7

Research papers

ALBOAN

Mainstreaming Human Rights in the international financial and trade institutions: achievements and prospects

BFA DFB
Bizkaiko Foru Aldundia
Diputación Foral de Bizkaia

EUSKO JAURLARITZA GOBIERNO VASCO
ETXEBIZITZA ETA GIZARTE GAIETAKO SAILA
Gizarte Gaietako Saiburordetza
Garapen Lankidetzarako Zuzendaritza
DEPARTAMENTO DE VIVIENDA Y ASUNTOS SOCIALES
Viceconsejería de Asuntos Sociales
Dirección de Cooperación al Desarrollo

Objetivos de Desarrollo del Milenio
Mileniumeko Garapen Helburuak

This publication is part of a collection of five 5 studies on the Goals of the Millennium Development. If you are interested in receiving more in-depth information on this subject, we also have available other complementary material (comics, posters, workbooks...), which can be requested at any of our offices or from our website.

Research papers ALBOAN

5. Unsuportable debt. (2008)
6. International financial mechanisms for development: the Tobin tax and the "International Finance Facility". (2008)
7. Mainstreaming Human Rights in the international financial and trade institutions: achievements and prospects. (2008)
8. Does the United Nations reform benefit the poor? A critical evaluation of the recent reform proposals. (2008)
9. The role of aid in the MDG localisation process. (2008)

Mainstreaming Human Rights in the international financial and trade institutions: achievements and prospects

Published by:

ALBOAN

Padre Lojendio 2, 2º • 48008 Bilbao
Tel.: 94 415 11 35 • Fax: 948 264 308
alboanbi@alboan.org

Avenida Barañain 2 • 31011 Pamplona
Tel.: 948 231 302 • Fax: 948 264 308
alboanna@alboan.org

C/ Ronda 7, 4º I • 20001 San Sebastián
Tel.: 943 275 173 • Fax: 943 320 267
alboangi@alboan.org

www.alboan.org

Author: Felipe Gómez Isa

Date: march 2008

Translation: Sergofi

Design by: Marra, S.L.

Printed by: Lankopi S.A.

Legal deposit: Bi-534-08

ISBN: 978-84-612-1356-6

Index

Mainstreaming Human Rights in the international financial and trade institutions: achievements and prospects

Minstreaming Human Rights in the international financial and trade institutions: achievements and prospects

*Felipe Gómez Isa**

I. Introduction

Globalization has become one of the main driving forces of our time. While it offers great opportunities in terms of new technologies, communication, and economic growth in some parts of the world, there are increasing concerns about its impacts on the protection and promotion of Human Rights. According to the *UN Millenium Summit Declaration*,

> "the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable"[1].

One of the most interesting facets is that it is the General Assembly of United Nations that is clamoring for a globalization that is "absolutely *inclusive* and *equi-*

* Professor of Public International Law and researcher at the Pedro Arrupe Institute of Human Rights of the University of Deusto (Bilbao, the Basque Country, Spain).

[1] *United Nations Millennium Declaration*, Resolution adopted by the General Assembly, UN Doc. 55/2, 18 September 2000, para. 5.

table," a statement which clearly shows that globalization is not currently headed in that direction. Very much to the contrary, in fact, the current process of globalization is characterized as one that generates exclusion and extreme inequality, which brings about very serious consequences for the protection of Human Rights, both in terms of civil and political rights and, above all, economic, social and cultural rights. These concerns are also shared by the International Confederation of Free Trade Unions (ICFTU), which, in a Day of General Discussion convened by the UN Committee on Economic, Social and Cultural Rights to analyse the issue of Globalization and its impact on the enjoyment of economic and social rights, emphasized that "the global market is a powerful mechanism for dynamic development, but it can also lead to the exclusion and marginalization of millions of ordinary citizens who do not have the advantage of wealth or status. It has to be balanced by countervailing powers"[2].

The process of globalization is also having a strong impact in the actors that are relevant both in the national and in the international arena. The dynamics of globalization, characterized by increasing financial and trade liberalization, deregulation, reduction of barriers to foreign investment and privatization (the so-called *Washington Consensus*), is reducing dramatically the role of the State. As a result, sectors previously covered by the public sector are left in the hands of the market. Consequently, this process has steadily weakened Human Rights protection in a number of countries, primarily affecting economic, social and cultural rights. As we well know, protection of these rights essentially depends on the State[3]. These rights hinge on the services provided by the state: rights such as healthcare, education, food and clothing, basic social services, a public social security system, etc. On par with cutbacks in certain sectors made by the state –which in so doing has relinquished its duties– economic, social and cultural rights have also suffered. This trend towards "privatization of Human Rights" has had disastrous consequences in terms of the protection of many of those same rights[4]. The

[2] *Day of General Discussion: Globalization and its impact on the enjoyment of economic and social rights, Background paper submitted by the International Confederation of Free Trade Unions* (ICFTU), UN Doc. E/C.12/1998/4.

[3] On this note, we should not forget about Art. 2 of the International Covenant on Economic, Social and Cultural Rights, which obliges the state to provide adequate protection for these rights. As the article states, 'each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

[4] R. Barrios Mendivil, 'Obstáculos para la vigencia de los derechos económicos, sociales y culturales', in Terre des Hommes, *El derecho a la equidad. Etica y mundialización social*, Barcelona, Icaria, 1997, pp. 83-116.

reduction in the role of the state has been particularly severe in many developing countries as a result of the Structural Adjustment Programs imposed by the World Bank and the International Monetary Fund, which have helped to further aggravate –if that is even possible– the state of economic, social and cultural rights in those countries, in addition to affecting the fulfillment of civil and political rights. The indivisibility and interdependence of all Human Rights are such that when a certain type of rights suffers, others feel the effects as well. The fact is that these plans backed by the Bretton Woods Institutions have brought about serious repercussions in terms of the fulfilment of Human Rights[5].

In connection with the gradual reduction of the role of the State, we have witnessed a more and more relevant role played by International Financial and Trade Institutions (IFTIs, basically the World Bank, the IMF and the recently created WTO) and large and powerful Transnational Corporations.

The aim of this paper is to see to what extent International Human Rights Law is able to frame the activities of the institutions that run the global economy. In order to do so, first we will try to draw a picture of the evolution of International Human Rights Law (section 2) and its status *vis-a-vis* International Financial and Trade Institutions (section 3) and Transnational Corporations (section 4). Secondly, some reflections will be made on the ongoing processes of privatisation from the angle of Human Rights (section 5). In third place, I will analyse the attempts to incorporate HRs concerns into the activities of IFTIs (section 6), and, finally, I will make some tentative proposals for an effective mainstreaming of HRs in their activities (section 7).

II. Evolution of International Human Rights Law (IHRL)[6]

The emergence of the individual as subject of Public International Law and, therefore, as holder of basic rights, took place within the context of Second World War and the brutal atrocities committed during the conflict. In the San Francisco Conference (June 1945), an international conference for the establishment of a new International Organization to promote peace and security, Human Rights

[5] A. Pigrau I Sole, 'Las políticas del FMI y del Banco Mundial y los Derechos de los Pueblos', nº 29-30 *Afers Internacionals* (1995) 139-175.

[6] A very much detailed analysis of the magnificent development of IHRL can be found in GOMEZ ISA, F. and DE FEYTER, K. (Eds.): *International Protection of Human Rights: Achievements and Challenges*, HumanitarianNet-University of Deusto, Bilbao, 2006.

became one of the main issues under discussion. As a consequence of the importance attached to Human Rights, they play an important role in the UN Charter. In the preamble of the UN Charter, while reaffirming "faith in fundamental Human Rights" and "in the dignity and worth of the human person…" the peoples of the United Nations declared themselves "determined… to promote social progress and better standards of life *in larger freedom*" (emphasis added)[7]. As we can see, from the very beginning it was clear that social progress and development should go hand in hand with the protection and promotion of HRs, and the concept of HRs was a comprehensive one, including both the traditional freedoms and socioeconomic rights. The principle of the *indivisibility of all HRs* was somewhat inherent in the spirit and in the underlying ideology of the UN Charter. Unfortunately, the Cold War exerted a very negative influence in this principle, and HRs became one of the main issues of controversy between the East and the West.

Article 1.3 of the UN Charter also includes HRs as one of the principal purposes of the Organization. According to this provision, it is a purpose of the UN "to achieve international co-operation… in promoting and encouraging respect for Human Rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Finally, under Chapter IX of the UN Charter, devoted to International Economic and Social Co-operation, two articles are worth mentioning. Article 55 states that:

> "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations…, the UN shall promote:
>
> … (c) universal respect for, and observance of, Human Rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Along the same lines, Article 56 establishes that "all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". As we can very clearly see,

[7] It is very illustrative that the Secretary-General launched his report in 2005 under the symbolic title "In larger freedom: towards development, security and Human Rights for all", underlining that security, development and Human Rights are the three central pillars of the UN's work. As stated by the Secretary-General, "we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for Human Rights", A/59/2005, para. 17.

both the UN as such and all its Members assume the legal obligation of respecting and promoting HRs, situating HRs as a vital objective to be achieved.

One of the problems arising out from these relevant provisions of the UN Charter is that we do not find a definition of HRs. There is no a catalogue of those rights. As a consequence, we have to recognize that the references of the UN Charter to HRs are general, and somehow vague and imprecise. On the other hand, they impose legal duties both on the UN and on its Member States; they constitute the legal and conceptual foundation for the development of International Human Rights Law after 1945[8].

The elaboration of the provisions of the UN Charter as far as HRs are concerned came with the adoption of the Universal Declaration of Human Rights (UDHR) the 10th December 1948, a much more detailed set of both civil and political rights and economic, social and cultural rights. The UDHR has been defined as an "authorized interpretation" of the HRs provisions of the UN Charter[9] and, therefore, the UN Charter and the UDHR must be read jointly when trying to identify and to define the HRs obligations of the UN and its Member States.

Most of the scholars advocate that at least a significant part of the rights enshrined in the UDHR, especially in the realm of civil and political rights, have become international customary law[10]. This means that all States of the international community would be bound by those norms. Along the same lines, the International Court of Justice (ICJ) has found that some of the most basic Human Rights norms have acquired the character of *obligations erga omnes* and, therefore, they can be considered as *ius cogens norms*, the highest category of norms at international level[11]. Among these norms that have become *ius cogens* the ICJ

[8] See VILLÁN DURÁN, C.: *Curso de Derecho Internacional de los Derechos Humanos*, Trotta, Madrid, 2002.

[9] GÓMEZ ISA, F. and ORAÁ, J.: *La Declaración Universal de Derechos Humanos*, Universidad de Deusto, Bilbao, 2002.

[10] INTERNATIONAL LAW ASSOCIATION: "Final Report on the Status of the Universal Declaration of Human Rights in National and International Law", *ILA Report of the Sixty-Sixth Conference,* Buenos Aires (Argentina), 1994, pp. 527 and ff. In this final report there is a fairly complete study of the incorporation of the UDHR into national laws and constitutions, as well as jurisprudential references to it.

[11] According to Article 53 of the Vienna Convention on the Law of Treaties, "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". At the same time, given the crucial importance of these norms, they have a retroactive effect, since, as stated in Article 64 of the Vienna Convention, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

has included the norms that prohibit genocide, slavery and slave trade, racial discrimination, torture[12], and, more recently, the right to self-determination[13]...

A last comment on the hierarchy of International Human Rights Law can be made in connection with Article 103 of the UN Charter, that establishes the prevalence of legal obligations arising from the Charter over any other treaty obligation. According to this provision,

> "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 shall prevail*" (emphasis added).

The problem with the interpretation of this provision is, once again, the scope of the HRs obligations that emanate from the UN Charter. While there is an emerging consensus on its applicability to the most basic civil and political rights, many doubts emerge when trying to apply this norm to economic, social and cultural rights. Despite the reiteration of the proclamation of the principle of indivisibility of all HRs[14], we are obliged to recognize that the legal status and the development of second generation Human Rights are different in comparison to civil and political rights. Economic, social and cultural rights are less developed conceptually, institutionally and jurisprudentially, being doubtful that they have become customary international law. This is one of the main problems when trying to apply IHRL to the International Financial and Trade Institutions, since their rules and policies affect primarily economic, social and cultural rights. Much efforts and work need to be done for clarifying and developing economic, social and cultural rights. New tools and new strategies are needed, as we will see.

---

[12] Barcelona Traction Case, *CIJ Recueil*, 1970.

[13] The opinion of the ICJ in the East Timor Case (*ICJ Recueil*, 1995) is worth mentioning. It reads as follows: "in the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court...; it is one of the essential principles of contemporary international law". An analysis of the scope of the right to self-determination of peoples in contemporary international law in GOMEZ ISA, F.: "El derecho de autodeterminación en el Derecho Internacional contemporáneo", in *Derecho de autodeterminación y realidad vasca*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 2002, pp. 267-318.

[14] This principle has been incorporated in many international instruments, from the UN Charter and the UDHR to the most recent Vienna Declaration and Plan of Action. According to the Vienna Declaration, "all Human Rights are universal, indivisible and interdependent and interrelated. The international community must treat Human Rights globally in a fair and equal manner, on the same footing, and with the same emphasis", *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, from 14th to 25th June 1993, A/CONF.157/23, 12 July 1993, Part I, para. 5.

III. International Financial and Trade Institutions before International Human Rights Law

The IFTIs are, legally speaking, international organizations and, therefore, subjects of Public International Law. That means that they can derive rights and duties from International Law[15]. As a consequence of the legal personality of IFTIs before Public International Law, they are subject to the reach of general rules of International Law, namely custom and general principles of International Law. According to Koen de Feyter, the IFTIs are under a duty to respect the prohibitive general rules of IHRL: they are under an obligation not to violate or to become complicit in the violation of general rules of IHRL. However, he concludes, "it is difficult to determine the exact content of the general rules of Human Rights law"[16], especially in the field of economic, social and cultural rights, as we have seen before.

The UN Charter gives the possibility to the UN system to enter into *relationship agreements* with International Organizations whose functions are related to those of the UN. According to Article 63.1 of the UN Charter, "the Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations". Unlike the WTO, the Bretton Woods institutions became very soon, in 1947, Specialized Agencies of the UN after the conclusion of a Relationship Agreement with the UN. This means that they are formally part of the family of the UN and have to co-ordinate their activities with the main bodies of the UN active in the field on international social and economic co-operation[17]. These Relationship Agreements incorporate an obligation of the Specialized Agencies to assist in achieving the objectives of international economic and social co-operation as defined in the above mentioned Article 55 of the UN Charter. We have to insist once again that universal respect and observance of HRs are among the major goals on the UN recognised in Article 55. Therefore, the IMF and the World Bank are under an obligation to contribute to the universal respect and observance of HRs. The UN Committee on Economic and Social

---

[15] AMERASINGHE, C.F.: *Principles of the institutional law of international organizations,* Cambridge University Press, Cambridge, 1996, p. 240.

[16] DE FEYTER, K.: "The International Financial Institutions and Human Rights. Law and Practice", in GOMEZ ISA, F. and DE FEYTER, K. (Eds.): *International Protection..., op. cit*., p. 563.

[17] Article 63.2 of the UN Charter establishes that the ECOSOC "may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations".

Rights has clarified the Human Rights implications of obtaining the status of a specialized agency:

> "In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches, which contribute, not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of Human Rights"[18].

Despite the clarity of these UN Charter provisions and the views expressed by the body that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), truly co-ordination of activities between UN development and HRs bodies and the Bretton Woods institutions has been absent until very recently, as it will be shown below. In practice, both the World Bank and especially the IMF have tried to preserve their maximum autonomy and independence.

The WTO is not a UN Specialized Agency. When the Agreement of the WTO was being discussed, industrialized countries tried to avoid any formal implication with the UN system; they wanted total autonomy and independence *vis-a vis* the UN to deal with the issue of trade liberalization. In Article 3.5 of the Marrakesh Agreement establishing the WTO[19] there is recognition of the need to cooperate with some international institutions. As stated in this provision, "with a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies". In 1996 an agreement was signed between the WTO and the World Bank and the IMF. It is clear that the WTO sees much more appropriate to collaborate with the Bretton Woods institutions rather than with the UN as such, although

[18] UN Committee on Economic, Social and Cultural Rights, General Comment No. 2, 1990, UN doc. E/1990/ 23, Annex III, para. 6.

[19] Adopted on 15 April 1994, it entered into force by 1 January 1995.

this possibility is also recognized in the Agreement establishing the WTO. According to Article 5.1, "the General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO". The use of the term "shall" in the provision just mentioned has been interpreted as entailing a "formal obligation"[20] on the part of the WTO to enter into this kind of agreements with other International Organizations. The conclusion of an agreement of co-operation between the WTO and the UN should become a priority, since from a development perspective and from a Human Rights perspective it does not make any sense at all that there are not formal relations between the WTO and the world organization that has among its main goals to promote development and Human Rights.

On the other hand, we must not forget that Member States of the IFTIs have assumed individually HRs obligations by having ratified the UN Charter and an increasing number of international treaties that protect HRs[21]. As mentioned before, Article 55 of the UN Charter underlines the obligation of States to promote universal respect and observance of Human Rights. This means that when defining and designing global rules and policies within the framework of the IFTIs, and especially when applying them, States should take into consideration that they are bound by international obligations arising both from the international instruments they have ratified and from the general rules of international law[22]. This is the view expressed by the UN Committee on Economic, Social and Cultural Rights on several ocassions. In the context of the right to education, for instance, the Committee has proclaimed that:

> "states parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education"[23].

---

[20] HOUSE, R. and MUTUA, M.: *Protecting Human Rights in a global economy. Challenges for the World Trade Organization*, International Centre for Human Rights and Democratic Development, 2000.

[21] As of 9 March 2006, the International Covenant on Economic, Social and Cultural Rights has been ratified by 152 States; the International Covenant on Civil and Political Rights, by 154; the Convention on the Elimination of Racial Discrimination, by 170; the Convention on the Elimination of All Forms of Discrimination Against Women, by 180; the Convention Against Torture, by 141; and the Convention on the Rights of the Child, by 192 (at www.unhchr.ch).

[22] See,among others, SKOGLY, S.: *The Human Rights obligations of the World Bank and the International Monetary Fund*, Cavendish, London, 2001; DARROW, M.: *Between light and shadow. The World Bank, the International Monetary Fund and International Human Rights Law*, Hart, Oxford, 2003.

[23] General Comment no. 13, The right to education (Article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999, para. 56.

IV. Transnational Corporations: towards increased accountability

The current process of globalization has entailed the increasing relevance of Transnational Corporations (TNCs), they have become one of the key vehicles for globalization. Investment liberalization has focused basically in the articulation of investor's rights, and there is a need to balance these rights with some obligations towards individuals[24]. International Human Rights Law has traditionally focused on the State as the main duty-bearer, leaving aside private actors. In the course of last decades there have been various initiatives to hold TNCs accountable.[25]

Some of the activities of TNCs are raising serious doubts from the viewpoint of Human Rights, particularly economic, social and cultural rights and the right to development[26]. In this sense, Mary Robinson, former United Nations High Commissioner for Human Rights, while presenting a report on *Business and Human Rights*, insisted that "corporations should support and respect the protection of internationally proclaimed Human Rights within their sphere of influence and make sure they are not complicit in Human Rights abuses"[27]. Not unrelated to this preoccupation are certain scandals involving several transnational corporations abusing the most basic labour rights, exploitation of child labour, interfering in the internal affairs of certain states, serious environmental consequences related to their production activities[28], etc.

---

[24] OHCHR: *Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, 2 July 2003.

[25] CLAPHAM, A.: *The Human Rights Obligations of Non-State Actors,* Oxford University Press, Oxford, 2006.

[26] Consider M.T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC', in P. Alston (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, pp. 553-569; F. Gomez Isa, 'Las Empresas Transnacionales y sus obligaciones en material de derechos humanos', in COURTIS, C. et al (Comp.): *Protección internacional de derechos humanos. Nuevos desafíos*, Porrúa-ITAM, México DF., 2005, pp. 177-201; C-H. Thuan (coord.), *Multinationales et Droits de l'Homme*, Amiens, Presses Universitaires de France-Centre de Relations Internationales et des Sciences Politiques d'Amiens, 1984; S. Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights', XLVI neth ilr, 1999, pp. 171-203; S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 yale l. j., 2001, pp. 443-545.

[27] *Business and Human Rights: A Progress Report*, Geneva, OHCHR, January 2000, p. 2.

[28] To cite just one example, Amnesty International has denounced several transnational corporations from the oil sector for involvement in serious Human Rights violations occurring in Sudan. Furthermore, these corporations benefit from those same Human Rights violations, given that they pave the way for the exploitation of oil, in Amnesty International, *Sudan: The Human Price of Oil*, AFR 54/04/00 (3 May 2000). See also *Sudan, Oil and Human Rights*, New York, Human Rights Watch, 2003, 754 pages; *Working Document on the impact of the activities of transnational corporations on the realization of economic, social and cultural rights,* prepared by Mr. El Hadji Guissé, pursuant to Sub-Commission resolution 1997/11, UN Doc. E/CN.4/Sub.2/1998/6; Secretary-General, *The impact of activities and working methods of transnational corporations on the full enjoyment of all Human Rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter*, UN Doc. E/CN.4/Sub.2/1996/12; E. Kolodner, *Transnational Corporations: Impediments or Catalysts of Social Development?*, UN Doc. UNRISD/OP/94/5 (Geneva, November 1994); A. Eide; H. Ole Bergesen and P. Goyer (eds.), *Human Rights and the Oil Industry*, Antwerp, Intersentia, 2000.

When trying to impose certain obligations on TNCs, two approaches have been used so far: the adoption of measures in the framework of the so-called *Corporate Social Responsibility*, and attempts to establish legally binding principles and guidelines.

The various measures adopted to promote Corporate Social Responsibility (CSR) are based on a voluntary basis, and depend almost exclusively in the good will of the companies. The most relevant international initiative was the *Global Compact* launched by UN Secretary-General Kofi Annan in 1999[29]. It constitutes a platform for encouraging and fostering good corporate practices and learning experiences in the fields of Human Rights, labour and the environment. It also provides the basis for a dialogue between the UN, business, labour and groups of civil society to improve corporate good practices. The problem associated to this kind of initiatives is that they are voluntary and without very demanding mechanisms of external monitoring, constituting sometimes an exercise of public relations.

The other strategy for incorporating HRs concerns into the business sector has been the adoption of legal instruments establishing principles and guidelines to be observed by companies. Since the 1970s there have been several international initiatives attempting to create a regulatory framework for transnational corporations in which the activities of such corporations are obliged to follow certain principles[30]. The United Nations have tried since the 1970s to adopt a global Code of Conduct. The last version of this draft of the UN Code of Conduct[31], which unfortunately has not yet been approved due to ideological differences in the context of the debate over the New International Economic Order and to the opposition of the industrialized nations where the majority of transnational corporations have their headquarters, states in Article 14 that "transnational corporations should respect Human Rights and basic freedoms in the countries where they carry out their activities...". Likewise, the UN Sub-Commission on the Promotion and Protection of Human Rights has recently decided to form a Working Group in charge of looking into the business practices of transnational corporations to see

[29] See more information in www.unglobalcompact.org.

[30] Two Codes of Conduct of a general nature have been adopted so far: the *OECD Declaration on International Investment and Multinational Enterprises*, 21 June 1976, revised in 1991 and 2000, and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,* 16 November 1977. On these initiatives, see A. Kolk; R. Van Tulder and C. Welters, 'International Codes of Conduct and Corporate Social Responsibility: can transnational corporations regulate themselves?', 8 *Transnational Corporations* nº 1, April 1999, pp. 143-180.

[31] UN Doc. E/1990/94, 12 June 1990.

what impact they have on the enjoyment of Human Rights[32]. The Working Group has held several periods of sessions since August 1999, confirming the serious hazards that certain work methods and activities of certain transnational corporations present for Human Rights as a whole[33]. On the other hand, the Sub-Commission has just adopted in August 2003 a *Project on Norms on the responsibilities of transnational corporations and other business enterprises with regard to Human Rights*[34], in which it proclaims the principle of *co-responsibility*. The Preamble of the Project of Norms recognizes that "even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect Human Rights, *transnational corporations and other business enterprises*, as organs of society, *are also responsible* for promoting and securing the Human Rights set forth in the Universal Declaration of Human Rights..." (emphasis added). This idea of co-responsibility is developed with much more precision in Part A of the Project, devoted to General Obligations. According to Article 1,

> "... within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect Human Rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups".

As we can see very clearly, transnational corporations and other enterprises assume the obligation of respect and ensure basic Human Rights within their spheres of influence, paying special attention to vulnerable groups like indigenous peoples. The main problems that this Project will have to face in the near future is the question of its legal nature and means of implementation, aspects that still are not totally defined in the text. Unfortunately, the Commission on Human Rights, in its decision 2004/116 of 20 April 2004, expressed the view that while the Norms contained "useful elements and ideas" for its consideration, as a draft proposal had no legal standing. Instead of insisting in continuing working in the development of the Norms, the Commission requested the Secretary-General to

[32] UN Doc. Resolution 1998/8, 20 August 1998.

[33] UN Doc. E/CN.4/Sub.2/1999/9, 12 August 1999, p. 5. See also the reports on the second, third, fourth and fifth periods of sessions, in UN Doc. E/CN.4/Sub.2/2000/12, 28 August 2000; UN Doc. E/CN.4/Sub.2/2001/9, 14 August 2001; UN Doc. E/CN.4/Sub.2/2002/13, 15 August 2002 and UN Doc. E/CN.4/Sub.2/2003/13, 6 August 2003.

[34] UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

appoint a special representative on the issue of Human Rights and transnational corporations and other business enterprises[35]. The special representative has submitted an interim report to the Commission at its sixty-second period of sessions in which the Draft Norms are considered having incurred in "doctrinal excesses" and comes to the conclusion that "the flaws of the Norms make that effort a *distraction* from rather than a basis for moving the special representative's mandate forward"[36] (emphasis added). As we can see, the future of the Norms is quite uncertain.

What it is clear from the analysis just made is that, given the increasing power TNCs have in the current global economy, there is an urgent need of holding them accountable. We should support and encourage the various initiatives taken both at national and at international level.

V. Privatization from a Human Rights perspective[37]

Privatization has become an integral component of the globalization process, implying the taking over by private parties of several services and functions traditionally covered by the state. Privatization programs have spread around the world within the last two decades. Following the view expressed by W. L. Megginson, one of the most relevant scholars in this field, "privatization has been a major force in world politics and economics for the past 25 years, and has dramatically reduced the role of state-owned enterprises in both developed and developing countries"[38].

So far, the approach taken to analyse privatization has focused on the economic side, assuming that the different forms of privatization are the best way to increase economic efficiency, flexibility and quality in the provision of services[39]; privatization is also seen as a way to raise revenue for the state and to reduce government interference in the economy, paving the way to introduce more competition[40]. This economic approach to privatization has not taken into consideration the poten-

---

[35] Resolution 2005/69. On 25 July 2005, the ECOSOC adopted decision 2006/273 approving the Commission's request and, three days later, on 28 July 2005, the Secretary-General appointed John Ruggie, Professor of International Affairs at Harvard University, as his special representative.

[36] UN Doc. E/CN.4/2006/97, 22 February 2006, paras. 59 and 69.

[37] A much deeper analysis on this issue can be found in DE FEYTER, K. And GOMEZ ISA, F. (Eds.): *Privatisation and Human Rights in the Age of Globalization*, Intersentia, Antwerp-Oxford, 2005.

[38] W.L. Megginson, 'Privatization in perspective: the last twenty years', in *Teoría y Política de privatizaciones: su contribución a la modernización económica. Análisis del caso español*, Madrid, Fundación SEPI, 2004, p. 45.

[39] *Building Better Partnerships; The Final Report of the Commission on Public Private Partnerships*, London, IPRP, 2001, p. 253.

[40] For the basic arguments in favour of privatization see W.L. Megginson: *op. cit*.

tial Human Rights implications of it[41]. It is only very recently that these Human Rights implications have started to be critically examined, when the process of privatization has begun to affect sectors like health, education, social security or water provision. Both part of the academic community[42], activists[43] and some UN Human Rights treaty bodies have expressed their concerns on the potential effects privatization can have on the enjoyment of basic Human Rights. For example, the UN Committee on Economic, Social and Cultural Rights, when considering the initial report of the Czech Republic on the implementation of the ICESCR, adopted its Concluding Observations in which the Committee considered as one of the principal subjects of concern that "the inadequacy of the social safety nets during the restructuring and privatization process have negatively affected the enjoyment of economic, social and cultural rights, in particular by the most disadvantaged and marginalized groups"[44]. As a result of these growing concerns, the UN Committee on the Rights of the Child convened a Day of General Discussion in September 2002 to carefully examine "The Private Sector as Service Provider and its Role in Implementing Child Rights", one of the most systematic and comprehensive approaches to the impact of the process of privatization on Human Rights in general, and, child rights, in particular. While the Committee welcomed the role of non-state actors, including NGOs and businesses, it declared that "it was increasingly concerned as the growing trend of privatization, including in the provision of services addressing basic needs including health, education and water"[45]. The concerns of the Committee address the tendency in the process of privatization to leave in private hands not only state-owned enterprises, but also essential services that are considered as Human Rights. These main concerns on the potential impact of the privatization process on the enjoyment of Human

[41] It is very surprising that when one examines the existing literature on privatization, the Human Rights dimension is absolutely missing. There are some analyses on the effect of privatization on distribution of wealth, but not from a Human Rights perspective. On the impact of privatization on distribution see V.V. Ramanadham, 'The impacts of privatization on distributional equity', in V.V. Ramanadham (ed.), *Privatization and Equity*, London, Routledge, 1995, pp. 1-34; E. Sheshinski and L.F. Lopez-Calva, 'Privatization and its Benefits: Theory, Evidence and Challenges', in K. Basu; P.B. Nayak and R. Ray (eds.), *Markets and Governments*, New Delhi, Oxford University Press, 2003.

[42] A. Christmas, *Report of the Seminar on Privatization of basic services, Democracy and Human Rights*, Community Law Centre, University of Western Cape, 2-3 October 2003; E. Drent, 'Privatization of basic services in Canada: Some recent experiences', 4 *ESR Review* nº 4, 2003.

[43] V. Shiva, *Water Wars: Privatization, pollution and profit*, Cambridge, MA: South End Press, 2002; M. Gavalda, 'La guerra del agua en Bolivia', in *Agua, ¿Mercancía o Bien Común?*, Alikornio Ediciones, Barcelona, 2003, pp. 323-345.

[44] *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Czech Republic*, UN Doc. E/C.12/1/Add.76, 2002, para. 10.

[45] *Day of General Discussion, The Private Sector as Service Provider and its Role in Implementing Child Rights*, 31st Session, UN Doc. CRC/C/121, 20 September 2002, p. 4.

Rights have been summarised by Sihaka Tsemo, OHCHR Regional Representative for Southern Africa, as follows[46]:

1. The establishment of a two-tiered system, with a corporate sector focused on the healthy and wealthy, and under-financed public sector focused on the poor and sick.

2. Creating a "brain drain", with better-trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructure.

3. An overemphasis on commercial objectives at the expense of social objectives.

4. An increasingly large and powerful private sector that can threaten the role of the government as the primary duty bearer of Human Rights by subverting regulatory systems through political pressure or the co-option of regulators.

Other concerns are related to the possibility of uneven income distribution associated to the process of privatization[47], affecting especially to the most vulnerable groups of society, Russia and some other countries in transition being the clearest examples.

In principle, International Human Rights Law is neutral on privatization, it is neither for nor against privatization[48]. This position has been firmly maintained by the UN Committee on Economic, Social and Cultural Rights in its famous General Comment 3 on the nature of states parties obligations arising from the ICESCR. The Committee states that the ICESCR is neutral on economic systems, provided that a given state is democratic and it is committed to the protection of the rights enshrined in the Covenant. Quoting paragraph 8 of the above mentioned General Comment,

> "the Committee notes that the undertaking "to take steps... by all appropriate means..." neither requires nor precludes any particular form of government or economic system..., provided only that it is

[46] S. Tsemo, 'Privatization of basic services, democracy and Human Rights', 4 *ESR Review* nº 4, 2003.

[47] A. Steinherr, 'The Future of Privatization', in *Teoría y Política de Privatizaciones: su contribución a la modernización económica. Análisis del caso español*, Madrid, Fundación SEPI, 2004, p. 955.

[48] P. Hunt, 'The international Human Rights treaty obligations of state parties in the context of service provision', in *Day of General Discussion, The Private Sector as Service Provider and its Role in Implementing Child Rights*, UN Doc. CRC/C/121, 31st Session, 20 September 2002, pp. 4-5.

> democratic and that all Human Rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy…"[49].

As we can clearly see, privatization is not excluded, provided that it is not detrimental to the effective realization of all Human Rights. This view can also be found in the Convention on the Rights of the Child (CRC, 1989). Article 3.1 of the CRC, one of the key articles of the Convention, since it establishes the main principle to be respected when dealing with children, the *best interests of the child*, reads as follows: "In all actions concerning children, whether undertaken by public or *private* social welfare institutions… the best interests of the child shall be a primary consideration" (emphasis added). The Convention is assuming that some of the services affecting the rights of the child can be provided by private institutions. The point is that these private actors shall be guided by the best interests of the child principle in its provision of services.

Although, as we have just seen, International Human Rights Law is neutral on privatization, we have to ascertain to what extent it can impose limits or conditions to the way a given process of privatization is carried out. The state cannot abdicate its responsibilities arising from its Human Rights obligations; privatization does not release governments from their obligations[50]. States are still the main bearer of Human Rights obligations and have to take care for the respect, protection and fulfilment of all Human Rights[51]. In sum, states are the *ultimate responsible* for the guarantee of Human Rights. This view was stressed by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. According to these significant Guidelines,

---

[49] General Comment no. 3, The nature of states parties obligations (Art. 2, para 1 ICESCR), 1990, UN Doc. E/1991/23, Annex III, para. 8.

[50] This position has been underlined by the European Court of Human Rights in the *Costello-Roberts case*. In this case, the European Court held the United Kingdom responsible for acts that took place in a private school. According to the European Court, the state cannot '… absolve itself from responsibility by delegating its obligations to private bodies or individuals', in *Costello-Roberts v. United Kingdom*, ECtHR, Series A No. 48, para. 27. A very similar position has been maintained by the UN Committee on Economic, Social and Cultural Rights in its Concluding Observations to the initial report submitted by Israel. The Committee declared that 'a state party cannot divest itself of its obligations under the Covenant by privatizing governmental functions', UN Doc. E/C.12/1/Add. 27, 4 December 1998, para. 11.

[51] N. Rodemann, *Financing the Right to Water*, Friedrich Ebert Stiftung, Side event to the 60th Session of the UN Commission on Human Rights, 22 March.

> "since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare... It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains *ultimately responsible* for guaranteeing the realization of these rights..."[52] (emphasis added).

Taking into account this idea of the state as the ultimate responsible of Human Rights obligations, it is obvious that the state has the right and the duty to impose limits and conditions to privatization[53]. This duty leads us to the need of taking a *Human Rights approach to privatization*; Human Rights concerns must be present in every process of privatization from the very beginning. There are two aspects in which the state can take part: first of all, the decision to privatize a given service that affects Human Rights obligations; second, the functioning of the service once it has been privatized.

As far as the decision to privatize a service is concerned, the state must take very carefully into consideration its potential Human Rights implications. States should undertake a *Human Rights assessment* before the decision to privatize is made. Paul Hunt has strongly advocated for the need of a Human Rights assessment; every process of privatization "should be preceded by an independent, objective and publicly available assessment of the impact on the respective right"[54]. The key issue is to what extent the state can manage the process of privatization in a way that ensures Human Rights and whether the state can ensure that private bodies respect those Human Rights[55]. This has led Bertrand Charrier, Executive Director of Green Cross International, with a lot of experience in the area of water provision and protection of natural resources, to say that if the state is not in a position to monitor the whole process of privatization (something very common in many third world countries), with a strong civil society supervising it, the decision to privatize should not be taken[56]. The whole

---

[52] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), in *Human Rights. Maastricht Perspectives*, Maastricht, Maastricht Centre for Human Rights, 1999, p. 22, para. 2.

[53] According to Article 2.3 of the Declaration on the right to development, "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".

[54] P. Hunt, *op. cit.*, p. 5.

[55] *Day of General Discussion, The Private Sector as Service Provider and its Role in Implementing Child Rights*, *op. cit.*, p. 6.

[56] B. Charrier, Interview in *Cuadernos Internacionales de Tecnología para el Desarrollo Humano*, Primavera 2004, p. 63.

process of taking the decision to privatize should be accompanied by full transparency and an adequate dissemination of information[57]. The only way civil society can take part in the process[58], an essential element of every process of privatization, is through transparency and adequate information to guarantee the right to seek, receive and impart information[59] enshrined in Article 19.2 of the ICCPR. Full disclosure of information is also a way to try to avoid corruption, an element unfortunately present in many processes of privatization[60]. Finally, when the decision to privatize is going to be made, those affected by the measures should have access to legal recourse and remedies and the necessary legal assistance for obtaining legal remedies[61].

One of the problems is that states are not entirely sovereign and autonomous when they take decisions to contracting-out certain services like education, health assistance or water provision; they simply implement policies designed and imposed by the International Financial Institutions (IFIs), in particular the World Bank and the International Monetary Fund, in the framework of Structural Adjustment Programs applied in some third world countries. In several occasions, the UN Committee on Economic, Social and Cultural Rights has reminded states negotiating international agreements that they should take steps to ensure that these instruments do not adversely impact upon economic, social and cultural rights[62]. In the context of the right to education, the Committee has proclaimed that "states parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education"[63]. On the other hand, the IFIs should also

---

[57] On the importance of information in the processes of privatization see G. Mortensen, *Consuming Democracy? The Right to Know*, Institute of Human Rights of the University of Deusto, EMA, July 2002, p. 64.

[58] The right to take part in the conduct of public affairs is recognized in Art. 25 a) of the International Covenant on Civil and Political Rights (ICCPR).

[59] The lack of sufficient and adequate information for a proper consultation to the population affected is one of the main criticisms made to the processes of privatization. This is the case in the recent attempt by the municipality of Quito (Ecuador) to privatize the water provision service, in R. Rodriguez, 'Municipio de Quito, Ecuador, quiere privatizar el agua', *Tintají*, 24 August 2004 (this article is available at: www.altercom.org/article1930.html).

[60] J.L. Montes, 'Hasta dónde puede llegar la privatización', in *Teoría y Política de Privatizaciones: su contribución a la modernización económica. Análisis del caso español*, Madrid, Fundación SEPI, 2004, p. 228.

[61] General Comment no. 15, the right to water (Articles 11 and 12 of the ICESCR), UN Doc. E/C.12/2002/11, 20 January 2003, para. 56.

[62] See General Comment no. 12, The right to adequate food (Article 11 of the Covenant), UN Doc. E/C.12/1999/5, 12 May 1999, para. 41; General Comment no. 14, The right to the highest attainable standard of health (Article 12 of the Covenant), UN Doc. E/C.12/2000/4, 11 August 2000, para. 39 and The right to water, *op. cit*., para. 60.

[63] General Comment no. 13, The right to education (Article 13 of the Covenant), UN Doc. E/C.12/1999/10, 8 December 1999, para. 56.

take into consideration in its programmes and policies its consequences in terms of the enjoyment of basic rights. In this sense, the UN Committee on the Rights of the Child "encourages states parties and the IMF, the World Bank and regional financial institutions or banks to take carefully into account the rights of children... when negotiating loans or programmes"[64].

The second element is the operation of the privatized service. Once the decision to privatize has been made, the state has to impose certain conditions to the private bodies delivering the service. For the imposition of these conditions, a detailed agreement or contract with the service providers is crucial; the contract becomes "the primary tool of accountability and the sole basis by which private agents can be held responsible"[65]. The UN Committee on Economic, Social and Cultural Rights has established several general requirements states have to take into consideration when implementing socio-economic rights. These features can also be applied to the area of privatization. This implies that private actors operating the service have to meet these conditions and the state has to monitor whether they are complying or not with them. According to the Committee[66], these requirements are the following:

1. *Availability*: the different economic, social and cultural rights have to be available in sufficient quantity.

2. *Accessibility*: economic, social and cultural rights have to be accessible to everyone without any kind of discrimination. Accessibility has four overlapping dimensions:

   a. *Non-discrimination*: economic, social and cultural rights have to accessible to all, especially to the most vulnerable groups of society;

   b. *Physical accessibility*: economic, social and cultural rights must be within physical reach for all groups of population, particularly persons with disabilities;

---

[64] *Day of General Discussion, The Private Sector as Service Provider and its Role in Implementing Child Rights*, *op. cit*., p. 21.

[65] G. Mortensen, *op. cit*., p. 21.

[66] The best definition of these criteria can be found in General Comment no. 14 on the right to health, in *The right to the highest attainable standard of health*, *op. cit*, para. 12. There is an additional criteria established by the Committee as far as the right to water is concerned; it is the criteria of *sustainability*, taking into account not only the needs of present generations, but also the needs of future generations, in *The right to water*, *op. cit*., para. 11.

c. *Economic accessibility (affordability)*: socioeconomic rights must be affordable for all. States must ensure that services are affordable for all, including socially marginalized groups[67];

d. *Information accessibility*: accessibility includes the right to seek, receive and impart information concerning the services that have been privatized.

3. *Acceptability*: the operation of the services must be culturally appropriate, especially taking into account the needs of ethnic minorities and indigenous peoples.

4. *Quality*: the quality of the rights guaranteed is a crucial element of a Human Rights culture; in this sense, privatization should not mean a decrease in the quality of the services provided.

Additionally, the ICESCR imposes three types of obligations on states parties: the obligation to respect, to protect, and to fulfil[68]. The *obligation to respect* requires states to refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights. The *obligation to protect* requires States to take measures that prevent third parties from interfering with such rights. Finally, the *obligation to fulfil* requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of socioeconomic rights. Dealing with privatization, the obligation to protect is the most relevant one, since it requires states to prevent violations of economic, social and cultural rights by third parties. States have to ensure such rights are consistently protected once private actors take over the services. States have to "ensure that privatization... does not constitute a threat to the availability, accessibility, acceptability and quality"[69] of the services delivered. Thus, states have to exert *due diligence* in monitoring the operation of services by private bodies. This obligation of due diligence is required by the Maastricht Guidelines when stating that

> "the obligation to protect includes the state's responsibility to ensure that private entities or individuals, including transnational corpo-

[67] The main concern on privatization of services is to what extent it respects the criteria of affordability. There are some examples that demonstrate that privatization, especially in the water sector, ends up affecting the access of the most marginalized groups of society to privatized services, in J. Shultz, 'Privatization versus Human Rights: Lessons from the Bolivian Water Revolt', 4 *ESR Review* nº 4, November 2003; N. Rosemann, *The Human Right to Water under the conditions of trade liberalization and privatization. A study of the privatization of water supply and wastewater disposal in Manila*, Berlin, Friedrich Ebert Stiftung, 2003.

[68] See The right to the highest attainable standard of health, *op. cit*., para. 33.

[69] *Ibid*., para. 35.

> rations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise *due diligence* in controlling their behaviour of such non-state actors"[70] (emphasis added).

This obligation of due diligence obliges states to implement a *regulatory scheme* to prevent any kind of abuse by third parties[71]. According to the UN Committee on Economic, Social and Cultural Rights, for this regulatory system to be effective it must include "independent monitoring, genuine public participation and imposition of penalties for non-compliance"[72].

At the same time, the UN Committee on Economic, Social and Cultural Rights "is of the view that a *minimum core obligation* to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party" (emphasis added)[73]. The establishment of this minimum core obligation has as a corollary that a state party cannot, under any circumstances, justify its non-compliance with it; this obligation is of a non-derogable nature. A given process of privatization could not lead to the violation of the minimum threshold of certain rights; the state must secure that the core elements of every right are enjoyed by the population.

Another relevant aspect is that there is a strong presumption that *retrogressive measures* are not permitted under the ICESCR[74]. This presumption drives us to defend that a process of privatization could not have as a consequence the deterioration of economic, social and cultural rights, the state being the main responsible of it. In this sense, "any deliberately retrogressive measure... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"[75].

---

[70] Maastricht Guidelines, *op. cit*., para. 18.

[71] Besides this regulatory framework, the UN Committee on the Rights of the Child 'encourages non-state service providers to develop *self-regulation mechanisms* which would include a system of checks and balances...' (emphasis added), in *Day of General Discussion, The Private Sector as Service Provider and its Role in Implementing Child Rights*, *op. cit*., p. 17.

[72] The right to water, *op. cit*., para. 24.

[73] The nature of states parties obligations..., *op. cit*, para. 10.

[74] Art. 2.1 of the ICESCR refers to '...progressive realization...'. In light of this progressivity, the Maastricht Guidelines defend that 'violations of economic, social and cultural rights can occur through... the adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed', in Maastricht Guidelines, *op. cit*., p. 25, para. 14 e).

[75] The nature of states parties obligations, *op. cit*., para. 9.

VI. Attempts to incorporate HRs concerns into the activities of the IFTIs

As we all know, development and Human Rights have been traditionally two complete separate worlds, with different logics and different instruments and strategies. This situation partially explains the isolation of IFTIs and other UN development bodies in relation to HRs institutions. This *status quo* started to change in the 70s and, especially, in the 80s. In the 70s third world countries, under the framework of the G-77, exerted great pressure to gain support for a New International Economic Order. Although in the Declaration on the Establishment of a New International Economic Order the UN General Assembly (GA) did not use a Human Rights language yet, it expressed some concerns related to a broad understanding of them. First of all, the GA made a plea for "full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interests of all countries"[76], having in mind the exclusion and marginalisation third world countries were facing within the Bretton Woods institutions. Similarly, it is the very first time in history that the UN called for "regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries"[77]. In the 80s, after the explosion of the debt crisis, the Bretton Woods institutions increasingly got involved in the solution of this global problem, devising the famous Structural Adjustment Programmes (SPAs). Shortly after the implementation of the first SPAs, some voices started to raise criticisms about the social effects of the Programmes in the daily lives of millions of people in the South, advocating for an *Adjustment with a Human Face*. UN Human Rights bodies payed increasing attention to the effect of the SPAs in the enjoyment of basic Human Rights, contributing to a better understanding of the complex but necessary relationship between development and Human Rights. It is against this background that progressively emerged the idea of conceiving development as a separate human right. Some relevant scholars from third world countries voiced the urgent need of proclaiming a new generation of Human Rights, the so-called solidarity rights, to complement the two existing generations, civil and political

[76] GA Resolution 3201 (S-VI), 1 May 1974, principle 4.c).

[77] *Ibidem*, principle 4.g). This call was the origin of the efforts to adopt a UN Code of Conduct for TNCs. It is worth mentioning that the different drafts of this UN Code of Conduct make explicit references to the need of the protection of basic Human Rights by TNCs.

rights, and economic, social and cultural rights. After a lengthy and difficult process of discussion and negotiation in the framework of a working group created by the UN Commission on Human Rights in 1981, the Declaration on the right to development was adopted by an overwhelming majority[78] by the UN General Assembly on 4 December 1986[79]. The most interesting feature of this pioneer Declaration is the clear link between development and Human Rights. The protection and promotion of all Human Rights, both civil and political and economic, social and cultural rights, became an essential ingredient of every process of development. Development is no possible without a scrupulous respect of all Human Rights. In the Preamble of the Declaration on the right to development we find the first reference to the crucial relation between the two realms, since it is stated that

> "all Human Rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that (...) the enjoyment of certain Human Rights cannot justify the denial of other Human Rights".

At the same time, in the substantive part of the Declaration there is an essential proclamation as far as the conceptual evolution of development is concerned. According to Article 2.1 of the Declaration on the right to development, "the human person is the central subject of development and should be the active participant and beneficiary of the right to development". This relevant provision paved the way for the emergence of the concept of Human Development in the late 80s under the auspices of scholars such as Amartya Sen[80] and the institutional umbrella of the United Nations Development Program (UNDP). For a multidimensional and comprehensive concept of development, Human Rights have become an essential and unavoidable element[81].

---

[78] The final vote on the Declaration on the right to development is very illustrative of the positions of the different countries of the international community. 146 States voted in favour, 8 abstained (the Federal Republic of Germany, the United Kingdom, Sweden, Finland, Japan, Denmark, Iceland and Israel) and only the US voted against the Declaration. A detailed study on the right to development in GOMEZ ISA, F.: *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional*, Universidad de Deusto, Bilbao, 1999.

[79] Resolution 41/128, 4 December 1986.

[80] See, among others, a book in which he recapitulates his theories on the complexities of the relation between development and Human Rights, in SEN, A.: *Development as Freedom*, Anchor Books, New York, 1999.

[81] ALSTON, P. and ROBINSON, M. (Eds.): *Human Rights and Development. Towards Mutual Reinforcement*, Oxford University Press, Oxford, 2006.

This new approach to development issues has also had an impact in the IFIs, at least on paper. The World Bank and, to a lesser extent, the IMF have progressively incorporated Human Rights considerations into their policies and programmes. Another important reason for this paradigm shift has also to do with growing criticisms on their role in designing global economic and financial policies and the impact of these policies from a Human Rights and also from a development perspective. In this sense, the whole Washington Consensus articulated and implemented by the Bretton Woods institutions is now under strong questioning. The current approach of these institutions to development is expressed in the Comprehensive Development Framework[82] (CDF), in which the interdependence of all elements of development is highlighted. According to the CDF, "we cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa. Integration of each of these subjects is imperative at the national level and among global players".

The integration of Human Rights considerations into the discourse of the World Bank is more and more visible. For instance, on a statement made by the Bank on the ocassion of the 50th Anniversary of the Universal Declaration of Human Rights, the following ideas can be found: "creating the conditions for the attainment of Human Rights is a central and irreductible goal of development..., the Bank contributes directly to the fulfilment of many rights articulated in the Universal Declaration"[83]. And, more recently, at a conference on the 2006 World Development Report, Equity and Development, Roberto Dañino, a relevant member of the Bank staff, stated that Human Rights "are the very essence of the Bank's work"[84].

As a response to this growing attention to Human Rights considerations, the World Bank has adopted several Operational Policies and Guidelines to be taken into account by staff when implementing World Bank projects. Although none of these operational policies addresses explicitly Human Rights, most of them refer to aspects that are essential for a broad understanding of Human Rights. For instance, operational policies have been adopted on poverty reduction, on indigenous peoples, on environment impact assessment... In Koen de Feyter's view, although

[82] WOLFENSHON, J.: *A proposal for a comprehensive development framework*, 1999, available at www.worldbank.org/cdf.

[83] GAETA, A. and VASILARA, M.: *Development and Human Rights: the role of the World Bank*, Washington D.C., the World Bank, 1998, pp. 2-3.

[84] World Bank Legal Forum 2005, available at http://sireresources.worldbank.org/INTTOPLEGFOR/Resources/LegalForum 2005.doc.

these operational policies do not use a Human Rights language, they do offer a certain degree of Human Rights protection, both in the area of civil and political rights (participation of project-affected groups is promoted) and in the area of economic, social and cultural rights (the operational policy on poverty reduction requires "improved access to education, health care and other social services...")[85].

Another significant step forward taken by the World Bank was the creation of the Inspection Panel in 1993 by the Bank's Board of Executive Directors to monitor compliance by Bank staff with internal regulations. The Panel is an independent body to provide an avenue to private citizens and groups who believe that they have been or are likely to be adversely affected by a project financed by the World Bank[86]. Its creation responded basically to strong pressures coming from civil society to increase transparency and accountability in Bank operations. Although the Inspection Panel is very far from being perfect (its procedure is administrative rather than judicial, the Board of Executive Directors has an important role in the different stages of the procedure, it does not provide for compensation to the persons negatively affected by the Bank[87]...) it has meant a step in the good direction. First of all, it has demonstrated that civil society has a role to play in the task of influencing global institutions towards increasing attention to human and social concerns. And, last but not least, it has also shown that Human Rights, transparency and accountability considerations can be integrated by IFTIs into their policies and practices. The example of the World Bank should be followed by other institutions.

One of the last steps in the evolution we are witnessing is the increasing attention to trade-related issues and their impact on Human Rights. Trade, on one hand, and Human Rights, on the other, have ignored each other until very recently. According to one of the most prominent advocates of the need of integrating the two realms, Caroline Dommen[88], it is only in 1998, in the context of the negotiations on a Multilateral Agreement on Investment (MAI) under the auspi-

---

[85] DE FEYTER, K.: "The International Financial Institutions and Human Rights...", *op. cit*., p. 572.

[86] For an in-depth analysis of the Inspection Panel see ALFREDSSON, G. and RING, R. (Eds.): *The Inspection Panel of the World Bank: A Different Complaints Procedure*, Martinus Nijhoff Publishers, The Hague, 2001. A study by the World Bank itself of the operation of the Inspection Panel 10 years after its creation can be found in *Accountability at the World Bank. The Inspection Panel 10 years on*, The World Bank, Washington D.C., 2003.

[87] DE FEYTER, K.: "The International Financial Institutions...", *op. cit*., pp. 579 and 580.

[88] DOMMEN, C.: "The WTO, international trade and Human Rights", in WINDFUHR, M. (Ed.): *Beyond the Nation-State. Human Rights in Times of Globalization*, The Global Publications Foundation, 2005. Caroline Dommen works for Trade-Human Rights-Equitable Economy, a very active NGO in this area. Information about it and about its work is available at www.3dthree.org.

ces of the Organisation for Economic Cooperation and Development (OECD), that different actors started to be aware of the interrelations between them. From then on, the so-called anti-globalization movement, development NGOs, Human Rights NGOs, UN Human Rights bodies, trade unions, the academic community... payed more and more and attention to the effects that the negotiations on trade-related issues, both in the framework of the WTO (the GATS, the TRIPS Agreement...) and outside the WTO, could have on the enjoyment of Human Rights by many people, in particular in the South.

One aspect that alerted the different actors just mentioned was the possible negative impact the implementation of the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) could have on the right to access to medicines for all at an affordable price. A global campaign was launched by several international NGOs, supported by some key countries such as Brazil, India or South Africa, to promote flexibility in the application of the TRIPS Agreement on those medicines that are essential for the protection of the right to health, especially of those most vulnerable. This campaign was very successful, gained public attention and support and forced the WTO to adopt the *Doha Declaration on the TRIPS Agreement and Public Health* on 14 November 2001 at its Fourth Ministerial Conference[89]. While recognizing that "intellectual property protection is important for the development of new medicines", it also recognizes "the concerns about its effects on prices". For that reason, the Doha Declaration states that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health... The Agreement can and should be interpreted and implemented in a manner supportive of WTO Member's right to protect public health and, in particular, to promote access to medicines for all". Although there are many concerns about the implementation of the Doha Declaration, some lessons should be learnt from this process: good data collection and quantitative research about the impact of TRIPS Agreement on prices of basic medicines, especially those to treat HIV/AIDS; a very good strategically planned campaign; support of key governments both at national and at international level; complicity of several UN bodies, including HRs bodies (the Sub-Commission for the Protection and Promotion of Human Rights, the Commission on Human Rights, the Office of the High Commissioner for Human Rights)...

[89] WT/MIN(01)DEC/2, 20 November 2001.

VII. Proposals for mainstreaming HRs into the IFTIs

This section is devoted to devise effective strategies to how best integrate HRs into the rules, policies and practices of the IFTIs, something that is much needed if we want global institutions to become meaningful actors for those countries and people most in need. The following proposals are only tentative ideas that I want to present to you for comments, discussion and, hopefully, a collective process of enrichment.

Crucial importance of actions at national level

One of the best ways to mainstream HRs and development issues into the dynamics of global institutions is to reflect and to take action nationally, trying to influence the policy-makers of the States. This is especially needed now, when trade negotiations are shifting to bilateral and regional fora, once industrialised countries have realized that in the framework of the WTO, given the pressures coming from civil society and from some coalitions of powerful developing countries, is much more difficult to reach agreements that are favourable to their interests.

Need of a HRs-based analysis of rules, policies and practices of the IFTIs

We need to develop and implement a Human Rights approach to the rules, policies and practices of global institutions. We have already seen that the most common way IFTIs affect Human Rights and development is through limiting Governments' capacity to regulate or to take the necessary measures to protect Human Rights, including the right to development, at national level. Both the tendency towards increasing privatisation of basic services and the liberalisation of trade and investment aim at curtailing the ability of the State to regulate for the sake of HRs, development and the needs of most vulnerable groups. But we should not forget that States have assumed a great number of HRs obligations; the State has the right and the duty to regulate in favour of Human Rights[90]. We need to stress once again the prevalence of HRs Law over other legal regimes. The UN Committee on Economic, Social and Cultural Rights has proposed very relevant criteria to guide those designing and applying global policies. These criteria were mentioned when we dealt with privatisation from a HRs perspective, and can be summarised as follows: *availability* (the various rights have to be available in sufficient quantity), *accessibility* (rights accessible to everyone without

[90] OHCHR: *Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, 2 July 2003.

any kind of discrimination); *acceptability* (taking into account the cultural appropriateness of the services) and, finally, *quality* of the rights provided.

Need of a well-designed methodology for HRs impact assessments

Sometimes is difficult to identify and to measure the impact of global rules and policies in the enjoyment of Human Rights, in particular in the field of economic, social and cultural rights. We need to refine our research methods and tools, combining quantitative research with qualitative analysis. For that reason, we need a sound methodology to measure that impact. In this sense, the UN High Commissioner for Human Rights has encouraged States "to undertake public, independent and transparent assessments of the impact of liberalisation policies on Human Rights, through a participatory and consultative process with concerned individuals and groups. She encourages States to use these assessments as the basis for WTO negotiations on progressive liberalisation. Where assessments are not available, the HCHRs encourages States to adopt a cautious approach to making new commitments until the relevant facts are available"[91].

Need of making better use of existing international mechanisms for the protection of HRs

As we all know, there are many international mechanisms, both at universal and at regional level, for the promotion and protection of HRs: State reporting[92], individual complaints, general comments by UN treaty-bodies... Until very recently they hardly payed any attention to how global policies influence in the enjoyment of Human Rights. We need to devise effective strategies to challenge before the HRs bodies those policies and practices connected to liberalisation that have an adverse impact on HRs[93]. On the other hand, we have to be aware that existing mechanisms for the protection of economic, social and cultural rights are not as well developed as those existing for civil and political rights. There is also a need to develop new mechanisms for economic, social and cultural rights (the Optional

[91] OHCHR: *Liberalization of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9, 25 June 2002.

[92] For instance, the UN Committee on the Rights of the Child recommended to El Salvador after the submission of its report in 2004 to "systematically consider the best interests of the child when negotiating trade-related intellectual property rights and implementing them into national law", CRC: *El Salvador, Concluding Observations*, CRC/C/15/Add.232, 30 June 2004.

[93] OVETT, D.: "Intellectual property, development and Human Rights: how Human Rights can support proposals for a World Intellectual Property Organization (WIPO) development agenda", *Policy Brief*, nº 2, February 2006, p. 3 (available at www.3dthree.org).

Protocol to the ICESCR should become a reality as soon as possible, the competence of both the Inter-American Commission and the Inter-American Court to also deal with violations of economic, social and cultural rights…).

Need of making better use of existing dispute settlement mechanisms within IFTIs

As we all know, there are very well developed dispute settlement mechanisms both in the framework of the World Bank (the International Center for Settlement of Investment Disputes, ICSID) and in the framework of the WTO (the Panel and the Appellate Body). There is a need of making use of these mechanisms to incorporate HRs concerns into their deliberations through the use of the *Amicus Curiae* briefs. NGOs and International Organizations with HRs mandates should take the opportunity of mainstreaming HRs considerations into the decision-making processes of these institutions.

A recent example is very illustrative on how HRs concerns can be raised within these dispute settlement mechanisms. On 19 May 2005, an ICSID Arbitration Tribunal allowed a petition as *amicus curiae* by a group of NGOs in the *Aguas Argentinas et al v. Argentina Case*. It was the first time an ICSID Tribunal took a decision of this nature, against the wishes of the private companies. Aguas Argentinas is a consortium of private companies that took over the water system of Buenos Aires in 1993 from a State-owned water company. The consortium filed a complaint before the ICSID because they argue that they have not received a fair return of their investment due in part to decisions taken by the Government of Argentina. 5 NGOs asserted that this case involved matters of public interest and the fundamental rights of the people living in the area. The ICSID Tribunal accepted that, for that reasons, the *amicus curiae* was justified. These are the relevant words of the ICSID Tribunal, accepting for the first time that Human Rights considerations can be brought before it:

> "the factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those services provide basic public services to millions of people and as a result may rise a variety of complex public and international law questions, *including Human Rights considerations*. Any decision rendered in this case… has the poten-

tial to affect the operation of those systems and thereby the public they serve" (emphasis added).

Although the case is still pending, it opens a very interesting window for incorporating "Human Rights considerations" into the decision-making processes of this kind of bodies.

Need of a serious dialogue between various social movements and NGOs

We need to build strategic alliances to better advocate in the field of economic, social and cultural rights, the most affected rights by global policies. For this to happen we need to open dialogue and inter-action between the different social movements working around global issues both in the North and in the South: development NGOs, environmental groups, HRs advocates, women's movements, indigenous groups, trade unions... We need greater understanding on how the different areas and realms are inextricably interrelated and linked. According to Eitan Felner[94], Director of the Center for Economic, Social and Cultural Rights, we need a combination of quantitative research, qualitative analysis and advocacy strategies. Only if we are able to incorporate creative thinking and strategic action we will succeed in our goal of making another world possible.

[94] Paper presented in a Conference organised by FRIDE and the Pedro Arrupe Institute of Human Rights in Madrid to analyse the creation of the Human Rights Council by the General Assembly of the UN on 15 March 2006 (Resolution 60/251), April 2006, Casa de América, Madrid. Some of the papers and main conclusions of the conference are avalaible in ALMQVIST, J. Y GÓMEZ ISA, F. (Eds.): "El Consejo de Derechos Humanos: Oportunidades y desafíos", Cuadernos Deusto de Derechos Humanos, nº 40, 2006.