Treaties.¹⁴⁷ However, the Vienna Convention is not retroactive and, in any case, the provisions of Article 30 expressly provide that the later in time rule is “without prejudiced to [A]rticle 103 of the United Nations Charter.”¹⁴⁸ As with domestic bills of rights, international human rights law may limit the implementation of other social goals to means and methods compatible with its contents. In practice, states and international organizations are taking action to increase the responsibility of state and non-state actors when their economic activities impact on human rights.

The second response to globalization is found in efforts to insist on state responsibility for the behavior of non-state actors. As far as human rights are concerned, this means the state is responsible for its acts and its omissions. The Restatement of U.S. Foreign Relations Law makes it clear that a state violates international law if it commits, encourages, or condones genocide, slavery, torture, or inhuman or degrading treatment.¹⁴⁹ Complicity in human rights violations between state and non-state actors is a growing subject of interest and litigation.

The next question posed is whether or not a state is responsible for the acts of international organizations in which it participates. The International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵⁰ Article 2(1), provides that each state party will “take steps, individually and through international assistance and coopera-

¹⁴⁵ *Id.* art. 103.

¹⁴⁶ *See id.*

¹⁴⁷ Vienna Convention on the Law of Treaties, May 27, 1969, art. 59, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

¹⁴⁸ U.N. CHARTER art. 30.

¹⁴⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601-02 (1987).

¹⁵⁰ *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 360.

tion” to achieve the rights in the Covenant.¹⁵¹ This means that voting in the World Bank or IMF for programs or policies that will lead to human rights regression in one or more states could be deemed to violate the voter’s obligations under the Covenant.¹⁵²

Traditional interpretations of the ICESCR, Article 2, permit states to determine how and when they allocate resources for the realization of economic, social, and cultural rights.¹⁵³ However, in its General Comment No. 3 on the nature of the states parties’ obligations under the ICESCR, the CESCR declared that concrete legal obligations are imposed by the Covenant under Article 2.¹⁵⁴ State parties are obliged to realize minimum standards relating to each of the rights utilizing available resources in an effective manner. Violations can occur either through commission or omission.

The jurisprudence of the CESCR also recognizes “minimum core obligations” on the part of state parties that have to be fulfilled irrespective of resource or other constraints. In determining whether a state party has utilized the “maximum of its available resources,” attention shall be paid to the equitable and effective use of and access to available resources. States also may be responsible if they fail to exercise due diligence in controlling the behavior of non-state actors, such as transnational corporations, over which they exercise jurisdiction, when such behavior deprives individuals of their economic, social, and cultural rights.

The CESCR has consulted with multilateral institutions, specialized agencies, and non-governmental organizations (NGOs) in developing its approach to the issue of globalization. Other treaty-based human rights mechanisms have also shown concern over rising economic disparities that impact on their individual mandates. For example, the Committee examining periodic country reports under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has shown great concern over the evidence of the feminization of poverty and the impact of economic policies on the rights of women.¹⁵⁵ The Human Rights Committee, in General Com-

¹⁵¹ *Id.* art. 2(1). Other references to international cooperation are found in Articles 11, 15, 22, and 23.

¹⁵² *Id.*

¹⁵³ *Id.* art. 2.

¹⁵⁴ See Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session, Economic and Social Council, U.N. ESCOR, Supp. No. 3, Annex III, General Cmt. No. 3, U.N. Doc. E/1991/23-E/C.12/1990/8* (1991).

¹⁵⁵ See *Report of the Committee on the Elimination of Discrimination against Women, U.N. GAOR, 52d Sess., Supp. No. 38, ¶¶ 295, 345, U.N. Doc. A/52/38/Rev.1* (1997); see also

ment No. 28 dealing with equality of rights between men and women, gives some consideration to issues such as the feminization of poverty, declining social indicators, and gender inequity in employment within the framework of globalization.

A number of U.N. specialized agencies have also addressed the question of globalization. The ILO has long tackled the phenomenon. From the Copenhagen Social Summit in 1995 to the 1998 Declaration on Fundamental Principles and Rights at Work, the ILO has pressed for an international consensus on the content of the core labor standards that provide a social floor to the global economy.¹⁵⁶ In 1998, the ILO adopted the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182).¹⁵⁷ It also adopted its Declaration on Fundamental Principles and Rights at Work together with a follow-up procedure based upon technical cooperation and reporting. The principles have been incorporated into codes of conduct by the private sector and also used as a basis for action by various regional communities, such as the Southern African Development Community, MERCOSUR, and the Caribbean Community. U.N. bodies and specialized agencies, such as the U.N. Children's Fund (UNICEF), the U.N. Educational, Scientific and Cultural Organization (UNESCO), the Office of the U.N. High Commissioner for Refugees (UNHCR), and the U.N. Environment Programme (UNEP), have all carried out work that has implications for the overall response by the U.N. to the phenomenon of globalization. On the regional level, the European Union, in the context of negotiations for the fourth Lomé Agreement with countries of Africa, the Caribbean, and the Pacific (ACP states), sought to include good governance in public affairs, democracy, respect for human rights, and respect for the rule of law, essential in the elements of the accord, with the termination of assistance for non-respect of any of the elements.

Committee on the Rights of the Child, *Report on the Twentieth Session*, U.N. ESCOR, ¶¶ 211–13, U.N. Doc. CRC/C/84 (1999) (recording a statement made by a representative of the IMF at the session acknowledging the link between child rights and a stable macroeconomic environment).

¹⁵⁶ The rights guaranteed are: freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of compulsory or forced labor; effective abolition of child labor; elimination of discrimination in occupation and employment. For more information, see the ILO website, at <http://www.ilo.org>.

¹⁵⁷ See generally Michèle Jackson, *A New Convention to Eliminate the Economic Exploitation of Children*, 6 TRIBUNE DES DROITS HUMAINS 36 (1999).

Finally, it may be asserted that both the home and the host states have obligations to regulate the conduct of multinational companies. The *Trail Smelter Arbitration*,¹⁵⁸ the *Corfu Channel Case*,¹⁵⁹ and the U.N. Survey of International Law all state the same principle: every state's obligation not to allow knowingly its territory to be used contrary to the rights of other states.¹⁶⁰ The *Trail Smelter Arbitration* involved a privately owned Canadian company that caused harm through its activities to farmers in the United States.¹⁶¹ Corporate decisions in one state to undertake activities in another state that involve human rights violations could similarly lead to recognition that both states have a duty to control the conduct of the multinational company.

In a third approach, the international community has been moving towards greater ascription of individual responsibility for human rights violations, both by state and by non-state actors. While states remain primarily responsible for ensuring the promotion and protection of human rights, increasing attention is being given to the responsibility under international law of inter-governmental organizations, business enterprises, and individuals. In this regard, the international legal system can no longer be described as one governing states alone. The Universal Declaration of Human Rights opened the door to this development by providing, in Article 30, that, "[n]othing in this Declaration may be interpreted as implying for any [s]tate, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."¹⁶² Conceptually linked to this, the preceding article stipulates that, "everyone has duties to the community in which alone the free and full development of his personality is possible."¹⁶³

The special rapporteur on the relationship between the enjoyment of human rights, in particular economic, social, and cultural rights, and income distribution, views economic, social, and cultural rights as "the set of basic rights which determines the limits of globalization."¹⁶⁴ In Bengoa's view, "lack of education, early school leaving and structural poverty are not only general ethical issues but also vio-

¹⁵⁸ 3 U.N. R.I.A.A. 1905 (1931-41) [hereinafter *Trail Smelter Arbitration*].

¹⁵⁹ 1949 I.C.J. 22.

¹⁶⁰ *Id.* See generally *supra* notes 158-159.

¹⁶¹ *Trail Smelter Arbitration*, *supra* note 158.

¹⁶² Universal Declaration, *supra* note 42, art. 30.

¹⁶³ *Id.* art. 29.

¹⁶⁴ Jose Bengoa, *Poverty, Income Distribution and Globalization: A Challenge for Human Rights, Addendum to the Final Report*, at ¶ 28, U.N. ESCOR, 50th Sess., U.N. Doc. E/CN.4/Sub.2/1998/8 (1998).

lations of the human rights proclaimed by international law."¹⁶⁵ He concludes that the great legal, political, and ethical challenge for the coming century will be the codification and enforceability of human rights in an internationalized market.¹⁶⁶ Such an action requires taking into consideration the fact that the state is neither the sole agent nor the sole economic actor, despite its central responsibility, for the realization of economic, social, and cultural rights. Other important actors are transnational corporations, international organizations, trading and financial enterprises, and even such groups as private agencies providing assistance to the poor and needy.¹⁶⁷ He suggests further development of codes of conduct for these non-state actors and in particular the formation of a "Social Forum" with the participation of all such actors. It is somewhat surprising that the suggestion is this modest, given his characterization of the globalized world as one where:

There is not only the enormous wealth of a few thousand, but also the corruption of many [s]tate authorities, the failure of [s]tate mechanisms and services to discharge their functions, the unregulated and uncontrolled presence of transnational corporations and companies, the authoritarian and unconsidered operation of international financial institutions, and the frequently futile action of organizations and institutions which are well-intentioned but which do not coordinate their activities in a stable and sustained manner.¹⁶⁸

Another special rapporteur has remarked upon the lack of effective mechanisms to enforce the accountability of non-state actors.¹⁶⁹ He asserts that enforcing respect for codes of conduct, trade union laws, and rights of association and expression may prove difficult, citing the example of the code on marketing breast milk substitutes.¹⁷⁰

In respect to intergovernmental organizations, the theoretical basis for insisting that they adhere to human rights standards in their

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* ¶ 29.

¹⁶⁷ *Id.* ¶ 31. Bengoa also notes that it is very important that development NGOs, international cooperation agencies, and charitable foundations participate, "as they are acquiring ever greater relevance in relations between north and south, as part of the growing 'privatization' of cooperation." *Id.*

¹⁶⁸ *Id.* ¶ 30.

¹⁶⁹ Oloka-Onyango, *Racism*, *supra* note 51, ¶ 35.

¹⁷⁰ *Id.*

programs derives from their international legal personality.¹⁷¹ International organizations are entities created by states delegating power to achieve certain goals and perform specified functions. While not states, and not having the full rights and duties of states, international organizations take on rights and duties under international law. It would be surprising if states could perform actions collectively through international organizations that the states could not lawfully do individually.¹⁷² In other words, if states cannot confer more power on international organizations than they themselves possess, international organizations are bound to respect human rights because all the states that create them are legally required to respect human rights pursuant to the U.N. Charter and customary international law.

The Commission on Human Rights has begun to suggest, albeit very cautiously, that multilateral institutions must conform their policies and practices to human rights norms. In its Resolution 2001/32, the Commission recognized:

That multilateral mechanisms have a unique role to play in meeting the challenges and opportunities presented by globalization and that the process of globalization must not be used to weaken or reinterpret the principles enshrined in the Charter of the U.N., which continues to be the foundation for friendly relations among states, as well as for the creation of a more just and equitable international economic system.¹⁷³

The resolution affirms not only the individual responsibility of states for human rights but “also recognizes that, in addition to [s]tates’ separate responsibilities to their individual societies, they have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.”¹⁷⁴ Subsequent to this, and in the most recent statement of the human rights bodies on the issue, the Sub-Commission adopted a resolution in which it considers that, “at-

¹⁷¹ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178-79. See generally, Louis Henkin, *Responsibility of International Organizations*, in HENKIN ET AL., *INTERNATIONAL LAW, CASES AND MATERIALS* 359-60 (3d ed. 1993).

¹⁷² The U.N. Charter, Chapter VII, does allow international peace-keeping actions, however, for threats to the peace, breaches of the peace, and acts of aggression—actions that would generally not be legal if performed unilaterally except in self-defense.

¹⁷³ Commission on Human Rights, *Globalization and its Impact on the Full Enjoyment of All Human Rights*, U.N. Doc. E/CN.4/RES/2001/32 (2001).

¹⁷⁴ *Id.*

tion to the human rights obligations of governments participating in international economic policy formulation will help to ensure socially just outcomes in the formulation, interpretation and implementation of those policies.”¹⁷⁵ The Sub-Commission expresses its gratitude for discussions with the WTO, the IMF, and the World Bank, and attempts to walk a difficult line in reaffirming “the importance and relevance of human rights obligations in all areas of governance and development, including international and regional trade, investment and financial policies and practices, while confirming that this in no way implies the imposition of conditionalities upon aid to development.”¹⁷⁶ It urges all governments and “international economic policy forums” to take international human rights obligations fully into account in international economic policy formulation.¹⁷⁷

In its 1998 comment on globalization, the CESCR called for a renewed commitment to respect economic, social, and cultural rights, emphasizing that international organizations, as well as governments that have created and managed them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways that are compatible with their human rights obligations, and to seek to devise policies and programs that promote respect for those rights.¹⁷⁸ The CESCR addressed itself in particular to the IMF and the World Bank, calling upon them to pay enhanced attention to human rights, including “through encouraging explicit recognition of these rights, assisting in the identification of country-specific benchmarks to facilitate their promotion, and facilitating the development of appropriate remedies for responding to violations.”¹⁷⁹ The WTO also should “devise appropriate methods to facilitate more systematic consideration of the impact upon human rights of particular trade and investment policies.”¹⁸⁰ The CESCR’s recent General Comment on the right to food concerns food security within the context of globalization.¹⁸¹ It draws attention to the responsibilities of private actors, aside from the obligation of states parties to regulate appropriately their conduct, in the realization of the right to adequate

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ Statement, *Globalization*, *supra* note 120, ¶ 5.

¹⁷⁹ *Id.* ¶ 7.

¹⁸⁰ *Id.*

¹⁸¹ *The Right to Adequate Food: Report of the Committee on Economic, Social and Cultural Rights*, General Comment No. 12, at 102, 106, U.N. ESCOR., Supp. No. 2, U.N. Doc. E/2000/22 (2000).

food.¹⁸² The comment goes on to stipulate that, “[t]he private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society”.¹⁸³ Furthermore, it calls upon the IMF and the World Bank to pay attention to the protection of the right to food in drawing up lending policies, credit, and structural adjustment programs.¹⁸⁴ This approach by a treaty-based mechanism, focusing on the responsibilities of multilateral organizations as well as private actors in protecting human rights, is a significant step in international law.

International conferences also have called on international financial institutions to pay greater attention to human rights, through promotion and through assisting in the development of benchmarks to monitor compliance and remedies to respond to violations.¹⁸⁵ In particular, “social safety nets should be defined by reference to these rights and enhanced attention should be accorded to such methods to protect the poor and vulnerable in the context of structural adjustment programs.”¹⁸⁶ Social monitoring and impact assessments, similar to that done for the environment, are recommended to international financial institutions and to the WTO. Labor unions have called for including core labor standards in the future WTO work program.¹⁸⁷

For individuals, international responsibility is also increasing. The U.N. Development Program *Human Development Report 2000* calls for greater accountability of non-state actors, pointing out that, “global corporations can have enormous impact on human rights—in their employment practices, in their environmental impact, in their support for corrupt regimes or in their advocacy for policy changes.”¹⁸⁸ The most egregious acts are proscribed as international crimes. The Nuremberg Military Tribunal¹⁸⁹ and subsequent princi-

¹⁸² *Id.*

¹⁸³ *Id.* ¶ 20.

¹⁸⁴ *Id.* ¶ 41.

¹⁸⁵ See *Final Act*, *supra* note 139 (calling for a reorientation of the work of the international community including the IMF and the World Bank to establish full employment, the eradication of poverty and popular participation as the primary goals of global development policy); ICFTU, *supra* note 109.

¹⁸⁶ ICFTU, *supra* note 109, ¶ 7.

¹⁸⁷ *Id.* ¶ 17.

¹⁸⁸ UNDP, *supra* note 16, at 10.

¹⁸⁹ See Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 280, 58 Stat. 1544 [hereinafter *London Charter*].

ples prepared by the U.N. International Law Commission¹⁹⁰ made clear that neither government position nor government orders will free an individual from responsibility for the commission of an international crime.¹⁹¹ As was said in the Nuremberg judgment: "crimes against international law are committed by men and not by abstract entities and it is only by punishing individuals who commit such crimes" that international law can be upheld.¹⁹² The U.N. Security Council also has made clear the international liability of non-state as well as state actors who commit war crimes and other international crimes

The list of international crimes at Nuremberg were war crimes, crimes against peace, and crimes against humanity.¹⁹³ The Convention on the Prevention and Punishment of the Crime of Genocide affirms that genocide, whether committed in peacetime or wartime, is a crime under international law and that, "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible [rulers], public officials, or private individuals."¹⁹⁴ In 1973, the U.N. similarly declared apartheid a crime against humanity and broadly imposed responsibility on "individuals, members of organizations, institutions and State representatives."¹⁹⁵ The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind holds that systematic or widespread violations of human rights constitute international crimes for which non-state as well as state actors may be responsible.¹⁹⁶ Article 21 of the Draft Code of Crimes imposes individual responsibility for the commission of "murder; torture; establishing or maintaining over persons a status of slav-

¹⁹⁰ *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, [1950] Y.B. Int'l L. Comm'n 374-78, ¶¶ 95-127, U.N. Doc. A/1316; *Draft Code of Crimes Against the Peace and Security of Mankind: Report of the International Law Commission on the Work of its Forty-third Session*, [1991] 2 Y.B. Int'l L. Comm'n 79, U.N. Doc. A/CN.4/L.464/Add.4 (1991) [hereinafter *Draft Code of Crimes*].

¹⁹¹ *London Charter*, *supra* note 189, arts. 7-8; *Draft Code of Crimes*, *supra* note 190, arts. 11, 13.

¹⁹² INTERNATIONAL MILITARY TRIBUNAL, 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

¹⁹³ *London Charter*, *supra* note 189, art. 6.

¹⁹⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entry into force Jan. 12, 1951).

¹⁹⁵ International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. III, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. No. 30, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50.

¹⁹⁶ *Draft Code of Offenses Against the Peace and Security of Mankind: Report of the Int'l Law Comm'n on the Work of its 48th Session*, U.N. GAOR, 51st Sess., art. 21, U.N. Doc. A/51/10 (1996).

ery, servitude, or forced labor; persecution on social, political, racial, religious, or cultural grounds in a systematic manner or on a mass scale; and deportation or forcible transfer of the population."¹⁹⁷

Recently, member states of international organizations have sought to reach misconduct that is transnational in character, but not specifically designated as an international crime. The Inter-American Convention on Violence against Women calls on state parties thereto to take action against state and non-state actors that commit violence against women in the public and private spheres, including family violence.¹⁹⁸ On November 15, 2000, the U.N. General Assembly adopted a Convention against Transnational Organized Crime and a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.¹⁹⁹ This Convention calls on states to criminalize listed offenses, including money laundering and corruption, and to cooperate to combat transnational crime and to protect victims of crime.²⁰⁰ The Protocol on Trafficking expressly refers to the human rights of victims²⁰¹ and to various human rights abuses such as forced labor, slavery, or practices similar to slavery.²⁰² Natural and legal persons may be liable, and the proceeds of crimes confiscated and seized are to be used for the benefit of victims.

International organizations have taken up several problems where trade and human rights are linked, in the process enhancing global governance by bringing together state and non-state actors. The U.N. Security Council has expressed its concern about the role of the illicit diamond trade supporting the conflict in Sierra Leone and called upon the international diamond industry to cooperate on a ban on all rough diamonds from Sierra Leone.²⁰³ The Council requested the U.N. Secretary-General to appoint a panel of experts to monitor implementation of the ban.²⁰⁴ In addition, the resolution calls upon states, international organizations, the diamond industry,

¹⁹⁷ *Id.*

¹⁹⁸ Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, June 9, 1994, 33 I.L.M. 1334 (1994) (entry into force Mar. 3, 1995).

¹⁹⁹ United Nations Convention Against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, U.N. Doc. A/55/383 (2000), *reprinted in* 40 I.L.M. 335 (2001).

²⁰⁰ *Id.* arts. 14(2), 25.

²⁰¹ *Id.*, pmb., art. 2(b)6.

²⁰² *See id.* art. 3(a).

²⁰³ S.C. Res. 1306, U.N. SCOR, 55th Sess., 4168th mtg., U.N. Doc. S/RES/1306 (2000).

²⁰⁴ *Id.*

and other relevant entities to assist the government of Sierra Leone to develop a well-structured and well-regulated diamond industry.²⁰⁵ The World Diamond Congress, meeting in 2000 in Antwerp, proposed the creation of an international diamond council made up of producers, manufacturers, traders, governments, and international organizations to oversee a new system to verify the provenance of rough diamonds.

If the behavior of non-state actors violates international norms directly applicable to their conduct, they may be held responsible to their victims. Efforts to hold corporations accountable for conduct occurring in overseas operations have recently become prevalent in U.S. courts. Using the Alien Tort Claims Act, plaintiffs have sought to hold multinational companies liable for customary human rights violations and environmental harm in Burma, Nigeria, Ecuador, and India. In England as well, the House of Lords has upheld an action brought against an English-based multinational company by South African mineworkers suffering from asbestos related diseases. The use of international human rights law in presenting claims directly against industry is a relatively recent phenomenon and reflects the growing attention being paid to non-state actors in international law and the expectations that their behavior will be tested by norms previously directed at states and state agents. The draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters refers to human rights in Article 18, in reference to war crimes and grave violations of fundamental rights.

Further action is being taken by human rights bodies. In 1998, the U.N. Sub-commission for the Prevention of Discrimination and Protection of Minorities voted to establish a Working Group to examine over three years the effects of the working methods and activities of transnational corporations on human rights.²⁰⁶ The mandate of the Working Group is extensive and includes identification and examination of the effects of the activities of transnational corporations on the enjoyment of civil, cultural, economic, political, and social rights, the right to development, the right to a healthy environment, and the right to peace.²⁰⁷ It is to gather and examine information and reports, and prepare an annual list of transnational corporations to provide examples of the positive and negative impacts on human rights of their activities in the countries in which they operate.²⁰⁸ In addition,

²⁰⁵ *Id.*

²⁰⁶ Sub-Commission Resolution 1999/8, *supra* note 49.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

the Working Group is to assess how existing human rights standards apply to transnational corporations, including private initiatives and codes of conduct, and collect for study international, regional, and bilateral investment agreements.²⁰⁹

The Working Group has prepared a draft code of principles relating to the human rights conduct of companies, based upon relevant language from the codes of conduct by the U.N., the Organization for Economic Co-Operation and Development (OECD), the ILO, corporations, unions, and non-governmental organizations.²¹⁰ The principles address a wide range of human rights issues, including non-discrimination, and freedom from harassment and abuse, slavery, forced labor and child labor, healthy and safe working environments, fair and equal remuneration, hours of work, freedom of association, and the right to collective bargaining, as well as war crimes and other international crimes.²¹¹ The fundamental rationale for the draft principles was to impose responsibility on companies commensurate with their increased power.²¹² During the meetings of the Working Group leading up to the principles, many non-governmental organizations argued in favor of drafting a legally binding instrument, on the basis that another voluntary code of conduct would be insufficient.²¹³

The ILO remains the key institution concerned with the rights of workers throughout the world. To the extent that other organizations have become involved, the ILO seeks to determine whether or not their standards conform to those of the ILO and adopt a similar human rights approach. The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy addresses the obligations of four groups: the enterprises themselves; workers' groups; employers' organizations; and governments. Its aims are to encourage the positive contributions of multinational companies to economic and social progress and to minimize the negative consequences that might accompany their activities. The Declaration provides that all four groups should respect the Universal Declaration of Human Rights and the two U.N. Covenants on Human Rights. The

²⁰⁹ *Id.*

²¹⁰ See Commission on Human Rights, *Report of the Working Group on the Effects of the Working Methods and Activities of Transnational Corporations on Human Rights*, at 4, U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1 (2000).

²¹¹ *Id.*

²¹² *Id.*

²¹³ Commission on Human Rights, *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations: Second Report of the Working Group*, ¶ 52, U.N. Doc. E/CN.4/Sub.2/2000/12 (2000).

ILO also surveys the positive and negative effects of multinational activities based on information from workers, employers, and governments.

The OECD became a focus of controversy during its unsuccessful efforts to draft a Multilateral Agreement on Investment (MAI), a process that ended in December, 1998.²¹⁴ Strikingly, both the investors pressing the MAI and those opposed to it were part of the globalized community and, according to one view, “compromise the concept of national sovereignty and local control.”²¹⁵ Many of the issues raised concerned human rights, including some related to the negotiating process itself and its lack of transparency.²¹⁶ In addition, NGOs were concerned about several substantive areas that seemed to seriously limit the sovereignty of states in favor of foreign investors.

Before and after the MAI negotiations, the OECD addressed issues of human rights. First, in 1995, it published guidelines on participatory development and good governance²¹⁷ in which the members reiterated their adherence to international human rights norms.²¹⁸ In 1996, OECD studied trade and labor standards, looking at core worker rights.²¹⁹ Later, it adopted revised Guidelines for Multinational Enterprises on June 27, 2000,²²⁰ supported by follow-up procedures in the twenty-nine member states and four non-member states participating in the process.²²¹ The Guidelines concern multinational enterprises operating in or from the thirty-three countries and

²¹⁴ For differing accounts about why the effort was unsuccessful, see Kobrin, *supra* note 31, at 97.

²¹⁵ *Id.* at 99.

²¹⁶ See Milloon Kothari & Tara Krause, *Human Rights or Corporate Rights? The MAI Challenge*, 5 *TRIBUNE DES DROITS HUMAINS* 16 (1998).

²¹⁷ See generally Development Assistance Committee of the Organization for Economic Co-Operation and Development, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance*, at 1, OECD Doc. OCDE/GP/93/191 (1997), available at <http://www.oecd.org/dac> [hereinafter OECD, *Working Group*].

²¹⁸ *Id.* ¶ 66.

²¹⁹ See generally Organization for Economic Co-operation and Development, *TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE* (1996).

²²⁰ OECD, *Working Group*, *supra* note 217, ¶¶ 12–13.

²²¹ The revision process demonstrated the impact of the Internet on prospects for participation in international organizations. A draft text of the guidelines were posted on the web with an invitation for the public to comment. After comments were received from businesses, labor unions, environmental groups, academic institutions, individuals, and non-member states, the draft was revised and the second version also posted on the Internet. A second round of public comment followed before the Guidelines were finalized. See James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 *MICH. J. INT'L L.* 769, 847 (2000).

apply to all operations worldwide. The revision added a human rights obligation, stating that, "enterprises should . . . [r]espect the human rights of those affected by their activities consistent with the host government's obligations and commitments." It is significant that the Guidelines do not refer to policies or practices, but rather to the legal obligations of the host state. Every state has such obligations under the U.N. Charter, customary international law, and such human rights treaties as the state has ratified. The Guidelines impose a duty upon businesses to inform themselves of the relevant obligations and conform their conduct to them. The follow-up foresees a series of procedures involving consultations, good offices, conciliation, and mediation.

The U.N. Declaration Against Corruption and Bribery in International Commercial Transactions encourages social responsibility and ethical behavior, calling on partners to international transactions to observe the laws of the host countries, and take into account the impact of their activities on economic and social development and protection of the environment and human rights.

Yet another response to the intersecting issues of globalization and human rights has been to utilize market mechanisms and other forms of private regulation to impact corporate behavior. Pressure from international and national groups, as well as perceived long-term interests, have led many companies to take up the issue of human rights. A survey by the Ashridge Centre for Business and Society found that human rights issues caused more than one in three of the 500 largest companies to abandon a proposed investment project and nearly one in five to divest its operations in a country. Nearly half have codes of conduct that refer to human rights. The record is not clear, however, on implementation. The U.N. Development Program *Human Development Report 2000* calls for better implementation of corporate codes of conduct, stating that, "many fail to meet human rights standards, or lack implementation measures and independent audits."²²² It suggests that the use of human rights indicators be extended to include the role of corporations.

Codes of conduct for human rights often result from pressure on companies to divest from countries with widespread and systematic human rights violations.²²³ Consumer boycotts and labeling initiatives

²²² UNDP, *supra* note 16, at 80.

²²³ Examples are the Sullivan Principles concerning South Africa during apartheid and the McBride Principles for Northern Ireland. See Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 Co-

such as “Rugmark”²²⁴ provide a means for persons concerned with labor conditions and human rights to use their purchasing power to influence corporate policy. Effective mobilization of international consumer pressure can substitute for regulation.²²⁵ A writer in the *Economist* has observed that, “a multinational’s failure to look like a good global citizen is increasingly expensive in a world where consumers and pressure groups can be quickly mobilised behind a cause.”²²⁶ Such marketplace regulation has been criticized as lacking in the accountability and transparency that normally accompany the formation of laws.²²⁷

The final approach concerned with enhancing human rights in a globalized world is one that has broad implications for global governance generally. It seeks to enhance non-state participation in international organizations and other fora concerned with international regulation. While international organizations other than the ILO have limited participation for non-governmental entities, efforts are being made to develop more collaborative efforts between state and non-state actors within the framework of international organizations.

The U.N. Millennium Declaration²²⁸ resolves to give greater opportunities to the private sector, NGOs, and civil society in general “to contribute to the realization of the Organization’s goals and programs.”²²⁹ The U.N. Global Compact Initiative aims to develop policy networks of international institutions, civil society, private sector organizations, and national governments to further human rights.²³⁰ The Initiative has taken up such issues as trade in diamonds in zones of conflict, corporate social responsibility generally, the inclusion of corporate behavior in the studies conducted by U.N. special rappor-

LUM. J. TRANSNAT’L L. 663, 671 (1995); see also J. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 *FORDHAM INT’L L.J.* 1, 47 (1993).

²²⁴ “Rugmark” is a program to label carpets that have been made free from child labor. See J. Hilowitz, *Social Labelling to Combat Child Labor: Some Considerations*, 136 *INT’L LAB. REV.* 215, 224 (1997).

²²⁵ Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 *CARDOZO L. REV.* 957, 959 (1996).

²²⁶ See *Multinationals and Their Morals*, *ECONOMIST*, Dec. 2, 1995, at 18.

²²⁷ Spiro, *supra* note 225, at 962–63 (criticizing NGOs for lack of accountability and transparency).

²²⁸ *United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/55/2 (2000) (issuing on behalf of the heads of state and government attending the U.N. Millennium General Assembly).

²²⁹ *Id.* ¶ 30.

²³⁰ See Office of the High Commissioner for Human Rights, *Business and Human Rights: An Update* (June 26, 2000), at <http://www.unhchr.ch/businesupdate.htm>.

teurs on various human rights issues, and the impact of national litigation on corporate liability for human rights abuses in countries where the companies have operations.²³¹ It is also concerned with the work of international financial institutions like the World Bank and regional organizations, such as the OECD.²³²

U.N. special rapporteurs have held discussions with private actors in exercising their mandates. The special rapporteurs on Sudan and on Afghanistan held dialogues with oil companies conducting activities in these countries; the special rapporteur on toxic waste met with a pharmaceutical company.²³³ The special rapporteur on the sale of children has worked with the International Chamber of Commerce requesting information about company initiatives benefitting children that could be proposed for action in various parts of the world.

Multinational companies also have been important in conflict resolution, especially in mobilizing information and communications technology. This was the case with the U.N. High Commissioner for Refugees in, for example, Kosovo.²³⁴ Successful partnership will require companies to shun corrupt leaders and work to build viable states that respect human rights.²³⁵ The joint U.N.-World Bank effort in East Timor demonstrates a broad engagement in rebuilding, including the development of judicial institutions and processes.²³⁶ Given the insecurity in many conflict and post-conflict areas, the cooperation of the U.N. and the World Bank with private enterprise will be necessary to ensure that the risks are properly shared, perhaps through more favorable terms for political-risk insurance.²³⁷ Humanitarian and human rights NGOs also must be part of the coalition, with the aim of overcoming the mutual distrust with which the business sector and NGOs view each other. To fully work, such a coalition may

²³¹ *Id.*

²³² *Id.*

²³³ The mandate of the special rapporteur on toxic waste includes complaints brought by and against states and non-state actors for the transboundary movement of toxic wastes and she is to identify specific companies and states involved in such traffic.

²³⁴ See JANE NELSON, *THE BUSINESS OF PEACE: THE PRIVATE SECTOR AS A PARTNER IN CONFLICT PREVENTION AND RESOLUTION* 20 (2000), available at <http://www.international-alert.org/corporate/Pubs.htm> (last visited Dec. 22, 2001).

²³⁵ See Jonathan Berman, *Boardrooms and Bombs: Strategies of Multinational Corporations in Conflict Areas*, 22 HARV. INT'L REV. 28, 28 (2000), available at <http://www.hir.harvard.edu> (last visited Mar. 11, 2002).

²³⁶ See generally Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001).

²³⁷ *Id.*

require restructuring international institutions to allow more effective participation by non-state actors.

Several multinational agreements have been concluded between international industry associations and workers' organizations.²³⁸ These include the collective agreement between the International Transport Workers Federation and the International Maritime Employers' Committee, an agreement that covers wages, minimum standards, and other terms and conditions of work, including maternity protection. In January, 2001 the two partners agreed upon the future development of labor standards in the international shipping industry to permit such standards to become the third pillar of the shipping industry, alongside maritime environmental and safety standards.²³⁹ The Spanish-based telecommunications company Telefonica and the Union Network International (UNI) similarly signed an agreement that covers some 120,000 workers represented by eighteen labor unions affiliated to UNI. Both sides agreed to respect ILO core labor standards covering freedom of association and the right to collective bargaining, non-discrimination, and freedom from forced labor and child labor. In all, the agreement referred to some fifteen ILO conventions and recommendations.

The question of whether or not non-economic, e.g., human rights values, are or should be incorporated in the trade regime remains debated. Richard Shell has proposed a "stakeholder model" of international government in which "private commercial parties, indigent citizens in developing countries with weak governments, environmentalists, labor interests, . . . consumer groups," and others affected by trade would have a role in economic policy-making and dispute settlement in order to integrate non-economic values with economic ones.²⁴⁰ Human rights interest groups and other NGOs having consultative status²⁴¹ have been prominent in various U.N. human

²³⁸ In addition to the two agreements mentioned here, other international agreements signed include the code of labor practice signed between the International Federation of Association Football (FIFA) and the International Confederation of Free Trade Unions (ICFTU), the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET) and the International Textile, Garment and Leather Workers' Federation (ITGLWF). ILO, Report of the Director General, *supra* note 25, at 43-44.

²³⁹ *Id.* at 42.

²⁴⁰ See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 908-09 (1995).

²⁴¹ Article 71 of the U.N. Charter authorizes ECOSOC to consult with NGOs concerned with matters within ECOSOC competence. Article 71 has been implemented through procedures adopted in ECOSOC resolutions. See *General Review of Arrangements for Consultations with Non-Governmental Organizations: Report of the Secretary-General, Open-ended*

rights meetings and in other international fora, but have had far less success in participating in the WTO.²⁴² In general, more transparency and participation are needed.

CONCLUSION

The key international legal developments that appear to be emerging as a result of globalization, as discussed above, seem to be the following. First, human rights institutions and activists are asserting a primacy of human rights law over other fields of international law. Whether or to what extent this assertion will be accepted remains to be seen. Second, the international legal personality of inter-governmental organizations is seen to carry with it the obligation to conform to general international law norms, above and beyond the requirements of the constituting charters or constitutions of the organizations. Third, the imposition of responsibility for human rights violations on non-state actors appears to be increasing. This all leads to asking: does the state need strengthening?

Globalization has created centers of power that are alongside, even in competition with the power of states. Accountability for human rights violations and prevention of future ones must today and in the future take into account these non-state actors: the media, corporations, and international organizations such as the WTO and the World Bank. States and their agents are no longer the only or sometimes even the key actors responsible for ensuring that human rights and freedoms are guaranteed. As recent international developments have shown, there are multiple avenues to respond to this problem. The first is to strengthen the state and to insist on its responsibility for ensuring that non-state actors do not commit human rights violations.

There is no doubt a need to strengthen weak states that lack the institutions necessary to protect and ensure human rights. Institutions such as independent judiciaries must be formed and executive power, including the police and military, must be brought under the rule of law. At the same time it must be recognized that there are two problems with solely relying on strengthened individual state action. First, it raises the specter of powerful state agents again capable of and perhaps willing to use and abuse state power to prolong their time in

Working Group on the Review of Arrangements for Consultation with Nongovernmental Organizations, U.N. GAOR, 1st Sess., U.N. Doc. E/AC.70/1994/5 (1994).

²⁴² See Kenneth W. Abbott, "Economic" Issues and Political Participation: *The Evolving Boundaries of International Federalism*, 18 *CARDOZO L. REV.* 971, 1005-06 (1996).

office. The wisdom of political philosophers who called for a balance of and restraints on power must not be forgotten because "the good old rule, [s]ufficeth them, the simple plan, [t]hat they should take, who have the power, [a]nd they should keep who can."²⁴³ The second problem is that even strong states are unable to deal unilaterally with all the challenges posed by globalization, especially when dealing with international crime, including terrorism. The amount of individual state strengthening that would be necessary to combat these problems would probably require an unacceptable retreat from basic human rights.

The alternative is to strengthen the weak states to enable them to protect human rights, while at the same time imposing increased international obligations on non-state actors through multilateral mechanisms. Thus, even though states will retain the primary responsibility for ensuring the promotion and protection of human rights, non-state actors will be held accountable when they undermine state efforts to do so or are complicit in violations undertaken by the state. Non-state actors have always had a pivotal role in developing the law of human rights; they now may take a further role as a result of globalization.

²⁴³ Wordsworth, *Rob Roy's Grave*, stanza 9, available at <http://www.bartleby.com/145/ww242.html> (last visited Mar. 10, 2002).